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THE

LAWS OF ENGLAND.

VOLUME XIII.

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THE

LAWS OF ENGLAND

BEING

A COMPLETE STATEMENT OF THE WHOLE LAW OF ENGLAND.

BY

THE RIGHT HONOURABLE THE

EARL OF HALSBURY

LORD HIGH CHANCELLOR OF GREAT BRITAIN,
1885-86, 1886-92, and 1895—1905,

AND OTHER LAWYERS.

VOLUME XIII.

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EVIDENCE.

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TABLE OF CONTENTS

AND

TABLE OF CROSS-REFERENCES.

PAGE

Table of Abbreviations - - - - - - - - - - xxiii

Table of Statutes - - - - - - - - - - - xli

Table of Cases - - - - - - - - - - - - lxi

EQUITY - - - - - - - - - - - - - 1—175

PART I. EQUITABLE JURISDICTION - - - - - - - 4

SECT. 1. Nature and Extent of Equitable Jurisdiction - - - 4

Sub-sect. 1. The Subjects of Equitable Jurisdiction - - 4
Sub-sect. 2. The Nature of Equity - - - - - 6
Sub-sect. 3. The Exclusive Jurisdiction in Equity - - 9
Sub-sect. 4. The Concurrent Jurisdiction in Equity - - 10

(i.) Specific Performance - - - - - - - 11
(ii.) Fraud - - - - - - - - - 13
(iii.) Extensions of Fraud - - - - - - - 15
(iv.) Mistake - - - - - - - - - 22
(v.) Accident - - - - - - - - - 25
(vi.) Account and Apportionment - - - - - 27
(vii.) Contribution - - - - - - - - 30
(viii.) Administration - - - - - - - - 30
(ix.) Partnership - - - - - - - - 38
(x.) Determination of Boundaries - - - - 39
(xi.) Partition - - - - - - - - - 40
(xii.) Dower - - - - - - - - - 41

Sub-sect. 5. The Auxiliary Jurisdiction in Equity - - 42

(i.) Discovery - - - - - - - - - 43
(ii.) Perpetuation of Testimony and Suits *de bene esse* - 44
(iii.) Injunction - - - - - - - - 46
(iv.) *Quia timet* Actions - - - - - - 51
(v.) Delivery up and Cancelling of Documents - - 52
(vi.) Receivers - - - - - - - - - 54
(vii.) Interpleader - - - - - - - - 56
(viii.) Bills of Peace - - - - - - - - 58
(ix.) *Ne exeat regno* - - - - - - - - 59

SECT. 2. The Present Exercise of Equitable Jurisdiction by all Divisions of the High Court - - - - - - 61

PAGE

PART II. PRINCIPLES AFFECTING RELIEF IN EQUITY - - 65

SECT. 1. Equity Acts *in Personam* - - - - - - - 65

SECT. 2. Equity gives Account of Profits, not Damages - - 67

SECT. 3. Equity follows the Law - - - - - - - 68

SECT. 4. Equality is Equity - - - - - - - - 69

SECT. 5. He who seeks Equity must do Equity. He who comes into Equity must come with Clean Hands - - - 70

SECT. 6. Equity looks on that as done which ought to be done - 73

SECT. 7. Equity does not allow a Statute to be made an Instrument of Fraud - - - - - - - - - 75

SECT. 8. Equity favours a Purchaser for Value without Notice - 76

SECT. 9. Equities rank in Order of Time - - - - - 79

SECT. 10. The Legal Estate gives Priority - - - - - 81

SECT. 11. Notice - - - - - - - - - 84

PART III. EQUITABLE INTERESTS IN PROPERTY - - - 88

SECT. 1. Nature of Equitable Estates - - - - - - - 88

Sub-sect. 1. Trust Estates - - - - - - - 88
Sub-sect. 2. Equity of Redemption - - - - - 90
Sub-sect. 3. Equitable Securities - - - - - 92
Sub-sect. 4. Incidents of Equitable Estates - - - - 93
Sub-sect. 5. Equitable Interests in Personal Property and under Contracts - - - - - - 96
Sub-sect. 6. Imperfect Gifts not Assisted - - - - 97

SECT. 2. Equitable Interests under Contracts of Sale - - - 98

SECT. 3. Restrictive Covenants - - - - - - - - 100

PART IV. EQUITABLE DOCTRINES AFFECTING PROPERTY - - 102

SECT. 1. Equitable Assignments - - - - - - - - 102

SECT. 2. Conversion - - - - - - - - - 104

SECT. 3. Election - - - - - - - - - 116

SECT. 4. Satisfaction - - - - - - - - - 128

SECT. 5. Performance - - - - - - - - - 139

SECT. 6. Marshalling - - - - - - - - - 142

SECT. 7. Merger of Estates and Charges - - - - - 146

SECT. 8. Subrogation - - - - - - - - - 149

PART V. EQUITABLE RELIEF AGAINST PENALTIES AND FORFEITURES - - - - - - - - - - 150

SECT. 1. Penalties - - - - - - - - - 150

SECT. 2. Forfeitures - - - - - - - - - 153

PART VI. EQUITABLE RELIEF IN CASES OF FIDUCIARY RELATIONSHIP - - - - - - - - - 154

SECT. 1. The Fiduciary Character - - - - - - 154

Sub-sect. 1. Express, Constructive, and Resulting Trusts - 154
Sub-sect. 2. Fiduciary Relationship - - - - - 156

SECT. 2. Disability of Trustee to Purchase - - - - - 156

SECT. 3. Disability of Trustee to make a Profit - - - - 158

SECT. 4. Following Assets - - - - - - - - - 159

PAGE

PART VII. EQUITABLE DEFENCES - - - - - - - 161
SECT. 1. Equitable Set-off - - - - - - - - - 161
SECT. 2. Release and Waiver - - - - - - - - 164
SECT. 3. Acquiescence - - - - - - - - - - 166
SECT. 4. Laches - - - - - - - - - - - 168
SECT. 5. Analogy of the Statutes of Limitation - - - - 174

For Administration - - - *See title* EXECUTORS AND ADMINISTRATORS.
Administration of Assets - ,, BANKRUPTCY AND INSOLVENCY; COMPANIES; EXECUTORS AND ADMINISTRATORS.
Advancements - - - - ,, DESCENT AND DISTRIBUTION; INFANTS AND CHILDREN; TRUSTS AND TRUSTEES; WILLS.
Anticipation, Restraint on - ,, HUSBAND AND WIFE; PERPETUITIES; PERSONAL PROPERTY; REAL PROPERTY AND CHATTELS REAL; TRUSTS AND TRUSTEES.
Appointment - - - - ,, POWERS.
Assignment of Choses in Action - - - - - ,, CHOSES IN ACTION.
Cancellation of Deeds - - ,, DEEDS AND OTHER INSTRUMENTS; MISREPRESENTATION AND FRAUD; MISTAKE; SALE OF LAND.
Capital and Income - - ,, REAL PROPERTY AND CHATTELS REAL; TRUSTS AND TRUSTEES; WILLS.
Construction of Deeds - - ,, DEEDS AND OTHER INSTRUMENTS.
Coverture - - - - - ,, HUSBAND AND WIFE.
Cy-près Doctrine - - - ,, CHARITIES; WILLS.
Defeasance - - - - ,, BONDS; MORTGAGE; TRUSTS AND TRUSTEES.
Discovery and Inspection - ,, DISCOVERY, INSPECTION, AND INTERROGATORIES.
Donatio Mortis Causâ - - ,, GIFTS.
Duress - - - - - ,, CONTRACT; WILLS.
Equitable Assignments - - ,, CHOSES IN ACTION; MORTGAGE.
Equitable Estoppel - - ,, ESTOPPEL.
Equitable Execution - - ,, EXECUTION.
Equitable Lien - - - ,, LIEN.
Executors - - - - - ,, EXECUTORS AND ADMINISTRATORS.
Executory Devise - - - ,, REAL PROPERTY AND CHATTELS REAL; TRUSTS AND TRUSTEES; WILLS.
Fraud and Deceit - - ,, FRAUDULENT AND VOIDABLE CONVEYANCES; MISREPRESENTATION AND FRAUD.
Income and Capital - - ,, REAL PROPERTY AND CHATTELS REAL; TRUSTS AND TRUSTEES.
Infants - - - - - ,, INFANTS AND CHILDREN.
Injunction - - - - ,, INJUNCTION.
Interpleader - - - ,, INTERPLEADER.
Interpretation of Wills - ,, WILLS.
Interrogatories - - - ,, DISCOVERY, INSPECTION, AND INTERROGATORIES.
Lunatics - - - - - ,, LUNATICS AND PERSONS OF UNSOUND MIND.
Married Women - - - ,, HUSBAND AND WIFE; REAL PROPERTY AND CHATTELS REAL.
Marshalling Assets and Securities - - - - - - ,, BANKRUPTCY AND INSOLVENCY, EXECUTORS AND ADMINISTRATORS; MORTGAGE.

For Mistake	*See title*	MISTAKE.
Mortgages	,,	MORTGAGE.
Mortmain	,,	CHARITIES; CORPORATIONS; REAL PROPERTY AND CHATTELS REAL.
Parent and Child	,,	INFANTS AND CHILDREN.
Partition	,,	PARTITION.
Partnership	,,	PARTNERSHIP.
Perpetuating Testimony	,,	EVIDENCE.
Receiver	,,	EXECUTION; RECEIVERS.
Rectification of Deeds	,,	MISREPRESENTATION AND FRAUD; MISTAKE; SALE OF LAND.
Restraint on Alienation	,,	PERSONAL PROPERTY; REAL PROPERTY AND CHATTELS REAL; TRUSTS AND TRUSTEES.
Separate Property of Married Women	,,	PERSONAL PROPERTY; REAL PROPERTY AND CHATTELS REAL.
Set-off	,,	SET-OFF AND COUNTERCLAIM.
Specific Performance	,,	SPECIFIC PERFORMANCE.
Statute of Uses	,,	REAL PROPERTY AND CHATTELS REAL; TRUSTS AND TRUSTEES.
Trusts and Trustees	,,	TRUSTS AND TRUSTEES.
Unconscionable Bargains	,,	FRAUDULENT AND VOIDABLE CONVEYANCES; MONEY AND MONEY-LENDING.
Undue Influence	,,	CONTRACT; FRAUDULENT AND VOIDABLE CONVEYANCES; MISPRESENTATION AND FRAUD; WILLS.
Uses and Trusts	,,	REAL PROPERTY AND CHATTELS REAL; TRUSTS AND TRUSTEES.
Voluntary Conveyances	,,	FRAUDULENT AND VOIDABLE CONVEYANCES.
Waste	,,	REAL PROPERTY AND CHATTELS REAL.

EQUITY OF REDEMPTION.

See EQUITY; MORTGAGE.

EQUITY TO A SETTLEMENT.

See EQUITY; HUSBAND AND WIFE.

ESCAPE.

See CRIMINAL LAW AND PROCEDURE.

ESCHEAT.

See CONSTITUTIONAL LAW; COPYHOLDS; CROWN PRACTICE; DESCENT AND DISTRIBUTION; REAL PROPERTY AND CHATTELS REAL.

ESCROW.

See DEEDS AND OTHER INSTRUMENTS.

ESTATE.

See REAL PROPERTY AND CHATTELS REAL.

ESTATE AGENT.

See AGENCY.

PAGE

ESTATE AND OTHER DEATH DUTIES - - 177—318

PART I. INTRODUCTION - - - - - - - - - - 180

SECT. 1. Incidence of the various Death Duties - - - - 180

SECT. 2. Management of the Duties - - - - - - - 181

SECT. 3. Composition of Claims - - - - - - - - 181

SECT. 4. Remission of Duty and Interest - - - - - - 182

PART II. ESTATE DUTY - - - - - - - - - - 183

SECT. 1. The Imposition of the Duty - - - - - - - 183

SECT. 2. Property which passes - - - - - - - - 183

Sub-sect. 1. Property - - - - - - - - 183
Sub-sect. 2. Settled Property - - - - - - - 184

SECT. 3. Property which is deemed to pass - - - - - - 185

Sub-sect. 1. Meaning of "deemed to pass" - - - 185
Sub-sect. 2. Property of which the Deceased was competent to dispose at his Death - - - - - 185
Sub-sect. 3. Property in which an Interest was limited to cease on the Deceased's Death - - - 186
Sub-sect. 4. Gifts *Mortis causâ* and *Inter vivos* - - - 187
Sub-sect. 5. Settlements with Reservation - - - - 190
Sub-sect. 6. Joint Investments - - - - - - - 191
Sub-sect. 7. Interests arising on Death - - - - 192

SECT. 4. Exceptions from the Charge of Duty - - - - 192

Sub-sect. 1. Foreign Property - - - - - - - 192
Sub-sect. 2. Trust Property - - - - - - - 193
Sub-sect. 3. Settled Property in which the Interest failed before Possession - - - - - 193
Sub-sect. 4. Property reverting to Disponer - - - 194
Sub-sect. 5. Where Money Consideration given - - - 195
Sub-sect. 6. Where Death Duty already Paid - - - 196
Sub-sect. 7. Other Exceptions - - - - - - 201

SECT. 5. Aggregation of Property and Rates of Duty - - - 202

Sub-sect. 1. Aggregation of Property - - - - - 202
Sub-sect. 2. Rates of Duty - - - - - - - 204

SECT. 6. Value Chargeable - - - - - - - - - 207

Sub-sect. 1. Gross Value - - - - - - - - 207
Sub-sect. 2. Deductions - - - - - - - - 210

SECT. 7. Collection of the Duty - - - - - - - - 212

Sub-sect. 1. The Duty - - - - - - - - 212
Sub-sect. 2. When the Duty is payable - - - - 213
Sub-sect. 3. By whom the Duty is payable - - - 214
(1) Personal Property of which the Deceased was competent to dispose at his Death - - - 214
(2) Other Property - - - - - - - - 216
(3) Limitation of Personal Liability - - - 218

PART II. ESTATE DUTY—*continued.*

SECT. 7. Collection of the Duty—*continued.* PAGE

Sub-sect. 4. Out of what Property the Duty is payable - 219
(1) Property which passes to the Executor as such - 219
(2) Other Property - - - - - - - 220
(3) Apportionment of Duty - - - - - 221
(4) Powers to raise the Duty - - - - - 223
(5) Limitation of the Charge of Duty - - - 223
Sub-sect. 5. Remission of Duty and Interest - - - 224
Sub-sect. 6. Commutation of Duty and Composition of Claims 224

SECT. 8. Interest, Penalties, and Proceedings - - - - 225
Sub-sect. 1. Interest - - - - - - - 225
Sub-sect. 2. Penalties - - - - - - - 225
Sub-sect. 3. Proceedings - - - - - - 226

SECT. 9. Repayment of Overpaid Duty - - - - - 228

PART III. SETTLEMENT ESTATE DUTY - - - - - - 228

SECT. 1. The Imposition of the Duty - - - - - - 228

SECT. 2. Settled Property - - - - - - - - 229

SECT. 3. Exceptions from the Charge of Duty - - - - 230

SECT. 4. The Rate of Duty - - - - - - - - 230

SECT. 5. Collection of the Duty - - - - - - - 230

SECT. 6. Application of General Estate Duty Enactments - - 231

PART IV. LEGACY DUTY - - - - - - - - - - 232

SECT. 1. The Imposition of the Duty - - - - - - 232

SECT. 2. Legacies, and Successions upon Intestacy - - - 233
Sub-sect. 1. The "Legacy" - - - - - - 233
Sub-sect. 2. Successions upon Intestacy - - - - 235
Sub-sect. 3. Personal Estate - - - - - - 235
Sub-sect. 4. The Will or Intestacy - - - - - 236
Sub-sect. 5. The Legatee or Successor - - - - 236
Sub-sect. 6. The Testator or Intestate - - - - 238
Sub-sect. 7. Domicil and *Situs* - - - - - - 238

SECT. 3. Exceptions from the Charge of Duty - - - - 239

SECT. 4. Rates of Duty - - - - - - - - - 242

SECT. 5. Value Chargeable - - - - - - - - 245
Sub-sect. 1. Gross Value - - - - - - - 245
Sub-sect. 2. Deductions - - - - - - - 249

SECT. 6. Collection of the Duty - - - - - - - 249
Sub-sect. 1. The Duty - - - - - - - 249
Sub-sect. 2. When the Duty is payable - - - - 249
Sub-sect. 3. By whom the Duty is payable - - - - 252
(1) The Accountable Persons - - - - - 252
(2) Limitation of Personal Liability - - - 256
Sub-sect. 4. Out of what Property the Duty is payable - 256
Sub-sect. 5. Remission of Duty and Interest - - - 258
Sub-sect. 6. Commutation of Duty and Composition of Claims 258

SECT. 7. Interest, Penalties, and Proceedings - - - - 259
Sub-sect. 1. Interest - - - - - - - - 259
Sub-sect. 2. Penalties - - - - - - - - 259
Sub-sect. 3. Proceedings - - - - - - - - 260

SECT. 8. Repayment of Overpaid Duty - - - - - - 261

PART V. SUCCESSION DUTY - - - - - - - - - 262
SECT. 1. The Imposition of the Duty - - - - - - 262
SECT. 2. The Succession - - - - - - - - - 263
Sub-sect. 1. Property - - - - - - - - 263
Sub-sect. 2. Successions under Dispositions - - - 265
Sub-sect. 3. Successions through Devolution by Law - 267
Sub-sect. 4. The Successor - - - - - - 267
Sub-sect. 5. The Predecessor - - - - - - 268
Sub-sect. 6. Special Modes of conferring Successions - - 271
Sub-sect. 7. Domicil and *Situs* - - - - - - 273
SECT. 3. Exceptions from the Charge of Duty - - - - 276
Sub-sect. 1. Interests surrendered, destroyed, or transmitted - - - - - - - - 276
Sub-sect. 2. Where the Successor is also the Predecessor - 277
Sub-sect. 3. Where Money Consideration given - - - 277
Sub-sect. 4. Where other Death Duty chargeable and exempted - - - - - - - - 278
Sub-sect. 5. Small Successions - - - - - - 280
Sub-sect. 6. Property not yielding Income - - - 280
Sub-sect. 7. Money applied to Payment of Duty - - 281
Sub-sect. 8. Early Cesser of Limited Interest - - - 281
SECT. 4. Rates of Duty - - - - - - - - - 282
SECT. 5. Value Chargeable - - - - - - - - - 286
Sub-sect. 1. Gross Value - - - - - - - - 286
Sub-sect. 2. Deductions - - - - - - - - 289
Sect. 6. Collection of the Duty - - - - - - - - 292
Sub-sect. 1. The Duty - - - - - - - - 292
Sub-sect. 2. When the Duty is payable - - - - 292
Sub-sect. 3. By whom the Duty is payable - - - 295
(1) The Accountable Persons - - - - - 295
(2) Limitation of Personal Liability- - - - 297
Sub-sect. 4. Out of what Property the Duty is payable - 298
(1) The Property - - - - - - - - 298
(2) Powers to raise the Duty - - - - - 300
(3) Limitation of the Charge of Duty - - - 301
Sub-sect. 5. Remission of Duty and Interest - - - 302
Sub-sect. 6. Commutation of Duty and Composition of Claims 302
SECT. 7. Interest, Penalties, and Proceedings - - - - 303
Sub-sect. 1. Interest- - - - - - - - - 303
Sub-sect. 2. Penalties - - - - - - - - 303
Sub-sect. 3. Proceedings - - - - - - - - 303
SECT. 8. Repayment of Overpaid Duty- - - - - - 304

PART VI. PROBATE DUTY - - - - - - - - - 305
SECT. 1. The Imposition of the Duty - - - - - - 305
SECT. 2. The Subject-matter of the Charge - - - - - 306
Sub-sect. 1. "Estate and Effects" - - - - - 306
Sub-sect. 2. Cumulative Duties - - - - - - 308
Sub-sect. 3. Domicil and *Situs* - - - - - - 309
SECT. 3. Exceptions from the Charge of Duty - - - - 311
SECT. 4. Rates of Duty - - - - - - - - - 312
SECT. 5. Value Chargeable - - - - - - - - - 312
Sub-sect. 1. Gross Value - - - - - - - - 312
Sub-sect. 2. Deductions - - - - - - - - 313

PART VI. PROBATE DUTY—*continued.* PAGE

SECT. 6. Collection of the Duty - - - - - - - - 314
Sub-sect. 1. The Duty - - - - - - - - 314
Sub-sect. 2. When the Duty is payable - - - - 315
Sub-sect. 3. By whom the Duty is payable - - - 315
Sub-sect. 4. Out of what Property the Duty is payable - 316
SECT. 7. Interest, Penalties, and Proceedings - - - - 317
Sub-sect. 1. Interest- - - - - - - - 317
Sub-sect. 2. Penalties - - - - - - - 317
Sub-sect. 3. Proceedings - - - - - - - 317
SECT. 8. Repayment of Overpaid Duty - - - - - 318

For Administrators - - - *See title* EXECUTORS AND ADMINISTRATORS.
Corporation Duty - - - ,, CORPORATIONS; REVENUE.
Executors - - - - - ,, EXECUTORS AND ADMINISTRATORS.
Legacies - - - - - ,, WILLS.
Personal Representatives - - ,, EXECUTORS AND ADMINISTRATORS.
Probate Practice - - - ,, EXECUTORS AND ADMINISTRATORS.
Settlements - - - - ,, SETTLEMENTS.

ESTATE BY THE CURTESY.

See COPYHOLDS; HUSBAND AND WIFE; REAL PROPERTY AND CHATTELS REAL.

ESTATE FOR LIFE.

See REAL PROPERTY AND CHATTELS REAL; SETTLEMENTS.

ESTATE PUR AUTRE VIE.

See DESCENT AND DISTRIBUTION; REAL PROPERTY AND CHATTELS REAL.

ESTATE TAIL.

See DESCENT AND DISTRIBUTION; REAL PROPERTY AND CHATTELS REAL; SETTLEMENTS.

ESTATES OF THE REALM.

See CONSTITUTIONAL LAW; PARLIAMENT.

PAGE

ESTOPPEL - - - - - - - - - - - **321—415**

PART I. DEFINITION, NATURE, AND CLASSIFICATION - - - 322
SECT. 1. Definition - - - - - - - - - - 322
SECT. 2. Kinds of Estoppel - - - - - - - - - 322

PART II. ESTOPPEL BY MATTER OF RECORD- - - - - 325
SECT. 1. What will create Estoppel by Record - - - - 325
Sub-sect. 1. In General - - - - - - - 325
Sub-sect. 2. Judgments *in rem* - - - - - - 327
Sub-sect. 3. Judgments *in personam* or *inter parties* - - 330
Sub-sect. 4. *Res Judicata* - - - - - - - 331
Sub-sect. 5. Judgment recovered - - - - - 334

PART II. ESTOPPEL BY MATTER OF RECORD—*continued.* PAGE

SECT. 2. Parties estopped by Record - - - - - - 338
Sub-sect. 1. Parties estopped by Judgment *in rem* - - 338
Sub-sect. 2. Parties estopped by Judgment *inter partes* - 343
SECT. 3. Who may take advantage of Estoppel - - - - 349
Sub-sect. 1. In General - - - - - - - - 349
Sub-sect. 2. Necessity of pleading Estoppel - - - 350
SECT. 4. Matters Preventing Existence of Estoppel - - - 351
Sub-sect. 1. In General - - - - - - - - 351
Sub-sect. 2. Fraud - - - - - - - - - 351
Sub-sect. 3. Lack of Jurisdiction - - - - - 353
Sub-sect. 4. Truth appearing in same Record - - - 354
Sub-sect. 5. Allegation not inconsistent with Record - - 354
Sub-sect. 6. Matter on Record not then in Issue - - 355
Sub-sect. 7. Record of other than Final Judgment - - 359
Sub-sect. 8. Estoppel against Estoppel - - - - 361
Sub-sect. 9. Second Action begun before Judgment in First 361

PART III. ESTOPPEL QUASI OF RECORD - - - - - 362
SECT. 1. Judgments of Courts not of Record - - - - - 362
SECT. 2. Approbation and Reprobation - - - - - - 364

PART IV. ESTOPPEL BY DEED - - - - - - - - 365
SECT. 1. In General - - - - - - - - - - 365
SECT. 2. Upon whom binding - - - - - - - - 368
SECT. 3. Exceptions - - - - - - - - - - 369
Sub-sect. 1. Fraud - - - - - - - - - 369
Sub-sect. 2. Mistake - - - - - - - - - 370
Sub-sect. 3. Infants, Married Women, Corporations - - 370
SECT. 4. Operation of Deeds by Estoppel - - - - - 371

PART V. ESTOPPEL IN PAIS - - - - - - - - - 375
SECT. 1. Its early Signification - - - - - - - 375
SECT. 2. Estoppel by Representation - - - - - - 376
Sub-sect. 1. In General - - - - - - - - 376
Sub-sect. 2. Estoppel by Statement - - - - - 386
Sub-sect. 3. Estoppel by Conduct - - - - - 388
Sub-sect. 4. Estoppel by Negligence - - - - - 398
SECT. 3. Estoppel between Particular Persons - - - - 402
Sub-sect. 1. Landlord and Tenant - - - - - 402
Sub-sect. 2. Bailor and Bailee - - - - - - 406
Sub-sect. 3. Companies and Holders of Certificates - - 408
Sub-sect. 4. Patentee and Licensee - - - - - 413

For Conclusiveness of Foreign Judgment - *See title* CONFLICT OF LAWS.
Conclusiveness of Judgment - - ,, JUDGMENTS AND ORDERS.
Documentary Evidence - - - ,, EVIDENCE.
Estoppel on Bailee - - - - ,, BAILMENT.
Estoppel on Principal or Agent - - ,, AGENCY.
Negotiable Instruments - - - ,, BILLS OF EXCHANGE ETC.

ESTOVERS.

See COMMONS.

ESTRAYS.

See ANIMALS; CONSTITUTIONAL LAW.

ESTREAT.

See CRIMINAL LAW AND PROCEDURE.

EVICTION.

See COUNTY COURTS; LANDLORD AND TENANT.

PAGE

EVICTION - - - - - - - - - - - - 415—631

PART I. INTRODUCTORY - - - - - - - - - - - 419

SECT. 1. Functions of the Law of Evidence - - - - - - 419

SECT. 2. Functions of Judge and Jury - - - - - - - 428

SECT. 3. Burden of Proof - - - - - - - - - - 433

PART II. FACTS WHICH MAY BE PROVED - - - - - - 436

SECT. 1. Facts in Issue - - - - - - - - - - 436

SECT. 2. Facts relevant to the Issue - - - - - - - 439

Sub-sect. 1. In General - - - - - - - - - 439
Sub-sect. 2. Facts Probative of the Main Fact - - - - 440
Sub-sect. 3. Facts showing the Identity or Connection of the Parties - - - - - - - - - 447
Sub-sect. 4. Facts showing State of Mind - - - - - 448
Sub-sect. 5. Similar Facts - - - - - - - - 450
Sub-sect. 6. Character - - - - - - - - - 454

SECT. 3. Hearsay - - - - - - - - - - - 455

Sub-sect. 1. General Rule and Exceptions- - - - - 455
Sub-sect. 2. Admissions and Confessions - - - - - 456
Sub-sect. 3. Statements by Deceased Persons - - - - 463

(i.) Declarations against Interest - - - - 463
(ii.) Declarations in the course of Duty - - - 464
(iii.) Declarations as to Public Rights - - - - 467
(iv.) Declarations as to Pedigree - - - - - 469
(v.) Declarations by Dying Persons - - - - 471
(vi.) Declarations by Testators - - - - - 471

Sub-sect. 4. Statements in Public Documents - - - 472

(i.) Public Statutes, Parliamentary Journals, and Government Gazettes - - - - - - 473
(ii.) Public Registers - - - - - - - 473
(iii.) Public Surveys, Assessments, and Reports - - 475
(iv.) Official Certificates - - - - - - 476
(v.) Corporation, Company, and Bankers' Books - - 478
(vi.) Histories, Scientific Works etc. - - - - 478

SECT. 4. Opinions - - - - - - - - - - - 479

Sub-sect. 1. General Reputation - - - - - - 479
Sub-sect. 2. Opinions of Experts - - - - - - 480
Sub-sect. 3. Opinions of Ordinary Witnesses - - - 482

SECT. 5. Judgments - - - - - - - - - - 483

PAGE

PART III. MODES OF PROOF - - - - - - - - - 484

SECT. 1. Admissions for Purposes of Trial - - - - - - 484

SECT. 2. Judicial Notice - - - - - - - - - 484

Sub-sect. 1. English Law, Customs, and Practice - - 484
Sub-sect. 2. Colonial and Foreign Laws - - - - 487
Sub-sect. 3. Time - - - - - - - - - 492
Sub-sect. 4. Affairs of State, States of War and Peace, Foreign Rulers, Officers of State - - - 492
Sub-sect. 5. Geography - - - - - - - - 493
Sub-sect. 6. Notorious Facts - - - - - - 494
Sub-sect. 7. Official Seals and Signatures - - - - 495

SECT. 3. Presumptions - - - - - - - - - 497

Sub-sect. 1. In General - - - - - - - - 497
Sub-sect. 2. Conclusive - - - - - - - - 498
Sub-sect. 3. Rebuttable - - - - - - - - 499
Sub-sect. 4. Of fact - - - - - - - - - 507

SECT. 4. Inspection - - - - - - - - - - 507

PART IV. DOCUMENTARY EVIDENCE - - - - - - - 510

SECT. 1. Proof of Execution of Documents - - - - - - 510

Sub-sect. 1. Handwriting - - - - - - - - 510
Sub-sect. 2. Sealing, Delivery, and Attestation - - - 510
Sub-sect. 3. Ancient Documents - - - - - - 512
Sub-sect. 4. Stamps - - - - - - - - - 515

SECT. 2. Proof of Contents of Documents - - - - - - 517

Sub-sect. 1. Primary Evidence - - - - - - - 517
Sub-sect. 2. Secondary Evidence - - - - - - 518
Sub-sect. 3. Copies of Public Documents - - - - - 522
(i.) Exemplifications - - - - - - - 523
(ii.) Office Copies - - - - - - - - 523
(iii.) Examined Copies - - - - - - - 524
(iv.) Certified Copies - - - - - - - - 524
(v.) Copies printed by Public Authority - - - 525

Sub-sect. 4. Proof of Particular Public or Official Documents 525
(i.) Statutes, Parliamentary Proceedings, and Orders - 525
(ii.) Foreign Judgments and Acts of State - - - 527
(iii.) Ancient Public Surveys, Inquisitions, and Assessments - - - - - - - - - - 527
(iv.) Birth, Marriage, and Death Certificates - - 533
(a) Of the Registrar-General of England - - 533
(b) Foreign Registers - - - - - - 534
(v.) Parish and other Registers and Records of Baptisms, Marriages, and Burials - - - - - 536
(vi.) Other Registers - - - - - - - - 539
(vii.) Court Rolls - - - - - - - - - 539
(viii.) Rate Books, Revenue Books, Log Books, Lighthouse Journals - - - - - - - 541
(ix.) Judicial Proceedings - - - - - - - 542
(a) When and how Admissible - - - - 542
(b) In High Court - - - - - - - 548
(c) In County Court - - - - - - - 549
(d) In Criminal Court - - - - - - 550
(e) Other Judicial Proceedings - - - - 551
(x.) Probate and Letters of Administration - - 553

PART IV. DOCUMENTARY EVIDENCE—*continued.*

PAGE

SECT. 2. Proof of Contents of Documents—*continued.*

Sub-sect. 5. Proof of Particular Private Documents - - 554

(i.) Bankers' Books - - - - - - - - 554
(ii.) Books of Companies and Corporations - - - 555
(iii.) Letters - - - - - - - - - 556
(a) Posting and Delivery - - - - - 556
(b) Without Prejudice - - - - - 557
(iv.) Telegrams - - - - - - - - 559
(v.) Deeds - - - - - - - - - 559
(vi.) Wills - - - - - - - - - 559
(vii.) Family Papers - - - - - - - 560
(viii.) Account Books - - - - - - - 561
(ix.) Bills of Exchange, Cheques, and Promissory Notes 562
(x.) Receipts - - - - - - - - 562
(xi.) Works of History and Science - - - - 563
(xii.) Plans and Maps - - - - - - - 563
(xiii.) Inscriptions - - - - - - - 564
(xiv.) Photographs - - - - - - - 565
(xv.) Newspaper Reports - - - - - - 565

SECT. 3. Exclusion of Extrinsic Evidence to Contradict or Vary Documents - - - - - - - - - 566

Sub-sect. 1. General Rule - - - - - - 566
Sub-sect. 2. Exceptions - - - - - - - 567

SECT. 4. Admission of Extrinsic Evidence to Interpret Documents 568

PART V. WITNESSES - - - - - - - - - - 569

SECT. 1. Competency - - - - - - - - - - 569

SECT. 2. Privilege - - - - - - - - - - 570

Sub-sect. 1. Judges, Jurors, Counsel, Solicitors - - - 571
Sub-sect. 2. Officers of State - - - - - - 572
Sub-sect. 3. Husband and Wife - - - - - 573
Sub-sect. 4. Title Deeds - - - - - - - 574
Sub-sect. 5. Matter incriminating Witness - - - - 574

SECT. 3. Attendance - - - - - - - - - 577

Sub-sect. 1. *Subpœna ad testificandum* - - - - 577

(i.) Witnesses within the Jurisdiction - - - 577
(ii.) Witnesses out of the Jurisdiction - - - 579

Sub-sect. 2. *Habeas corpus ad testificandum* - - - - 580
Sub-sect. 3. *Subpœna duces tecum* - - - - - 580

(i.) In General - - - - - - - - 580
(ii.) Solicitors - - - - - - - - 581
(iii.) Production of Documents at Proceedings other than Trial - - - - - - - - 582

Sub-sect. 4. Expenses - - - - - - - 583
Sub-sect. 5. Privilege from Arrest - - - - - 585
Sub-sect. 6. Penalties for Non-attendance - - - - 588

SECT. 4. Oath and Affirmation - - - - - - - 590

SECT. 5. Ordering out of Court - - - - - - - 593

SECT. 6. Examination in Chief, Cross-examination, and Re-examination - - - - - - - - - 594

Sub-sect. 1. Leading Questions - - - - - - 594
Sub-sect. 2. Refreshing Memory - - - - - 595
Sub-sect. 3. Cross-examination - - - - - - 597
Sub-sect. 4. Re-examination - - - - - - 599
Sub-sect. 5. Further Evidence - - - - - - 599

PART V. WITNESSES—*continued.* PAGE

SECT. 7. Impeaching Credit of Witness - - - - - 600
Sub-sect. 1. Of Party's own Witness - - - - - 600
Sub-sect. 2. Of Opponent's Witness - - - - - 601
Sub-sect. 3. Re-establishing Credit of Witness - - - 603
SECT. 8. Corroboration - - - - - - - - - 603
SECT. 9. Attesting Witnesses, when required to be called - - 604
SECT. 10. Evidence of Opinion and Belief - - - - - 607

PART VI. EVIDENCE OUT OF COURT - - - - - - 609
SECT. 1. How Obtained - - - - - - - - - 609
SECT. 2. Examination of Witnesses - - - - - - 609
Sub-sect. 1. Commission - - - - - - - 609
Sub-sect. 2. Examiners - - - - - - - 610
Sub-sect. 3. Mandamus - - - - - - - 611
Sub-sect. 4. Letters of Request - - - - - 611
SECT. 3. When Examination out of Court will be Ordered - - 611
Sub-sect. 1. Witnesses within the Jurisdiction - - - 613
Sub-sect. 2. Witnesses Abroad - - - - - - 613
SECT. 4. Taking the Evidence - - - - - - - 615
SECT. 5. Return and Use of the Evidence - - - - - 617
SECT. 6. Interlocutory Proceedings—Evidence by Affidavit - - 618
SECT. 7. Trial on Affidavits - - - - - - - 620
Sub-sect. 1. By Consent - - - - - - - 620
Sub-sect. 2. By Order of Court - - - - - - 622
Sub-sect. 3. In County Court - - - - - - 624
SECT. 8. Form and Contents of Affidavits - - - - - 625
SECT. 9. Who may take Affidavits - - - - - - 627
SECT. 10. Filing and Office Copies of Affidavits - - - - 629
SECT. 11. Action for Perpetuation of Testimony - - - - 630
SECT. 12. Evidence for Use before Foreign Tribunals - - - 630

For Acknowledgments, Certificate of *See title* REAL PROPERTY AND CHATTELS REAL; SALE OF LAND.

Admissions for Purposes of Trial - - - - - ,, PLEADING; PRACTICE AND PROCEDURE.
Character, Evidence of - - ,, CRIMINAL LAW AND PROCEDURE.
Common Informer - - - ,, CRIMINAL LAW AND PROCEDURE.
Confession and Avoidance - ,, PLEADING.
Confessions - - - - ,, CRIMINAL LAW AND PROCEDURE.
County Courts - - - ,, COUNTY COURTS.
Criminal Cases, Evidence in - ,, CRIMINAL LAW AND PROCEDURE.
Custom - - - - ,, CUSTOM AND USAGES.
Deeds, Receipts in - - - ,, DEEDS AND OTHER INSTRUMENTS.
Discovery - - - - ,, DISCOVERY, INSPECTION, AND INTERROGATORIES.
Easements - - - - ,, EASEMENTS AND PROFITS À PRENDRE.
Estoppel - - - - ,, ESTOPPEL.
Foreign Judgments - - ,, CONFLICT OF LAWS.
Inquests, Evidence at - - ,, CORONERS.
Inspection of Documents - - ,, DISCOVERY, INSPECTION, AND INTERROGATORIES.
Interrogatories - - - ,, DISCOVERY, INSPECTION, AND INTERROGATORIES.

For Judgments - - - - *See title* ESTOPPEL; JUDGMENTS AND ORDERS.
Pleadings - - - - ,, PLEADING.
Prescription - - - ,, COMMONS; EASEMENTS AND PROFITS À PRENDRE.
Presumptions as to Rights of Property - - - - ,, PERSONAL PROPERTY; REAL PROPERTY AND CHATTELS REAL.
Stamps - - - - ,, REVENUE; titles *passim*.
Title, Abstract of - - ,, SALE OF LAND.
Usage, Proof of - - - ,, CUSTOM AND USAGES.
Wills, Due Execution of - ,, WILLS.

EXAMINERS.

See COURTS; EVIDENCE; PRACTICE AND PROCEDURE.

EXCHANGE.

See COMPULSORY PURCHASE OF LAND AND COMPENSATION; REAL PROPERTY AND CHATTELS REAL; STOCK EXCHANGE.

EXCHEQUER.

See CONSTITUTIONAL LAW; REVENUE.

EXCHEQUER BILLS.

See BILLS OF EXCHANGE ETC.

EXCISE.

See INTOXICATING LIQUORS; REVENUE.

EXCOMMUNICATION.

See ECCLESIASTICAL LAW.

ABBREVIATIONS

USED IN THIS WORK.

A. C. (preceded by date)	Law Reports, Appeal Cases, House of Lords, since 1890 (*e.g.* [1891] A. C.)
A.-G.	Attorney-General
Act.	Acton's Reports, Prize Causes, 2 vols., 1809—1811
Ad. & El.	Adolphus and Ellis's Reports, King's Bench and Queen's Bench, 12 vols., 1831—1842
Adam	Adam's Justiciary Reports (Scotland), 1893—(current)
Add.	Addams' Ecclesiastical Reports, 3 vols., 1822—1826
Adv.-Gen.	Advocate-General
Alc. & N.	Alcock and Napier's Reports, King's Bench (Ireland), 1 vol., 1813—1833
Alc. Reg. Cas.	Alcock's Registry Cases (Ireland), 1 vol., 1832—1841
Aleyn	Aleyn's Reports, King's Bench, fol., 1 vol., 1646—1649
Amb.	Ambler's Reports, Chancery, 2 vols., 1725—1783
And.	Anderson's Reports, Common Pleas, fol., 1 vol., 1535—1605
Andr.	Andrews' Reports, King's Bench, fol., 1 vol., 1737—1740
Anon.	Anonymous
Anst.	Anstruther's Reports, Exchequer, 3 vols., 1792—1797
App. Cas.	Law Reports, Appeal Cases, House of Lords, 15 vols., 1875—1890
Arkley	Arkley's Justiciary Reports (Scotland), 1 vol., 1846—1848
Arm. M. & O.	Armstrong, Macartney, and Ogle's Civil and Criminal Reports (Ireland), 1840—1842
Arn.	Arnold's Reports, Common Pleas, 2 vols., 1838—1839
Arn. & H.	Arnold and Hodges' Reports, Queen's Bench, 1 vol., 1840—1841
Asp. M. L. C.	Aspinall's Maritime Law Cases, 1870—(current)
Ashb.	Ashburner's Principles of Equity, 1902
Atk.	Atkyns' Reports, Chancery, 3 vols., 1736—1754
Ayl. Pan.	Ayliffe's New Pandect of Roman Civil Law
Ayl. Par.	Ayliffe's Parergon Juris Canonici Anglicani
B. & Ad.	Barnewall and Adolphus' Reports, King's Bench, 5 vols., 1830—1834
B. & Ald.	Barnewall and Alderson's Reports, King's Bench, 5 vols., 1817—1822
B. & C.	Barnewall and Cresswell's Reports, King's Bench, 10 vols., 1822—1830
B. & S.	Best and Smith's Reports, Queen's 10 vols., Bench, 1861—1870
Bac. Abr.	Bacon's Abridgment
Bail Ct. Cas.	Bail Court Cases (Lowndes and Maxwell), 1 vol., 1852—1854
Baild.	Baildon's Select Cases in Chancery (Selden Society, Vol. X.)
Ball & B.	Ball and Beatty's Reports, Chancery (Ireland), 2 vols., 1807—1814
Bankr. & Ins. R.	Bankruptcy and Insolvency Reports, 2 vols., 1853—1855

Bar. & Arn.	Barron & Arnold's Election Cases, 1 vol., 1843—1846
Bar. & Aust.	Barron & Austin's Election Cases, 1 vol., 1842
Barn. (CH.)	Barnardiston's Reports, Chancery, fol., 1 vol., 1740—1741
Barn. (K. B.)	Barnardiston's Reports, King's Bench, fol., 2 vols., 1726—1734
Barnes	Barnes' Notes of Cases of Practice, Common Pleas, 1 vol., 1732—1760
Batt.	Batty's Reports, King's Bench (Ireland), 1 vol., 1825—1826
Beat.	Beatty's Reports, Chancery (Ireland), 1 vol., 1813—1830
Beav.	Beavan's Reports, Rolls Court, 36 vols., 1838—1866
Beav. & Wal.	Beavan and Walford's Railway Parliamentary Cases, 1 vol., 1846
Beaw.	Beawes's Lex Mercatoria
Bellewe	Bellewe's Cases *temp.* Richard II., King's Bench, 1 vol.
Bell, C. C.	T. Bell's Crown Cases Reserved, 1 vol., 1858—1860
Bell, Ct. of Sess. ..	R. Bell's Decisions, Court of Session (Scotland), 1 vol., 1790—1792
Bell, Ct. of Sess. fol. ..	R. Bell's Decisions, Court of Session (Scotland), fol., 1 vol., 1794—1795
Bell, Dict. Dec. ..	S. S. Bell's Dictionary of Decisions, Court of Session (Scotland), 2 vols., 1808—1833
Bell, Sc. App.	S. S. Bell's Scotch Appeals, House of Lords, 7 vols., 1842—1850
Belt's Sup.	Belt's Supplement to Vesey Sen., Chancery, 1 vol., 1746—1756
Benl.	Benloe's (or Bendloe's) Reports, King's Bench and Common Pleas, fol., 1 vol., 1515—1627
Ben. & D.	Benloe and Dalison's Reports, Common Pleas, fol., 1 vol., 1357—1579
Bing.	Bingham's Reports, Common Pleas, 10 vols., 1822—1834
Bing. (N. C.)	Bingham's New Cases, Common Pleas, 6 vols., 1834—1840
Bitt. Prac. Cas.	Bittleston's Practice Cases in Chambers under the Judicature Acts, 1873 and 1875, 1 vol., 1875—1876
Bitt. Rep. in Ch. ..	Bittleston's Reports in Chambers (Queen's Bench Division), 1 vol., 1883—1884
Bl. Com	Blackstone's Commentaries
Bl. D. & Osb.	Blackham, Dundas, and Osborne's Reports, Practice and Nisi Prius (Ireland), 1 vol., 1846—1848
Bli.	Bligh's Reports, House of Lords, 4 vols., 1819—1821
Bli. (N. S.)	Bligh's Reports, House of Lords, New Series, 11 vols., 1827—1837
Bos. & P.	Bosanquet and Puller's Reports, Common Pleas, 3 vols., 1796—1804
Bos. & P. (N. R.) ..	Bosanquet and Puller's New Reports, Common Pleas, 2 vols., 1804—1807
Bract.	Bracton De Legibus et Consuetudinibus Angliæ
Bro. Abr.	Sir J. Brooke's Abridgment
Bro. C. C.	W. Brown's Chancery Reports, 4 vols., 1778—1794
Bro. Ecc. Rep.	W. G. Brooke's Ecclesiastical Reports, Privy Council, 1 vol., 1850—1872
Bro. (N. C.)	Sir R. Brooke's New Cases, 1 vol., 1515—1558
Bro. Parl. Cas.	J. Brown's Cases in Parliament, 8 vols., 1702—1800
Bro. Supp. to Mor. ..	M. P. Brown's Supplement to Morison's Dictionary of Decisions, Court of Session (Scotland), 5 vols.
Bro. Synop.	M. P. Brown's Synopsis of Decisions, Court of Session (Scotland), 4 vols., 1532—1827
Brod. & Bing.	Broderip and Bingham's Reports, Common Pleas, 3 vols., 1819—1822

Brod. & F.	Brodrick and Fremantle's Ecclesiastical Reports, Privy Council, 1 vol., 1705—1864
Broun	Broun's Justiciary Reports (Scotland), 2 vols., 1842—1845
Brown. & Lush. ..	Browning and Lushington's Reports, Admiralty, 1 vol., 1863—1866
Brownl.	Brownlow and Goldesborough's Reports, Common Pleas, 2 parts, 1569—1624
Bruce	Bruce's Decisions, Court of Session (Scotland), 1714—1715
Buchan.	Buchanan's Reports, Court of Session and Justiciary (Scotland), 1806—1813
Buck	Buck's Cases in Bankruptcy, 1 vol., 1816—1820
Bulst.	Bulstrode's Reports, King's Bench, fol., 3 parts in 1 vol., 1610—1626
Bunb.	Bunbury's Reports, Exchequer, fol., 1 vol., 1713—1741
Burr.	Burrow's Reports, King's Bench, 5 vols., 1756—1772
Burr. S. C.	Burrow's Settlement Cases, King's Bench, 1 vol., 1733—1776
Burrell	Burrell's Reports, Admiralty, ed. by Marsden, 1 vol., 1648—1840
C. A.	Court of Appeal
C. B.	Common Bench Reports, 18 vols., 1845—1856
C. B. (N. S.)	Common Bench Reports, New Series, 20 vols., 1856—1865
C. C. Ct. Cas.	Central Criminal Court Cases (Sessions Papers), 1834—(current)
C. L. R.	Common Law Reports, 3 vols., 1853—1855
C. P. D.	Law Reports, Common Pleas Division, 5 vols., 1875—1880
C. & P.	Carrington and Payne's Reports, Nisi Prius, 9 vols., 1823—1841
Cab. & El.	Cababé and Ellis's Reports, Queen's Bench Division, 1 vol., 1882—1885
Cald. Mag. Cas. ..	Caldecott's Magistrates Cases, 1 vol., 1777—1786
Calth.	Calthrop's City of London Cases, King's Bench, 1 vol., 1609—1618
Camp.	Campbell's Reports, Nisi Prius, 4 vols., 1807—1816
Carp. Pat. Cas.	Carpmael's Patent Cases, 2 vols., 1602—1842
Car. & Kir.	Carrington and Kirwan's Reports, Nisi Prius, 3 vols., 1815—1853
Car. & M.	Carrington and Marshman's Reports, Nisi Prius, 1 vol., 1841—1843
Cart.	Carter's Reports, Common Pleas, fol., 1 vol., 1664—1673
Carth.	Carthew's Reports, King's Bench, fol., 1 vol., 1687—1700
Cary	Cary's Reports, Chancery, 1 vol.
Cas. in Ch.	Cases in Chancery, fol., 3 parts, 1660—1697
Cas. Pract. K. B. ..	Cases of Practice, King's Bench, 1 vol., 1655—1775
Cas. Sett.	Cases of Settlements and Removals, 1 vol., 1689—1727
Cas. *temp.* Finch ..	Cases *temp.* Finch, Chancery, fol., 1 vol., 1673—1680
Cas. *temp.* King ..	Select Cases *temp.* King, Chancery, fol., 1 vol., 1724—1733
Cas. *temp.* Talb.	Cases in Equity *temp.* Talbot, fol., 1 vol., 1730—1737
Ch. (preceded by date) ..	Law Reports, Chancery Division, since 1890 (*e.g.*, [1891] 1 Ch.)
Ch. App.	Law Reports, Chancery Appeals, 10 vols., 1865—1875
Ch. D.	Law Reports, Chancery Division, 45 vols., 1875—1890
Ch. Rob.	Christopher Robinson's Reports, Admiralty, 6 vols., 1798—1808

Char. Pr. Cas.	Charley's New Practice Reports, 3 vols., 1875—1876
Char. Cham. Cas. ..	Charley's Chamber Cases, 1 vol., 1875—1876
Chit.	Chitty's Practice Reports, King's Bench, 2 vols., 1770—1822
Cl. & Fin.	Clark and Finnelly's Reports, House of Lords, 12 vols., 1831—1846
Clay.	Clayton's Reports and Pleas of Assises at Yorke, 1 vol., 1631—1650
Clif. & Rick.	Clifford and Rickards' Locus Standi Reports, 3 vols., 1873—1884
Clif. & Steph.	Clifford and Stephens' Locus Standi Reports, 2 vols., 1867—1872
Cockb. & Rowe	Cockburn and Rowe's Election Cases, 1 vol., 1833
Co. Ent.	Coke's Entries
Co. Inst.	Coke's Institutes
Co. Litt.	Coke on Littleton (1 Inst.)
Co. Rep.	Coke's Reports, 13 parts, 1572—1616
Coll.	Collyer's Reports, Chancery 2 vols., 1844—1846
Coll. Jurid.	Collectanea Juridica, 2 vols.
Colles	Colles' Cases in Parliament, 1 vol., 1697—1713
Colt.	Coltman's Registration Cases, 1 vol., 1879—1885
Com.	Comyns' Reports, King's Bench, Common Pleas, and Exchequer, fol., 2 vols., 1695—1740
Com. Cas.	Commercial Cases, 1895—(current)
Com. Dig.	Comyns' Digest
Comb.	Comberbach's Reports, King's Bench, fol., 1 vol., 1685—1698
Con. & Law.	Connor and Lawson's Reports, Chancery (Ireland), 2 vols., 1841—1843
Cooke & Al.	Cooke and Alcock's Reports, King's Bench (Ireland), 1 vol., 1833—1834
Cooke, Pr. Cas. ..	Cooke's Practice Reports, Common Pleas, 1 vol., 1706—1747
Cooke, Pr. Reg.	Cooke's Practical Register of the Common Pleas, 1 vol., 1702—1742
Coop. G.	G. Cooper's Reports, Chancery, 1 vol., 1792—1815
Coop. Pr. Cas.	C. P. Cooper's Reports, Chancery Practice, 1 vol., 1837—1838
Coop. *temp.* Brough. ..	C. P. Cooper's Cases *temp.* Brougham, Chancery, 1 vol., 1833—1834
Coop. *temp.* Cott. ..	C. P. Cooper's Cases *temp.* Cottenham, Chancery, 2 vols., 1846—1848 (and miscellaneous earlier cases)
Corb. & D.	Corbett and Daniell's Election Cases, 1 vol., 1819
Couper	Couper's Justiciary Reports (Scotland), 5 vols., 1868—1885
Cowp.	Cowper's Reports, King's Bench, 2 vols., 1774—1778
Cox, C. C.	E. W. Cox's Criminal Law Cases, 1843—(current)
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TABLE OF STATUTES.

		PAGE
23 Hen. 8, c. 5.	(Statute of Sewers, 1532)	529
27 Hen. 8, c. 10.	(Statute of Uses, 1535)	89, 94
31 Hen. 8, c. 1.	(Partition Suits, 1539)	40
32 Hen. 8, c. 32.	(Partition by Joint Limited Owners, 1540), s. 1	40
c. 34.	(Reversioners (Benefit of Covenants), 1540)	100
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	s. 6	583
	s. 62	590
21 Jac. 1, c. 16.	(Limitation Act, 1623)	170, 175
18 & 19 Car. 2, c. 11.	(Evidence of Death of *Cestui que vie*, 1666)	502
29 Car. 2, c. 3.	(Statute of Frauds, 1677)	65, 71, 76, 333, 356, 490
	s. 4	425, 426
	s. 7	75
8 & 9 Will. 3, c. 11.	(Frivolous and Vexatious Suits (Prevention), 1696), s. 8	151
4 & 5 Anne, c. 3	(Amendment of Law and Advancement of Justice, 1705)—	
	s. 12	151
	s. 13	151
7 Anne, c. 20.	(Middlesex Registry Act, 1708)—	
	s. 6	474
	s. 12	474
	s. 19	474
4 Geo. 2, c. 28.	(Landlord and Tenant Act, 1730)	153
9 Geo. 2, c. 36.	(Charitable Uses Act, 1735)	145
11 Geo. 2, c. 19.	(Distress for Rent Act, 1737), s. 15	29
19 Geo. 2, c. 37.	(Marine Insurance Act, 1745), s. 1	487
24 Geo. 2, c. 23.	(Calendar (New Style) Act, 1750)	492
25 Geo. 2, c. 30.	(Calendar Act, 1751)	492
13 Geo. 3, c. 63.	(East India Company's Act, 1772)	609
	s. 4	614
	s. 40	611, 617
	s. 444	611
14 Geo. 3, c. 48.	(Life Assurance Act, 1774)	192
24 Geo. 3, c. 25.	(East India Company's Act, 1784)—	
	s. 78	609
	s. 79	609
26 Geo. 3, c. 57.	(East India Company's Act, 1786), s. 28	609
36 Geo. 3, c. 52.	(Legacy Duty Act, 1796)	232, 245, 260, 292
	s. 4	232, 249
	s. 5	232, 255
	s. 6	232, 249, 252, 256, 257
	s. 7	233
	s. 8	232, 242, 245, 246, 251, 256, 262, 282, 289
	s. 9	232, 242, 246, 251, 253, 256
	s. 10	232, 246, 250, 253, 256, 289
	s. 11	232, 246, 250, 256, 289
	s. 12	232, 242, 246, 247, 251, 256, 282, 289
	s. 13	232, 251, 253, 256
	s. 14	232, 240, 251, 253, 256, 280, 289
	s. 15	232, 247
	s. 16	232, 238, 247
	s. 17	232, 247, 253, 256
	s. 18	232, 247, 248, 256
	s. 19	232, 239, 245, 248, 251, 256
	s. 20	232, 236

		PAGE
36 Geo. 3, c. 52.	(Legacy Duty Act, 1796)—	
	s. 21	232, 240, 256
	s. 22	232, 261
	s. 23	232, 249, 286, 289
	s. 24	232, 256, 257, 260
	s. 25	232, 254
	s. 26	232, 250, 252
	s. 27	232, 255
	s. 28	232, 259
	s. 29	232, 256, 259
	s. 30	232, 259
	s. 31	232, 260
	s. 33	232, 258
	s. 34	232, 261
	s. 35	232, 255, 259
	s. 37	232, 244, 262
	s. 38	232, 260
	s. 39	232, 260
	s. 41	232, 256
	s. 43	232, 260
	s. 44	232, 260
38 Geo. 3 c. 60.	(Land Tax Perpetuation Act, 1798)	307
	s. 99	307
c. 87.	(Administration of Estates Act, 1798)	312
39 Geo. 3, c. 73.	(Legacy Duty Act, 1799), s. 1	232, 240, 280
39 & 40 Geo. 3, c. 98.	(Accumulations Act, 1800)	108
41 Geo. 3, c. 86.	(Probate Duty Act, 1801)	312
	s. 3	305, 311
	s. 31	311
42 Geo. 3, c. 116.	(Land Tax Redemption Act, 1802)	307
44 Geo. 3, c. 98.	(Stamp Act, 1804)	232, 312
45 Geo. 3, c. 28.	(Legacy Duty Act, 1805)	232
	s. 4	233, 242
	s. 5	232, 256, 296, 298
	s. 7	232, 296, 298
c. 92.	(Writ of Subpœna Act, 1805)	584
	s. 3	580, 585
	s. 4	580, 585
46 Geo. 3, c. 37.	(Witnesses Act, 1806)	576
48 Geo. 3, c. 149.	(Probate and Legacy Duties Act, 1808)	232
	s. 35	305, 311
	s. 36	305, 311
	s. 37	305, 311
	ss. 38—42	305
	s. 44	232, 259
52 Geo. 3, c. 146.	(Parochial Registers Act, 1812)	473, 536, 538
	s. 5	514, 537
	Sched. A	537
54 Geo. 3, c. 92.	(Probate and Legacy Duties (Ireland) Act, 1814)—	
	s. 5	232
	ss. 7—33	232
	s. 22	236
	ss. 35—39	232
	s. 43	232
55 Geo. 3, c. 184.	(Stamp Act, 1815)—	
	s. 2	232, 233, 235, 239, 240, 242, 243, 249, 305, 312, 314
	s. 37	305, 315, 317
	s. 38	215, 306, 311, 315
	s. 40	318
	ss. 40—43	305
	s. 41	313, 315, 316
	s. 42	316
	s. 43	315, 316
	ss. 45—49	315
	ss. 45—51	305
	s. 50	311
	s. 51	318

		PAGE
55 Geo. 3, c. 184.	(Stamp Act, 1815), Sched.	201, 232, 233, 235, 239, 240, 242, 243, 249, 280, 305, 311, 312, 314
c. 192.	(Wills Act, 1815)	120
56 Geo. 3, c. 56.	(Probate Duty (Ireland) Act, 1816)—	
	s. 115	232, 305
	s. 116	305
	s. 117	305
	ss. 119—131	305
	s. 128	232
c. lxxiii.	(Customs Act, 1816)	264
4 Geo. 4, c. 76.	(Marriage Act, 1823), s. 1	538
5 Geo. 4, c. 84.	(Transportation Act, 1824), s. 24	550
7 & 8 Geo. 4, c. 28.	(Criminal Law Act, 1827), s. 11	550
11 Geo. 4 & 1 Will. 4, c. 47.	(Debts Recovery Act, 1830)	34
c. 70.	(Law Terms Act, 1830), s. 14	5
1 Will. 4, c. 22.	(Evidence on Commission Act, 1831)	609, 617
	s. 1	611
	s. 2	615
3 & 4 Will. 4, c. 27.	(Real Property Limitation Act, 1833)—	
	s. 24	175
	s. 25	167
	s. 36	40
c. 41.	(Judicial Committee Act, 1833), s. 19	577
c. 49.	(Quakers and Moravians Act, 1833)	592
	s. 1	592
c. 74.	(Fines and Recoveries Act, 1833)	113
	s. 1	114
	s. 71	114
	s. 77	114
c. 104.	(Administration of Estates Act, 1833)	34, 35
c. 105.	(Dower Act, 1833)	96, 107, 121
c. 106.	(Inheritance Act, 1833)	271
	s. 2	344
	s. 3	120
4 & 5 Will. 4, c. 60.	(Land Tax Act, 1834), s. 8	249
5 & 6 Will. 4, c. 62.	(Statutory Declarations Act, 1835)	592
	s. 4	592
	s. 18	592
	s. 20	592
6 & 7 Will. 4, c. 71.	(Tithe Commutation Act, 1836), s. 64	531
c. 85.	(Marriage Act, 1836)	533
c. 86.	(Births, Marriages and Deaths Registration Act, 1836)	536
	s. 20	533
	s. 21	533
	s. 25	533
	s. 26	533
	s. 27	533
	s. 31	473, 474
	s. 38	533
	Sched. A	533
	Sched. B	534
	Sched. C	534
c. 106.	(Stannaries Act, 1836)	496
c. 116.	(Grand Jury (Ireland) Act, 1836), s. 106	306
7 Will. 4 & 1 Vict. c. 22.	(Births and Deaths Registration Act, 1837), s. 8	533, 534
c. 26.	(Wills Act, 1837)	120, 145, 308
	s. 9	75, 120
	s. 21	506
	s. 24	120
	s. 33	186, 204, 237, 308
1 & 2 Vict. c. 77.	(Quakers and Moravians Act, 1838)	592
c. 94.	(Public Record Office Act, 1838)—	
	s. 11	496
	s. 12	524, 551
	s. 13	524, 551
c. 105.	(Oaths Act, 1838), s. 1	591
c. 110.	(Judgments Acts, 1838)	94

		PAGE
2 & 3 Vict. c. 11.	(Judgments Act, 1839), s. 11	346
c. 71.	(Metropolitan Police Courts Act, 1839), s. 40	353
c. 84.	(Poor Rate Act, 1839)	585
3 & 4 Vict. c. 92.	(Non-Parochial Registers Act, 1840)	474, 539
	s. 2	539
	s. 6	539
	s. 9	539
	s. 17	539
	s. 20	539
c. 105.	(Debtors (Ireland) Act, 1840), s. 67	615
5 Vict. c. 5.	(Court of Chancery Act, 1841)	6
	s. 1	5
5 & 6 Vict. c. 35.	(Income Tax Act, 1842), s. 60	208
c. 45.	(Copyright Act, 1842), s. 11	474
c. 69.	(Perpetuation of Testimony Act, 1843)	46
c. 79.	(Railway Passenger Duty Act, 1842), s. 23	305, 308, 318
c. 82.	(Stamp Duties (Ireland) Act, 1842)—	
	s. 35	305
	s. 36	305
	s. 37	232, 236
	s. 38	232, 237, 243
	s. 39	232
6 & 7 Vict. c. 18.	(Parliamentary Voters Registration Act, 1843), s. 100	557
c. 36.	(Scientific Societies Act, 1843), s. 1	191
c. 73.	(Solicitors Act, 1843), s. 37	215, 316
c. 82.	(Evidence By Commission Act, 1843)—	
	s. 5	611
	s. 7	585
c. 85.	(Evidence Act, 1843)	569
7 & 8 Vict. c. 12.	(International Copyright Act, 1844), s. 8	474
c. 33.	(County Rates Act, 1844), s. 6	556
c. 81.	(Marriages (Ireland) Act, 1844)	535
c. 101.	(Poor Law Amendment Act, 1844), s. 72	557
8 & 9 Vict. c. 16.	(Companies Clauses Consolidation Act, 1845)—	
	s. 9	478
	s. 98	478
	s. 136	556
c. 18.	(Lands Clauses Consolidation Act, 1845)...102, 110, 114,	545
	s. 50	353, 364
c. 76.	(Revenue Act, 1845), s. 4	232, 233, 238, 242, 280
c. 109.	(Gaming Act, 1845)	487
	s. 9	576
c. 113.	(Evidence Act, 1845)	535
	s. 1	525
	s. 2	497
	s. 3	525, 527
	s. 5	535
9 & 10 Vict. c. 93.	(Fatal Accidents Act, 1846), s. 2	306
10 & 11 Vict. c. 65.	(Cemeteries Clauses Act, 1847)—	
	s. 32	538
	s. 33	538
c. 109.	(Poor Law Board Act, 1847)—	
	s. 21	585
	s. 26	585
11 & 12 Vict. c. 42.	(Indictable Offences Act, 1848), s. 17	548, 61
c. 43.	(Summary Jurisdiction Act, 1848), s. 7	585
12 & 13 Vict. c. 1.	(Inland Revenue Board Act, 1849), s. 1	249
c. 109.	(Petty Bag Act, 1849)	496
13 & 14 Vict. c. 21.	(Lord Brougham's Act, 1850), s. 7	525
14 & 15 Vict. c. 99.	(Evidence Act, 1851)—	
	s. 2	14, 569
	s. 7	491, 527
	s. 13	525, 550
	s. 14	523, 524, 534, 536, 553
	s. 16	591
c. 100.	(Criminal Law Procedure Act, 1851), s. 22	550
15 & 16 Vict. c. 76.	(Common Law Procedure Act, 1852)—	
	s. 55	444

		PAGE
15 & 16 Vict. c. 76.	(Common Law Procedure Act, 1852)	331
	s. 210	153
	s. 211	153
	s. 212	153
c. 80.	(Court of Chancery Act, 1852)	6
16 & 17 Vict. c. 30.	(Criminal Procedure Act, 1853), s. 9	580
c. 51.	(Succession Duty Act, 1853)	208, 262, 279, 303
	s. 1	195, 213, 263, 264, 267, 268, 271, 274, 280, 296
	ss. 1—18	262
	s. 2	263, 266, 267, 268, 271
	s. 3	272
	s. 4	270, 272, 276
	s. 5	272, 285, 299
	s. 6	272
	s. 7	265, 273, 289
	s. 8	266, 273
	s. 9	181, 292
	s. 10	263, 279, 282, 283
	s. 11	232, 244, 284
	s. 12	277, 285
	s. 13	268, 269
	s. 14	236, 277, 285, 295
	s. 15	268, 277, 285, 294
	s. 16	283, 284, 286, 293, 301
	s. 17	264, 265, 271, 277
	s. 18	263, 276, 280, 281
	s. 19	232, 235, 239, 363
	s. 20	278, 291, 294
	ss. 20—46	262
	s. 21	282, 287, 293
	s. 22	290
	s. 23	281, 288, 294, 303
	s. 24	202, 214, 281, 287, 294
	s. 25	288
	s. 26	288
	s. 27	286, 301
	s. 28	291
	s. 29	265, 289
	s. 30	265, 289
	s. 31	232, 245, 287, 289
	s. 32	280, 282, 286, 289, 292
	s. 33	292
	s. 34	290
	s. 35	291
	s. 36	291
	s. 37	286, 294, 304
	s. 38	271, 291
	s. 39	286, 295, 303
	s. 40	295, 305
	s. 41	302
	s. 42	295, 298, 299, 300, 301
	s. 43	297, 300
	s. 44	295, 301
	s. 45	296, 297, 304
	s. 46	303
	s. 47	263
	s. 48	232
	s. 49	297
	ss. 49—55	262
	s. 50	304
	s. 51	292
	s. 52	296, 302
	s. 53	232, 258, 301
	s. 54	263
	Sched.	245, 287, 289, 291
c. 57.	(Succession Duty Act, 1853), s. 48	232
c. 59.	(Stamp Act, 1853), s. 8	305

		PAGE
16 & 17 Vict. c. 83.	(Evidence Amendment Act, 1853)	569
	s. 3	427, 573
c. 134.	(Burial Act, 1853)	538
17 & 18 Vict. c. 34.	(Attendance of Witnesses Act, 1854)	580, 585
	s. 1	579
	s. 2	579
	s. 3	579
	s. 4	579, 585
c. 38.	(Gaming Houses Act, 1854)—	
	s. 5	576
	s. 6	576
c. 80.	(Registration of Births, Deaths and Marriages (Scotland) Act, 1854)	535
c. 87.	(Burial Act, 1854)	538
c. 104.	(Merchant Shipping Act, 1854), s. 18	529
c. 113.	(Real Estate Charges Act, 1854)	144, 314
c. 125.	(Common Law Procedure Act, 1854)—	
	s. 78	13
	s. 79	51
	s. 81	51
	s. 82	51
	s. 87	26
18 & 19 Vict. c. 29.	(Registration of Births, Deaths and Marriages (Scotland) Act, 1855)	535
c. 111.	(Bills of Lading Act, 1855), s. 3	387, 563
c. 120.	(Metropolis Management Act, 1855)	353
19 & 20 Vict. c. 96.	(Marriage (Scotland) Act, 1856), s. 2	535
c. 97.	(Mercantile Law Amendment Act, 1856)—	
	s. 3	425
	s. 5	31
c. 113.	(Foreign Tribunals Evidence Act, 1856)	630
	s. 1	630, 631
	s. 2	631
	s. 3	631
	s. 4	585, 631
	s. 5	631
20 & 21 Vict. c. 77.	(Court of Probate Act, 1857)—	
	s. 22	496, 553
	s. 23	362
	s. 24	577
	s. 26	582
	s. 61	13
	s. 62	13, 512
	s. 64	512
	s. 69	553
	s. 92	305, 315
	s. 93	315
c. 79.	(Probates and Letters of Administration (Ireland) Act, 1857)—	
	s. 94	312
	s. 95	312
c. 81.	(Burial Act, 1857)	538
c. 85.	(Matrimonial Causes Act, 1857)	548, 577, 609
	s. 6	362
	s. 13	496
	s. 28	432
	s. 29	432
	s. 31	344
	s. 33	433
	s. 49	577
c. clvii.	(Mayor's Court Procedure Act, 1857)—	
	s. 24	610
	s. 26	610
21 & 22 Vict. c. 25.	(Births and Deaths Registration Act, 1858)	474
	s. 1—3	539
c. 27.	(Chancery Amendment Act, 1858), s. 2	12, 51
c. 56.	(Confirmation of Executors (Scotland) Act, 1858)—	
	s. 14	312

		PAGE
21 & 22 Vict. c. 56.	(Confirmation of Executors (Scotland) Act, 1858)—	
	s. 15	312
c. 90.	(Medical Act, 1858), s. 29	364
c. 93.	(Legitimacy Declaration Act, 1858)	45
	s. 1	329
	s. 8	329
c. 95.	(Court of Probate Act, 1858), s. 23	577
22 Vict. c. 20.	(Evidence by Commission Act, 1859)	615, 631
	s. 1	611
	s. 3	585
22 & 23 Vict. c. 35.	(Law of Property Amendment Act, 1859)—	
	s. 27	160
	s. 28	160
	s. 29	160
c. 36.	(Probate Duty Act, 1859), s. 1	305, 312
c. 63.	(British Law Ascertainment Act, 1859)	488, 490
	s. 1	490, 491
	s. 2	491
	s. 3	491
	s. 4	491
	s. 5	490
23 & 24 Vict. c. 5.	(Indian Securities Act, 1860), s. 1	310
c. 15.	(Probate Duty Act, 1860)—	
	s. 4	305, 306
	s. 5	305, 317
	s. 6	305
c. 34.	(Petitions of Right Act, 1860)	261, 304, 318
c. 80.	(Heritable Securities (Scotland) Act, 1860), ss. 1—8	305
c. 85.	(Registration of Births, Deaths, and Marriages (Scotland) Act, 1860)	535
c. 86.	(Ionian Isles Marriage Act, 1860), s. 4	535
c. 126.	(Common Law Procedure Act, 1860)—	
	s. 1	153
	s. 25	151
c. 144.	(Matrimonial Causes Act, 1860)	577
24 & 25 Vict. c. 10	(Admiralty Court Act, 1861), s. 21	577
c. 11.	(Foreign Law Ascertainment Act, 1861)	491
c. 14.	(Post Office Savings Bank Act, 1861), s. 11	201
c. 92.	(Probate Duty Act, 1861)—	
	s. 1	232, 263
	s. 3	305, 313
c. 96.	(Larceny Act, 1861)—	
	s. 85	576
	s. 116	550
c. 99.	(Coinage Offences Act, 1861), s. 37	550
c. 100.	(Offences against the Person Act, 1861)—	
	s. 44	353, 477
	s. 45	477
c. 121.	(Domicile Act, 1861)	181
25 & 26 Vict. c. 22.	(Revenue Act, 1862), s. 39	305, 309
c. 68.	(Fine Arts Copyright Act, 1862)—	
	s. 4	474
	s. 5	474
26 & 27 Vict. c. 27.	(Marriage Law (Ireland) Amendment Act, 1863)	535
c. 49.	(Duchy of Cornwall Management Act, 1863), s. 2	496
c. 125.	(Statute Law Revision Act, 1863)	583, 590
27 & 28 Vict. c. 56.	(Revenue (No. 2) Act, 1864)—	
	s. 4	305, 310
	s. 5	305, 311, 312
c. 77.	(Ionian States Act of Parliament Repeal Act, 1864)—	
	s. 7	536
	s. 8	536
c. 97.	(Registration of Burials Act, 1864)	538
c. 101.	(Highway Act, 1864), s. 12	552
28 & 29 Vict. c. 18.	(Criminal Procedure Act, 1865)	600, 604
	s. 1	508, 511, 525, 600, 608
	s. 3	600

		PAGE
28 & 29 Vict. c. 18.	(Criminal Procedure Act, 1865)—	
	s. 4	548
	s. 5	548, 602
	s. 6	525, 550, 601, 602
	s. 7	511, 604
	s. 8	508, 510, 608
c. 63.	(Colonial Laws Validity Act, 1865), s. 6	491
c. 104.	(Crown Suits, etc. Act, 1865)	232, 252, 262, 305
	s. 53	252
	s. 55	261, 304
	s. 56	261, 304
	s. 57	315, 318
	s. 58	304
	s. 63	304
	s. 64	304
c. 111.	(Navy and Marines (Property of Deceased) Act, 1865)—	
	s. 2	201
	s. 6	201
29 & 30 Vict. c. 109.	(Naval Discipline Act, 1866)	182
	s. 66	585, 586, 588
30 & 31 Vict. c. 35.	(Criminal Law Amendment Act, 1867)—	
	s. 6	613
	s. 7	613
c. 69.	(Real Estate Charges Act, 1867)	144, 314
31 & 32 Vict. c. 4.	(Sales of Reversions Act, 1867)	21
c. 37.	(Documentary Evidence Act, 1868)	526
	s. 2 (1)	525
	(2)	525
	(3)	526
	s. 5	523, 525
c. 40.	(Partition Act, 1868)	40, 112
	s. 8	112
c. 119.	(Regulation of Railways Act, 1868), s. 26	508
c. 124.	(Inland Revenue Act, 1868)—	
	s. 7	305, 314
	s. 9	225, 226, 232, 260, 303
32 & 33 Vict. c. 41.	(Poor Rate Assessment and Collection Act, 1869), s. 18	530, 541
c. 46.	(Administration of Estates Act, 1869)	35, 36
c. 56.	(Endowed Schools Act, 1869), s. 57	557
c. 62.	(Debtors Act, 1869)—	
	s. 4	156
	(3)	156
	s. 6	60
c. 67.	(Valuation of Property (Metropolis) Act, 1869)—	
	s. 45	530
	s. 65	557
c. 68.	(Evidence Further Amendment Act, 1869)	569
	s. 2	603
	s. 3	576
33 & 34 Vict. c. 14.	(Naturalization Act, 1870), s. 6	181
c. 23.	(Forfeiture Act, 1870)	107
c. 35.	(Apportionment Act, 1870)	29
c. 52.	(Extradition Act, 1870)	527
	s. 14	527
	s. 15	527
	s. 24	630, 631
c. 75.	(Elementary Education Act, 1870)—	
	s. 81	557
	s. 83	526
c. 90.	(Foreign Enlistment Act, 1870)—	
	s. 8	435
	s. 9	435
c. 99.	(Inland Revenue Repeal Act, 1870)	515
c. 110.	(Matrimonial Causes and Marriage Law (Ireland) Amendment Act, 1870)	535
c. 112.	(Prevention of Crimes Act, 1871), s. 18	525, 550
34 & 35 Vict. c. 43.	(Ecclesiastical Dilapidations Act, 1871), s. 69	557

		PAGE
34 & 35 Vict. c. 70.	(Local Government Board Act, 1871)	585
	s. 2	526
	s. 5	496, 526
35 & 36 Vict. c. 33.	(Ballot Act, 1872)	474
c. 63.	(Statute Law Revision Act, 1872)	242, 249
c. 77.	(Mines Regulation Act, 1872), s. 40	557
c. 86.	(Borough and Local Courts of Record Act, 1872), Sched.	609
c. 93.	(Pawnbrokers Act, 1872), s. 34	431
36 & 37 Vict. c. 16.	(Marriage Law (Ireland) Amendment Act, 1873)	535
c. 31.	(Matrimonial Causes Act, 1873)	352
c. 43.	(Indian Railway Companies Act, 1873), s. 6	310
c. 48.	(Regulation of Railways Act, 1873), s. 35	557
c. 60.	(Extradition Act, 1873)—	
	s. 4	527
	s. 5	580
c. 66.	(Judicature Act, 1873)	43, 61
	s. 3	61
	s. 4	61
	s. 16	61
	s. 24 (1)	62
	(2)	62
	(3)	63
	(4)	63, 484
	(5)	63
	(6)	484, 486
	(7)	62
	s. 25 (4)	146
	(6)	103
	(8)	51, 55, 56, 154
	(11)	64
	s. 27 (7)	62
	s. 52 (1)	64
	(2)	64
	(3)	64
	(4)	64
	(5)	64
	(6)	64
	(7)	64
	(8)	64
	(10)	64
	(11)	64
	s. 61	496
	s. 62	627
	s. 77	627, 628
	s. 82	627, 628
	s. 84	627, 628
	s. 87	487
	s. 89	486
	s. 91	486
	s. 100	544, 548, 609
37 & 38 Vict. c. 59.	(Real Property Limitation Act, 1874), s. 9	403
c. 85.	(Public Worship Regulation Act, 1874)	585
	s. 9	577
c. 88.	(Births and Deaths Registration Act, 1874)	474, 533, 536
	s. 37	535
	s. 38	533, 534
38 & 39 Vict. c. 55	(Public Health Act, 1875)—	
	s. 130	526
	s. 135	526
	s. 150	329, 353
	s. 267	557
	s. 297 (7)	526
	Sched. I.	555
c. 63.	(Sale of Food and Drugs Act, 1875), s. 21	477

		PAGE
38 & 39 Vict. c. 77.	(Judicature Act, 1875)—	
	s. 10	36, 64
	s. 22	428
c. 87.	(Land Transfer Act, 1875)	101, 474
	s. 90	557
39 & 40 Vict. c. 17.	(Partition Act, 1876)	40, 112
c. 36.	(Customs Consolidation Act, 1876)—	
	s. 37	585
	s. 261	444
c. 61.	(Poor Law Amendment Act, 1876), s. 34	603
40 & 41 Vict. c. 18.	(Settled Estates Act, 1877), s. 22	300
c. 34.	(Real Estate Charges Act, 1877)	144, 314
	s. 1	223
c. 39.	(Factors Act, 1877), s. 5	392
c 41.	(Crown Office Act, 1877), s. 4	496
41 & 42 Vict. c. 26.	(Parliamentary and Municipal Registration Act, 1878), s. 36	585
c. 31.	(Bills of Sale Act, 1878), s. 16	549
c. 33.	(Dentists Act, 1878)—	
	s. 3	342
	s. 13	342, 364
	s. 14	342
	s. 15	342
c. 52.	(Public Health (Ireland) Act, 1878), s. 265	526
c. 76.	(Telegraphs Act, 1878), s. 12	557
42 & 43 Vict c. 11.	(Bankers' Books Evidence Act, 1879)—	
	s. 3	478
	s. 4	478
	s. 6	554
	s. 7	555
	s. 9	554
c. 49.	(Summary Jurisdiction Act, 1879)—	
	s. 22	474, 550
	s. 27 (4)	551
	s. 36	585
	s. 44	551
c. 59.	(Civil Procedure Acts Repeal Act, 1879)	6, 162
43 Vict. c. 14.	(Customs and Inland Revenue Act, 1880)—	
	s. 9	305, 312
	s. 10	215, 305, 307
	(1)	316
	(2)	315
	(4)	314
	s. 11	232, 258, 262, 302
	s. 12	232, 256, 262, 298
	s. 13	232, 239
	Sched.	305, 312
43 & 44 Vict. c. 9.	(Statutes (Definition of Time) Act, 1880)	492
c. 19.	(Taxes Management Act, 1880), s. 16	557
c. 42.	(Employers' Liability Act, 1880)	192
	s. 7	557
44 & 45 Vict. c. 12.	(Customs and Inland Revenue Act, 1881)	279, 283, 314
	s. 26	314
	(1)	181
	(3)	315
	ss. 26—33	305
	s. 27	305, 311, 312, 314, 315
	s. 28	313, 314
	s. 29	215, 314, 316
	s. 30	316
	s. 31	318
	s. 32	215, 313, 315, 316
	s. 33	279, 309, 317
	(1)	206, 312
	(5)	312
	s. 35	207, 305, 312
	s. 36	232, 239, 262, 279
	s. 37	305, 316

		PAGE
44 & 45 Vict. c. 12.	(Customs and Inland Revenue Act, 1881)—	
	s. 38 (1)	185, 206
	(2)	185
	(a)	187, 188, 189
	(b)	192
	(c)	191
	s. 40	305, 315, 317
	s. 41	232, 239, 243, 262, 279, 282
	s. 42	232, 239
	s. 43	232, 258
c. 24.	(Summary Jurisdiction Act, 1881), s. 4 (3)	585
c. 41.	(Conveyancing and Law of Property Act, 1881)	154, 386
	s. 10	100
	s. 11	100
	s. 18	1
	s. 55	388
	s. 56	372, 388
	s. 67	556
c. 53.	(Army Act, 1881)	182
	s. 125	588
	(2)	585
	s. 126	585
	s. 163	474, 556
	(1) (g)	535
	(h)	535
c. 60.	(Newspaper Libel and Registration Act, 1881), s. 15	474
c. 69.	(Fugitive Offenders Act, 1881)	585
	s. 29	527
45 & 46 Vict. c. 9.	(Documentary Evidence Act, 1882)—	
	s. 2	525
	s. 4	525
c. 25.	(Prevention of Crime (Ireland) Act, 1882), s. 19	306
c. 38.	(Settled Land Act, 1882)	184, 186, 198, 223, 230
	s. 2	184, 198
	(2)	184
	s. 58 (1) (i.)	209
c. 39.	(Conveyancing Act, 1882)	86, 87
	s. 1 (4) (ii.)	87
	s. 2 (1)	549
	(2)	549
	s. 3 (1) (i.)	87
	(ii.)	85, 87
	s. 7 (7)	549
	(8)	549
c. 50.	(Municipal Corporations Act, 1882)—	
	s. 22	478
	(5)	555
c. 61.	(Bills of Exchange Act, 1882)	392
	s. 20 (2)	392
	s. 21 (2)	402, 499
	(3)	507
	s. 30	435
	s. 38 (2)	393
	s. 54 (2)	324, 394
	s. 55	394
	(1) (b)	324
	(2) (b)	324
	(c)	324
	s. 70	26
	s. 88 (2)	324, 394
c. 75.	(Married Women's Property Act, 1882)	120, 170, 327
	s. 1	486
46 & 47 Vict. c. 30.	(Companies (Colonial Registers) Act, 1883)	310
	s. 3 (7) (b)	310
c. 49.	(Statute Law Revision and Civil Procedure Act, 1883)	12, 43, 45, 50, 51
	s. 7	151

		PAGE
46 & 47 Vict. c. 51.	(Corrupt and Illegal Practices Prevention Act, 1883), s. 62	556
c. 52.	(Bankruptcy Act, 1883)—	
	s. 17	551, 576
	s. 18 (9)	546
	s. 20	329
	s. 27	577
	(2)	585
	s. 28 (4)	546
	s. 35 (2)	348
	s. 38	162
	s. 41	28
	s. 48	348
	s. 105	609
	s. 127 (5)	609
	s. 132 (1)	551
	(2)	551
	s. 133 (1)	551
	s. 134	551
	s. 136	548
	s. 137	496, 497
	s. 138	551
	s. 140	551
	Sched. II.	591
47 & 48 Vict. c. 39.	(Naval Discipline Act, 1884), s. 7 (2)	182
c. 54.	(Yorkshire Registries Act, 1884)	87
	s. 9	474
	s. 14	86
	s. 20	474
	s. 21	474
	s. 51	474
c. 61.	(Judicature Act, 1884)—	
	s. 16	579
	s. 18	337
c. 62.	(Revenue Act, 1884), s. 11	305
c. 71.	(Intestates' Estates Act, 1884), s. 4	96, 107
48 & 49 Vict. c. 8.	(Army (Annual) Act, 1885), s. 8 (2)	182
c. 36.	(Artillery and Rifle Ranges Act, 1885), s. 6	526
c. 74.	(Evidence by Commission Act, 1885)	611, 615
49 & 50 Vict. c. 5.	(Drill Grounds Act, 1886)	526
c. 33.	(International Copyright Act, 1886)—	
	s. 7	474
	s. 8	474
50 & 51 Vict. c. 40.	(Savings Banks Act, 1887)—	
	s. 2	201
	s. 3	201
c. 55.	(Sheriffs Act, 1887), s. 39	360
c. 67.	(Superannuation Act, 1887), s. 8	201
c. 71.	(Coroners Act, 1887)—	
	s. 19	577
	s. 21	577
51 & 52 Vict. c. 8.	(Customs and Inland Revenue Act, 1888)	283
	s. 21	262
	(1)	279, 283
	(2)	232, 233, 239, 264, 277, 283, 292, 293
	s. 22	262
	(1)	293
	(b)	293
	(3) (a)	282
	(b)	299
c. 41.	(Local Government Act, 1888)—	
	s. 75	478
	s. 85 (1)	492
c. 43.	(County Courts Act, 1888)—	
	s. 28	550
	s. 56	254
	s. 81	335
	s. 110	577

		PAGE
51 & 52 Vict. c. 43.	(County Courts Act, 1888)—	
	s. 111	585
	s. 112	580
	s. 180	496
c. 46.	(Oaths Act, 1888)	569
	s. 1	591
	s. 3	592
	s. 5	592
c. 59.	(Trustee Act, 1888)	172
	s. 8	156, 172
c. 65.	(Solicitors Act, 1888), s. 13	546
52 & 53 Vict. c. 7.	(Customs and Inland Revenue Act, 1889)—	
	s. 5	183
	(1)	312
	(2)	206
	(3)	312
	(4)	312
	(5)	312
	(6)	312
	(7)	312
	s. 6	183, 283
	(1)	283
	(2)	283
	(3)	283
	(4)	283
	s. 7	283, 312
	s. 8	283, 312
	s. 9	283, 312
	(1)	181
	s. 10	262
	(1)	291
	(2)	280
	(3)	297
	s. 11 (1)	185, 188, 189, 190, 191, 192
	s. 12	223, 262
	(1)	301
	(2)	300
	(3)	295, 300, 302
	s. 13	218, 262, 298
	(1)	298
	(2)	298
	(4)	298
	s. 14	218, 231, 232, 256, 262, 297
	s. 15	218, 262, 298
c. 10.	(Commissioners for Oaths Act, 1889)	627
	s. 1	627
	(3)	215, 628
	s. 2	627
	s. 3	496, 628
	s. 6	496, 628
c. 42.	(Revenue Act, 1889)—	
	s. 18	305, 310
	s. 19	217, 305, 311
c. 45.	(Factors Act, 1889)	391
	s. 2 (1)	391
	(2)	391
	(3)	391
	s. 5	391
	s. 7	391
	s. 8	392
	s. 9	392
c. 49.	(Arbitration Act, 1889)—	
	s. 7 (a)	627
	s. 8	577
	s. 11 (2)	545
	s. 18	577
c. 52.	(Official Secrets Act, 1889), s. 2	576

		PAGE
52 & 53 Vict. c. 63.	(Interpretation Act, 1889)—	
	s. 3	187, 216
	s. 4	494
	s. 9	427, 485
	s. 30	200
53 & 54 Vict. c. 5.	(Lunacy Act, 1890)—	
	s. 116	552
	s. 185	546
	s. 327	557
c. 7.	(Commissioners for Oaths Act, 1890)	627
c. 21.	(Inland Revenue Regulation Act, 1890)—	
	s. 1	249
	(2)	181
	s. 21	226
	s. 22 (2)	260
	s. 24	444
	s. 32	260
	s. 33 (1)	260
	s. 35 (1)	260
	(2)	260
	s. 39	249
	s. 40	249
c. 29.	(Intestates' Estates Act, 1890)	141
c. 37.	(Foreign Jurisdiction Act, 1890), s. 4	494
c. 39.	(Partnership Act, 1890)—	
	s. 9	335
	s. 14	390
	s. 15	460
	s. 20 (3)	39, 308
	s. 22	308
	s. 36	391
c. 71.	(Bankruptcy Act, 1890)—	
	s. 3 (13)	551
	s. 8	329
	(5)	546
	s. 27	576
54 & 55 Vict. c. 10.	(Middlesex Registry Act, 1891)	474
c. 17.	(Charitable Trusts (Recovery) Act, 1891)—	
	s. 5	529
	(i)	546
c. 21.	(Savings Banks Act, 1891), s. 12 (2)	201
c. 38.	(Stamp Duties Management Act, 1891), s. 24	216
c. 39.	(Stamp Act, 1891)—	
	s. 14	458, 515
	s. 15	317
	s. 65	541
	Sched.	230
c. 50.	(Commissioners for Oaths Act, 1891)	627
	s. 2	496, 628
c. 73.	(Mortmain and Charitable Uses Act, 1891)	145, 242
55 Vict. c. 6.	(Colonial Probates Act, 1892)—	
	s. 2	553
	s. 3	553
55 & 56 Vict. c. 4.	(Betting and Loans (Infant) Act, 1892), s. 3	507
c. 9.	(Gaming Act, 1892)	487, 576
c. 13.	(Conveyancing Act, 1892)	154
c. 19.	(Statute Law Revision Act, 1892)	508, 511, 600
c. 23.	(Foreign Marriage Act, 1892)—	
	s. 9	536
	s. 10	536
	s. 11	536
	s. 17	536
c. 32.	(Clergy Discipline Act, 1892)—	
	s. 2	603
	s. 9	578, 585
c. 57.	(Private Street Works Act, 1892)—	
	s. 7	328

		PAGE
55 & 56 Vict. c. 57.	(Private Street Works Act, 1892)—	
	s. 8	328
56 & 57 Vict. c. 5.	(Regimental Debts Act, 1893), s. 16	201
c. 21.	(Voluntary Conveyances Act, 1893)	17, 143
c. 53.	(Trustee Act, 1893)—	
	s. 42	254
	s. 50	254
c. 71.	(Sale of Goods Act, 1893)—	
	s. 2	431
	s. 4 (1)	426
	(3)	426
	s. 14	444
	s. 17	425
	s. 25 (1)	392
	(2)	392
	s. 52	13
	s. 55	444
c. 73.	(Local Government Act, 1894), s. 17 (8)	514
57 & 58 Vict. c. 16.	(Judicature Act, 1894), s. 3	419
c. 30.	(Finance Act, 1894)	180, 183, 184, 186, 193, 196, 201, 212, 213, 215, 226, 227, 231, 283, 287
	s. 1	183, 217, 232, 239, 243, 279, 282, 283, 305, 306, 311
	s. 2	183
	(1)	185
	(a)	185
	(b)	186, 196
	(c)	185, 187, 188, 189, 190, 191, 192
	(d)	192, 214
	(2)	193
	(3)	193
	s. 3	183
	(1)	195
	(2)	195, 210
	s. 4	183, 203, 204
	s. 5	183, 262
	(1)	228, 229
	(a)	228, 230
	(b)	230
	(2)	183, 197, 232, 239, 279
	(3)	183, 186, 193, 194
	(4)	228, 230
	(5)	183, 184, 209, 220, 228, 230
	s. 6	183
	(1)	212
	(2)	215, 216
	(3)	216
	(4)	216
	(5)	184
	(6)	213, 223
	(7)	213
	(8)	213, 221, 293
	s. 7	183
	(1)	210, 211
	(a)	197, 210, 219
	(b)	211
	(c)	211
	(2)	211
	(3)	212
	(4)	212
	(5)	207, 208, 290
	(6)	186, 204, 213
	(7)	186, 209
	(8)	209
	(9)	209
	(10)	183, 203
	s. 8	183
	(1)	201, 213, 226, 228

		PAGE
57 & 58 Vict. c. 30.	(Finance Act, 1894)—	
	s. 8 (2)	218, 223, 231
	(3)	214, 215, 218
	(4)	217, 218
	(5)	217
	(6)	226
	(7)	207
	(8)	210
	(9)	214
	(10)	225
	(11)	182
	(12)	228
	(13)	226
	(14)	216, 226
	(15)	218
	(16)	212
	(18)	218
	s. 9	183
	(1)	217, 220
	(2)	221
	(3)	221
	(4)	221
	(5)	223
	(6)	221
	(7)	223
	s. 10	183
	(1)	226, 227
	(2)	226
	(3)	226, 227
	(4)	227
	(5)	227
	(6)	228
	s. 11	183
	(1)	224
	(2)	218, 224
	(3)	207, 219, 224
	(4)	219, 224
	s. 12	183, 225
	s. 13	183, 224, 232, 262
	(1)	181, 182
	(2)	182
	(3)	180
	s. 14	183, 217
	(1)	222
	(2)	222
	(3)	222
	s. 15	183, 262
	(1)	201
	(2)	182, 203, 232
	(3)	202
	(4)	202, 214, 287
	s. 16	183, 262
	(1)	183, 206, 207, 208, 212, 232, 239
	(2)	206, 207
	(3)	183, 203, 208, 228, 230, 232, 239, 243, 279, 284
	(5)	183, 225
	s. 17	183, 206, 230
	s. 18	183, 262
	(1)	286, 287, 292, 293, 298
	(2)	286, 287, 290
	s. 19	183
	s. 20	183, 200
	(1)	200
	(2)	221, 226
	(3)	200
	(4)	200
	s. 21	183

		PAGE
57 & 58 Vict. c. 30.	(Finance Act, 1894)—	
	s. 21 (1)	199
	(2)	181, 232, 305, 306
	(3)	196, 287
	(4)	228, 230
	(5)	195
	s. 22	183
	(1) (a)	183, 184
	(b)	185, 216
	(c)	206
	(d)	215
	(e)	183, 201
	(f)	183, 199
	(g)	208, 262
	(h)	183
	(i)	184, 198
	(j)	186
	(k)	210
	(l)	184
	(m)	212
	(n)	215
	(o)	212
	(2) (a)	185, 186, 262
	(b)	186
	(c)	186
	(3)	184
	s. 23	183, 228
	(18)	223
	(a)	223
	s. 24	183, 184, 262, 305, 306
	(1) (b)	183
	s. 42	183
	Sched. I.	183, 232, 239, 243, 262, 279, 282, 283, 305, 306, 311
	Sched. II.	183, 215
57 & 58 Vict. c. 41.	(Prevention of Cruelty to Children Act, 1894)	508
c. 46.	(Copyhold Act, 1894)—	
	s. 57	556
	s. 87	40
c. 57.	(Diseases of Animals Act, 1894), s. 47	557
c. 60.	(Merchant Shipping Act, 1894)	611
	s. 24	426
	s. 64	474, 477
	s. 123	522
	s. 254	535
	s. 339	535
	s. 483 (2)	363
	s. 694	511, 605
	s. 695	474, 477
	s. 729	585
c. ccxiii.	(London Building Act, 1894), s. 22	329
58 Vict. c. 9.	(Documentary Evidence Act, 1895), s. 1	526
58 & 59 Vict. c. 39.	(Summary Jurisdiction (Married Women) Act, 1895)	340
59 & 60 Vict. c. 25.	(Friendly Societies Act, 1896)—	
	s. 59	201
	s. 96	557
c. 28.	(Finance Act, 1896)	183
	s. 14	183, 185, 194
	s. 15	183
	(1)	185, 194
	(2)	194
	(3)	194
	(4)	185, 195, 213
	s. 16	183, 214
	s. 17	183, 206
	s. 18	183, 262
	(1)	183, 207, 214, 225, 226, 305, 317
	(2)	232, 245, 259, 293, 303, 305, 317

		PAGE
59 & 60 Vict. c. 28.	(Finance Act, 1896)—	
	s. 18 (3)	182, 183, 232
	s. 19	183
	(1)	228, 231
	(2)	228, 231
	s. 20	183, 240, 281
	(1)	202, 203
	(2)	214, 217
	s. 21	183, 200, 232
	s. 22	183, 227
	s. 23	183
	s. 24	183
	(1)	194, 195, 200, 202, 204
	(2)	183
	s. 39	183
	s. 40	183, 213, 223, 232
	s. 41	183
	Sched.	183, 213, 223, 232
60 & 61 Vict. c. 65.	(Land Transfer Act, 1897)	37, 101, 145, 220, 224, 299, 474
	s. 1 (3)	13, 106
	s. 2 (3)	37
	s. 5	220
61 & 62 Vict. c. 10.	(Finance Act, 1898)—	
	s. 13	183, 197, 232, 239, 279
	s. 14	228, 229
	s. 17	183
c. 36.	(Criminal Evidence Act, 1898)—	
	s. 1 (d)	573
	s. 4 (1)	573
c. 41.	(Prison Act, 1898)—	
	s. 11	580
	s. 15	580
	Sched. I.	580
c. 46.	(Revenue Act, 1898), s. 7 (6)	216
c. 48.	(Benefices Act, 1898), s. 1 (1) (b)	281
c. 58.	(Marriage Act, 1898)	474
	s. 4	533
	s. 7	533
	s. 11	533
62 & 63 Vict. c. 19.	(Electric Lighting Clauses Act, 1899), s. 62	557
c. 33.	(Board of Education Act, 1899)	526
	s. 7	496
c. xcix.	(Ionian Bank (Limited) Act, 1899), s. 2	215
63 & 64 Vict. c. 7.	(Finance Act, 1900)—	
	s. 11 (1)	183, 185, 187, 225
	(2)	183
	s. 12	183
	(1)	203, 204
	(2)	185, 203
	s. 13	183
	(1)	206
	(2)	216
	s. 14	183, 262
	(1)	182, 232
	(2)	182, 232
	s. 18	183
	s. 19	183
	Sched. II.	183
c. 26.	(Land Charges Act, 1900)	35
	s. 2 (3)	35
	(5)	35
c. 51.	(Money-lenders Act, 1900), s. 2	71
1 Edw. 7, c. 10.	(Larceny Act, 1901)	576
c. 22.	(Factory and Workshop Act, 1901)—	
	s. 22 (4)	565
	s. 148	557
2 Edw. 7, c. 42.	(Education Act, 1902), Sched. I.	478, 555

		PAGE
3 Edw. 7, c. 36.	(Motor Car Act, 1903), s. 9	603
c. 42.	(County Courts Act, 1903), s. 3	222, 254
c. 45.	(Employment of Children Act, 1903)	508
c. 46.	(Revenue Act, 1903)—	
	s. 14	183, 207
	s. 17 (2)	183
c. 48.	(Post Office Act, 1908)	526
4 Edw. 7, c. 15.	(Prevention of Cruelty to Children Act, 1904), s. 17	508
5 Edw. 7, c. 15.	(Trade Marks Act, 1905), s. 50	474
6 Edw. 7, c. 20.	(Revenue Act, 1906), s. 12	187
c. 41.	(Marine Insurance Act, 1906)	487
	s. 54	388
	s. 62 (5)	397
c. 58.	(Workmen's Compensation Act, 1906)	193, 306
	s. 2	557
	Sched. I.	333, 355, 508
7 Edw. 7, c. 13.	(Finance Act, 1907)—	
	s. 12	183, 205, 206
	s. 13	182, 183, 232, 262
	s. 14	183, 218, 224
	s. 15	183, 200, 232
	s. 16	183, 203
	s. 30	183
	(2)	183
	Sched. I.	183, 205
	Sched. III.	183
c. 16.	(Evidence (Colonial Statutes) Act, 1907)	488
	s. 1 (1)	492
c. 29.	(Patents and Designs Act, 1907)—	
	s. 28	474
	s. 52	474
	s. 64	496
	s. 71	87
	s. 81	557
c. 40.	(Notification of Births Act, 1907)	533
c. 47.	(Deceased Wife's Sister's Marriage Act, 1907)	283
8 Edw. 7, c. 15.	(Costs in Criminal Cases Act, 1908)—	
	s. 1	579
	s. 3	585
	s. 4	585
c. 28.	(Agricultural Holdings Act, 1908), s. 45	556
c. 47.	(Lunacy Act, 1908), s. 1	128
c. 67.	(Children Act, 1908)—	
	s. 87	556
	s. 123	508
c. 69.	(Companies (Consolidation) Act, 1908)	329, 410
	s. 16	477
	s. 17	477
	s. 23	477
	s. 25	555
	s. 33	411, 478, 555
	s. 71	478
	(2)	555
	(3)	555
	s. 77	390
	s. 81 (4)	165
	s. 103	92
	s. 116	556
	s. 172	329
	s. 174	577
	s. 220	555
	s. 223	329
	s. 225	497
	s. 286	305
	Sched. I.	556
9 Edw. 7, c. 12.	(Marine Insurance (Gambling Policies) Act, 1909)	487
c. 39.	(Oaths Act, 1909)	591
	s. 3	628

		PAGE
10 Edw. 7, c. 8.	(Finance (1909-10) Act, 1910)	243
	s. 31	557
	s. 33	227
	(4)	227
	s. 34	227
	s. 54	183, 204, 205, 228, 230
	s. 55	183, 197, 199
	s. 56	183
	(1)	183, 213, 228, 230, 262, 292
	(2)	213
	s. 57	183, 211
	(a)	211
	(b)	211
	s. 58	183, 232, 262
	(1)	243, 284
	(2)	242, 243, 244, 279, 284
	(3)	243, 284
	(4)	242, 243, 279, 282, 284
	s. 59	183
	(1)	187, 193, 225
	(2)	185, 188, 189, 201
	(3)	189
	s. 60	183
	(1)	208
	(2)	208
	(3)	226, 227, 228
	s. 61	183
	(1)	183, 208
	(2)	183, 207
	(3)	183
	(4)	183
	(5)	183, 214, 217, 262, 281, 287, 294
	s. 62	183, 211
	s. 63	182, 183, 202, 203, 214, 232, 240, 252, 262, 281
	s. 64	183, 197, 205, 232, 284
	s. 65	217, 262
	s. 95	183
	s. 96 (1)	183
	(3)	183
	(7)	183
	Sched. II.	183, 204
	Sched. VI.	183
10 Edw. 7 & 1 Geo. 5, c. 24	(Licensing Consolidation Act, 1910)	557
Indian Act X. of 1865.	(Indian Succession Act, 1865)	489
Indian Act XV. of 1872.	(Indian Christian Marriage Act, 1872)	535
	s. 80	535

TABLE OF CASES.

A.

PAGE

—— *v.* Christopher (1841), 11 Sim. 409 ; 10 L. J. (CH.) 145 627
—— *v.* Romney (1745), 1 Amb. 61 615
Aaron's Reefs *v.* Twiss, [1896] A. C. 273 ; 65 L. J. (P. C.) 54 ; 74 L. T. 794 . 15, 397
Abbey *v.* Lill (1829), 5 Bing. 299 ; 2 Moo. & P. 534 ; 7 L. J. (O. S.) (C. P.) 96 . 556
Abbiss *v.* Burney, *Re* Finch. *See* Finch, *Re*, Abbiss *v.* Burney.
Abbott *v.* Abbott and Godoy (1860), 29 L. J. (P. M. & A.) 57 534
——— *v.* Plumbe (1779), 1 Doug (K. B.) 216 605
Abbott's Trade Mark, *Re* (1904), 48 Sol. Jo. 351 629
Aberaman Ironworks *v.* Wickens (1868), L. R. 5 Eq. 485 ; 18 L. T. 305 . . 12
Aberdeen Rail. Co. *v.* Blaikie Bros. (1854), 1 Macq. 461 ; 2 Eq. Rep. 1281 . 156, 158
Aberdeen Town Council *v.* Aberdeen University (1877), 2 App. Cas. 544 ; 4 Rettie (H. L.), 48 ; 14 Sc. L. R. 490 158
Abergavenny (Earl) *v.* Powell (1816), 1 Mer. 434 45
Abigaye *v.* Clifton (1611), Hob. 213 592
Abouloff *v.* Oppenheimer (1882), 10 Q. B. D. 295 ; 52 L. J. (Q. B.) 1 ; 47 L. T. 325 ; 31 W. R. 57, C. A. 483, 484
Abraham *v.* Newton (1832), 8 Bing. 274 ; 1 Dowl. 266 ; 1 Moo. & S. 384 ; 1 L. J. (C. P.) 91 613
Abrahams, *Re*, Abraham *v.* Abrahams, [1908] 2 Ch. 69 ; 77 L. J. (CH.) 578 ; 99 L. T. 240 164
——— & Co. *v.* Dunlop Pneumatic Tyre Co., [1905] 1 K. B. 46 ; 74 L. J. (K. B.) 14 ; 91 L. T. 11, C. A. 619
Abrath *v.* North Eastern Rail. Co. (1883), 11 Q. B. D. 440 ; 52 L. J. (Q. B.) 620 ; 49 L. T. 618 ; 47 J. P. 692 ; 32 W. R. 50, C. A. 433, 434, 436
——— *v.* ——— (1886), 11 App. Cas. 247 ; 55 L. J. (Q. B.) 457 ; 55 L. T. 63 ; 50 J. P. 659 431, 434
Accrington Corporation Steam Tramways Co., *Re*, [1909] 2 Ch. 40 ; 78 L. J. (CH.) 485 ; 101 L. T. 99 ; 16 Mans. 178 69
Acerro *v.* Petroni (1815), 1 Stark. 100 594
Ackerman *v.* Lockhart, *Re* Hawkes. *See* Hawkes, *Re*, Ackerman *v.* Lockhart.
Ackland *v.* Gravener (1862), 31 Beav. 482 ; 32 L. J. (CH.) 474 55
Ackroyd *v.* Smithson (1780), 1 Bro. C. C. 503 ; 3 P. Wms. 22, n. ; 1 White & Tud. L. C., 7th ed., 372 108, 109
Ackworth *v.* Kempe (1778), 1 Doug. 40 544
"Actæon," The (1853), 1 Ecc. & Ad. 176 462
Acworth *v.* Stone, *Re* Power, *Re* Stone. *See* Power, *Re*, *Re* Stone, Acworth *v.* Stone.
Adair *v.* Shaw (1803), 1 Sch. & Lef. 243 32
—— *v.* Young (1879), 40 L. T. 61 621
Adam *v.* Kerr (1798), 1 Bos. & P. 360 511, 605
Adams *v.* Adams, [1900] W. N. 32 535
——— *v.* Angell (1877), 5 Ch. D. 634 ; 46 L. J. (CH.) 352 ; 36 L. T. 334, C. A. . . . 147, 148
——— *v.* Bankart (1835), 1 Cr. M. & R. 681 ; 5 Tyr. 425 ; 1 Gale, 481 ; 4 L. J. (EX.) 69 599
Adamson, *Ex parte*, *Re* Collie. *See* Collie, *Re*, *Ex parte* Adamson.
———, *In the Goods of* (1875), L. R. 3 P. & D. 253 505
Adamthwaite *v.* Synge (1816), 1 Stark. 183 524
Adderley *v.* Dixon (1824), 1 Sm. & St. 607 ; 2 L. J. (O. S.) (CH.) 103 . . . 11

PAGE
Addis *v.* Knight (1817), 2 Mer. 117 163
Addison *v.* Dawson (1711), 2 Vern. 678 16
Adley *v.* Whitstable Co. (1810), 17 Ves. 315 28, 43
Admiralty Lords (Commissioners) *v.* Aberdeen Steam Trawling Co., [1909] S. C. 335; 46 Sc. L. R. 254 531
Adnam *v.* Sandwich (1877), 2 Q. B. D. 485 170
Advocate-General *v.* Anstruther (1850), 13 Dunl. (Ct. of Sess.) 450 307
——— *v.* Blackburn's Trustees (1847), 10 Dunl. (Ct. of Sess.) 166 . 264
——— *v.* Grant (1825), 12 Cl. & Fin. 16 239, 274
——— *v.* Hamilton (1856), 18 Dunl. (Ct. of Sess.) 636 264
——— *v.* Oswald (1848), 10 Dunl. (Ct. of Sess.) 969 233, 245
——— *v.* Ramsay's Trustees (1823), 2 Cr. M. & R. 224, n.; 4 L. J. (EX.) 211 236, 264
——— *v.* Smith (1854), 1 Macq. 760; 17 Dunlop (H. L.), 14; 26 Sc. Jur. 533 265
——— *v.* Stair (Earl) (1850), (unreported) 232, 246, 251
——— *v.* Trotter (1847), 10 Dunl. (Ct. of Sess.) 56 236
Affleck *v.* Affleck (1857), 3 Sm. & G. 394; 26 L. J. (CH.) 358; 3 Jur. (N. S.) 326; 5 W. R. 425 93
Agar *v.* Fairfax, Agar *v.* Holdsworth (1811), 17 Ves. 533 40
Agassiz *v.* London Tramway Co. (1867), 27 L. T. 492; 21 W. R. 199 . 420, 437, 438
Agnew *v.* Jobson (1877), 13 Cox, C. C. 625; 47 L. J. (M. C.) 67 508
Agra Bank, Ltd. *v.* Barry (1874), L. R. 7 H. L. 135 87
Ailesbury (Marquis) and Iveagh (Lord), *Re*, [1893] 2 Ch. 345; 62 L. J. (CH.) 713; 69 L. T. 101; 41 W. R. 644; 3 R. 440 198
Ainsworth *v.* Wilding, [1896] 1 Ch. 673; 65 L. J. (CH.) 432; 74 L. T. 193; 44 W. R. 540 352
Airey, *Re*, Airey *v.* Stapleton, [1897] 1 Ch. 164; 66 L. J. (CH.) 152; 76 L. T. 151; 45 W. R. 286 505, 512, 515
Aiscough, *Ex parte* (1731), 2 P. Wms. 591; Mos. 391; 2 Eq. Cas. Abr. 780 . 508
Ajum Goolam Hossen & Co. *v.* Union Marine Insurance Co., Hajee Cassim Joosub *v.* Ajum Goolam Hossen & Co., [1901] A. C. 362; 70 L. J. (P. C.) 34; 84 L. T. 366; 17 T. L. R. 376; 9 Asp. M. L. C. 167 441
Akerman, *Re*, Akerman *v.* Akerman, [1891] 3 Ch. 212; 61 L. J. (CH.) 34; 65 L. T. 194; 40 W. R. 12 164
Alchorne *v.* Gomme (1824), 2 Bing. 54; 9 Moore (C. P.), 130; 2 L. J. (O. S.) (C. P.) 118 373, 402
Alcinous *v.* Nigreu (1854), 4 E. & B. 217 493
Alcock *v.* Delay (1855), 4 E. & B. 660 516
——— *v.* Royal Exchange Assurance Co. (1849), 13 Q. B. 292; 18 L. J. (Q. B.) 121; 13 Jur. 445 595, 596
Aldborough (Earl) *v.* Trye (1840), 7 Cl. & Fin. 436; West, 221 21, 79, 90
Aldersey, *Re*, Gibson *v.* Hall, [1905] 2 Ch. 181; 74 L. J. (CH.) 548; 92 L. T. 826...440, 500
Aldrich *v.* Cooper (1803), 8 Ves. 382 142, 144, 145, 146
——— *v.* Thompson (1787), 2 Bro. C. C. 149 58
Aldridge *v.* Forbes (1839), 9 L. J. (CH.) 37; 4 Jur. 20 143
——— *v.* Great Western Rail. Co. (1841), 3 Man. & G. 515; 4 Scott (N. R.), 156; 1 Dowl. (N. S.) 247 452
Alexander *v.* Alexander (1669), 2 Rep. Ch. 20 31
——— *v.* Cross, *Re* Cousins. *See* Cousins, *Re*, Alexander *v.* Cross.
——— *v.* Gibson (1811), 2 Camp. 555 601
——— *v.* Steinhardt, Walker & Co., [1903] 2 K. B. 208; 72 L. J. (K. B.) 490; 8 Com. Cas. 209; 10 Mans. 258 556
——— *v.* Vanderzee (1872), L. R. 7 C. P. 530; 20 W. R. 871 430
Alexander's Trustees *v.* Alexander's Marriage Contract Trustees (1910), 47 Sc. L. R. 537 219, 221
Aleyn *v.* Belchier (1758), 1 Eden, 132 15
Alison, *Re*, Johnson *v.* Mounsey (1879), 11 Ch. D. 284; 40 L. T. 234; 27 W. R. 537, C. A. 91
Alison's Case, *Re*, Bank of Hindustan. *See* Bank of Hindustan, *Re*, Alison's Case.
Allan *v.* Allan (1808), 15 Ves. 130 45
——— *v.* Gott (1872), 7 Ch. App. 439; 41 L. J. (CH.) 571; 26 L. T. 412; 20 W. R. 427 109
——— *v.* Sundius (1862), 1 H. & C. 123; 31 L. J. (EX.) 307; 6 L. T. 359; 10 W. R. 648 567
Allason *v.* Stark (1838), 9 Ad. & El. 255; 1 Per. & Dav. 183; 8 L. J. (M. C.) 13 . 327

PAGE
Allcard *v.* Skinner (1887), 36 Ch. D. 145; 56 L. J. (CH.) 1052; 57 L. T. 61; 36 W. R. 251, C. A. 18, 19, 170, 171, 174
——— *v.* Walker, [1896] 2 Ch. 369; 65 L. J. (CH.) 660; 74 L. T. 487; 44 W. R. 661 24
Allen *v.* Allen, [1894] P. 248; 63 L. J. (P.) 120; 70 L. T. 783; 42 W. R. 549, C. A. . 422, 597, 598, 624
——- *v.* Anthony (1816), 1 Mer. 282 88
——- *v.* Dundas (1789), 3 Term Rep. 125 362, 553
——- *v.* Flood, [1898] A. C. 1; 67 L. J. (Q. B.) 119; 77 L. T. 717; 62 J. P. 595; 46 W. R. 258; 14 T. L. R. 125 449
——- *v.* Hamilton (Duke) (1867), L. R. 2 C. P. 630; 15 W. R. 866 . . . 579
——- *v.* Knight (1846), 5 Hare, 272; affirmed 16 L. J. (CH.) 370; 11 Jur. 527 . 83
——- *v.* Macpherson (1842), 1 Ph. 133 13
——- *v.* McPherson (1847), 1 H. L. Cas. 191; 11 Jur. 785 . . . 340, 362, 553
——- *v.* Southampton (Lord), *Re* Southampton's (Lord) Estate, Banfather's Claim. *See* Southampton's (Lord) Estate, *Re*, Allen *v.* Southampton (Lord), Banfather's Claim.
——- *v.* Taylor (1870), L. R. 10 Eq. 52; 39 L. J. (CH.) 627; 22 L. T. 512 . . 625
——- *v.* Yoxall (1844), 1 Car. & Kir. 315 584
——- (Samuel) & Sons, Ltd., *Re*, [1907] 1 Ch. 575; 76 L. J. (CH.) 362; 96 L. T. 660; 14 Mans. 144 81
Alley *v.* Deschamps (1806), 13 Ves. 225 12
Allfrey *v.* Allfrey (1849), 1 Mac. & G. 87; 1 H. & Tw. 179; 13 Jur. 269 . . 171
Allin's Legacy, *Re* (1867), 17 L. T. 60; 15 W. R. 1164 502
Allison *v.* Johnson (1902), 46 Sol. Jo. 686 477
Allsop and Joy's Contract, *Re* (1889), 61 L. T. 213 340, 357, 483
Alpha Co., Ltd., *Re*, Ward *v.* Alpha Co., [1903] 1 Ch. 203; 72 L. J. (CH.) 91; 87 L. T. 646; 51 W. R. 201; 10 Mans. 237 31
Alsop *v.* Bell (1857), 24 Beav. 451 148
——- *v.* Bowtrell (1619), Cro. Jac. 541; Palm. 9; Godb. 281 534
Alston, *In the Goods of*, [1892] P. 142; 61 L. J. (P.) 92; 66 L. T. 591 . . 503
Alston's Trustees *v.* Lord Advocate (1895), 33 Sc. L. R. 278 318
Alstow, *Ex parte*, *Re* Holland. *See* Holland, *Re*, *Ex parte* Alstow.
Ambrose *v.* Dunmow Union (1846), 9 Beav. 508 28
——— *v.* Kerrison (1851), 10 C. B. 776; 20 L. J. (C. P.) 135 210
Amey *v.* Long (1808), 9 East, 473; 6 Esp. 116; 1 Camp. 16 . . 429, 579, 581
Amsinck *v.* Barklay (1803), 8 Ves. 594 60
Amstell *v.* Alexander (1867), 16 L. T. 830 600
Anderson, *Ex parte*, *Re* Tollemache. *See* Tollemache, *Re*, *Ex parte* Anderson.
——— *Re*, Pegler *v.* Gillatt, [1905] 2 Ch. 70; 74 L. J. (CH.) 433; 92 L. T. 725; 53 W. R. 510. 120, 374
——— *v.* Abbott (1857), 23 Beav. 457; 3 Jur. (N. S.) 833; 5 W. R. 381 . 118
——— *v.* Collinson, [1901] 2 K. B. 107; 70 L. J. (K. B.) 620; 84 L. T. 465; 49 W. R. 623; 17 T. L. R. 465 344
——— *v.* Dwyer (1804), 1 Sch. & Lef. 301 29
——— *v.* Hamilton (1820), 2 Brod. & Bing. 156, n.; 8 Price, 244; 4 Moore (C. P.), 593 573
——— *v.* May (1800), 2 Bos. & P. 237; 3 Esp. 167 521
——— ——— *v.* Whalley (1852), 3 Car. & Kir. 54 595
Andrew *v.* Aitken (1882), 22 Ch. D. 218; 52 L. J. (CH.) 294; 48 L. T. 148; 31 W. R. 425 100
——— *v.* Andrew (1845), 1 Coll. 686 96
——— *v.* ——— (1856), 8 De G. M. & G. 336; 25 L. J. (CH.) 779; 2 Jur. (N. S.) 719 516
——— *v.* Motley (1862), 32 L. J. (C. P.) 128; 12 C. B. (N. S.) 526 . . . 605
——— *v.* Pearce (1805), 1 New Rep. 158 373
——— *v.* Robinson (1812), 3 Camp. 199 388
Andrewes *v.* Uthwatt (1886), 2 T. L. R. 895 480
Andrews *v.* Brown and Gregory, Ltd., *Re* Brown and Gregory, Ltd., Shephard *v.* Brown and Gregory, Ltd. *See* Brown and Gregory, Ltd., *Re*, Shephard *v.* Brown and Gregory, Ltd., Andrews *v.* Brown and Gregory, Ltd.
——— ——— *v.* Elliott (1855), 5 E. & B. 502; 25 L. J. (Q. B.) 1; 1 Jur. (N. S.) 1046; affirmed (1856), 6 E. & B. 338 389, 390
——— *v.* Martin (1862), 12 C. B. (N. S.) 371; 6 L. T. 433 587
——— *v.* Palmer (1812), 1 Ves. & B. 21 547
Anerall *v.* Wade (1835), L. & G. *temp.* Sugd. 252 93
Angel *v.* Smith (1804), 9 Ves. 335 55

PAGE
Angell *v.* Angell (1822), 1 Sim. & St. 83 45, 46
—— *v.* Draper (1686), 1 Vern. 399 56
—— *v.* Hadden (1808), 15 Ves. 244 ; (1809) 16 Ves. 202 ; (1817) 2 Mer. 164 . 58
Anglesey (Marquis), *Re*, Willmot *v.* Gardner, [1901] 2 Ch. 548 ; 70 L. J. (CH.) 810 ; 49 W. R. 708 ; 85 L. T. 175, C. A. 446
—— *v.* Hatherton (Lord) (1842), 10 M. & W. 218 ; 12 L. J. (EX.) 57 452, 469
Anglo-French Co-operative Society, *Re* (1880), 14 Ch. D. 533 ; 49 L. J. (CH.) 388 ; 28 W. R. 580 355
Anglo-Italian Bank *v.* Davies (1878), 9 Ch. D. 275 ; 47 L. J. (CH.) 833 ; 39 L. T. 244 ; 27 L. R. 3, C. A. 56
Angus *v.* Angus (1737), West *temp.* Hard. 23 66
—— *v.* Clifford, [1891] 2 Ch. 449 ; 60 L. J. (CH.) 443 ; 65 L. T. 274 ; 39 W. R. 498, C. A. 438
Anon. (1505), Keil. 65 404
—— (1596), Cary, 5 8
—— (1679), 2 Cas. in Ch. 8 94
—— (1681), 2 Cas. in Ch. 54 36, 70
—— (1698), 3 Salk. 84 71
—— (1701), 12 Mod. Rep. 607 605
—— (1704), Freem. (CH.) 278 90, 149
—— (1718), 1 P. Wms. 495 161
—— (1729), Mos. 118 548
—— (1742), 3 Swan. 139, n. 41
—— (1747), 3 Atk. 572 31
—— (1750), 1 Ves. Sen. 476 50
—— (1753). *See* Doe d. Church *v.* Perkins, 3 Term Rep. 752.
—— (1755), Amb. 252 595
—— (1811), 18 Ves. 258 34
—— (1856), 2 K. & J. 441 38
—— (1899), 44 Sol. Jo. 95 522
—— *v.* Hawkes (1676), 1 Cas. in Ch. 273 29
Ansley *v.* Cotton (1846), 16 L. J. (CH.) 55 241
Anstee *v.* Nelms (1856), 1 H. & N. 225 ; 26 L. J. (EX.) 5 ; 4 W. R. 612 . 374, 480
Anstey *v.* Newman (1870), 39 L. J. (CH.) 769 143
Anstis, *Re*, Chetwynd *v.* Morgan, Morgan *v.* Chetwynd (1886), 31 Ch. D. 596 ; 54 L. T. 742 ; 34 W. R. 483, C. A. 73
Anstruther *v.* Adair (1834), 2 My. & K. 513 488
Anthony Birrell Pearce & Co., *Re*. Doig *v.* Anthony Birrell Pearce & Co., *Re* Same, Groos *v.* Same, [1899] 2 Ch. 50 ; 68 L. J. (CH.) 444 ; 80 L. T. 688 . 482, 626
Antram *v.* Chace (1812), 15 East, 209 552
Antrim Land etc. Co. *v.* Stewart, [1904] 2 I. R. 357, C. A. 61
Antrobus *v.* Smith (1805), 12 Ves. 39 98
Aplin's Trust, *Re* (1865), 13 W. R. 1062 123
Apothecaries Co. *v.* Bentley (1824), Ry. & M. 159 ; 1 C. & P. 538 435
Applebee, *Re*, Leveson *v.* Beales, [1891] 3 Ch. 422 ; 60 L. J. (CH.) 793 ; 65 L. T. 406 ; 40 W. R. 90 98
Appleby, *Re*, Walker *v.* Lever ; Walker *v.* Nisbet, [1903] 1 Ch. 565 ; 51 W. R. 153, C. A. 104, 105
Appleton *v.* Braybrook (Lord) (1817), 6 M. & S. 34 ; 2 Stark. 6 490
Arbon *v.* Fussell (1862), 3 F. & F. 152 508
Arbor *v.* Fussell (1862), 7 L. T. 283 ; 9 Jur. (N. S.) 753 ; 11 W. R. 26 516
Archbold *v.* Scully (1861), 9 H. L. Cas. 360 ; 5 L. T. 160 ; 7 Jur. (N. S.) 1169 . 167, 168
Archer *v.* Hudson (1844), 7 Beav. 551 ; 8 Jur. 761 ; affirmed 15 L. J. (CH.) 211 . 18
—— *v.* Preston. *See* Arglasse *v.* Muschamp.
Archer's Case, *Re* North Australian Territory Co., [1892] 1 Ch. 322 ; 61 L. J. (CH.) 129 ; 65 L. T. 800 ; 40 W. R. 212, C. A. 158
Ardesoife *v.* Bennet (1772), Dick. 463 126, 127
Arding *v.* Flower (1800), 8 Term Rep. 534 586
Arglasse *v.* Muschamp (1682), 1 Vern. 75 ; 2 Rep. Ch. 266 65, 66
Arkwright *v.* Newbold (1881), 17 Ch. D. 301 ; 50 L. J. (CH.) 372 ; 44 L. T. 393 ; 29 W. R. 455, C. A. 14
Armory *v.* Delamirie (1722), 1 Stra. 505 507
Armour *v.* Walker (1883), 25 Ch. D. 673 ; 53 L. J. (CH.) 413 ; 50 L. T. 292 ; 32 W. R. 214, C. A. 614
Armstrong *v.* Armstrong (1871), L. R. 12 Eq. 614 ; 25 L. T. 199 ; 19 W. R. 971 164

PAGE
Armstrong *v.* Hewitt (1817), 4 Price. 216 530
——— *v.* Lynn (1875), 9 I. R. Eq. 186 124
——— *v.* Normandy (1850), 5 Exch. 409 ; 19 L. J. (EX.) 343 ; 14 Jur. 579 . 456
——— *v.* Stokes (1872), L. R. 7 Q. B. 598 ; 41 L. J. (Q. B.) 253 ; 26 L. T. 872 ; 21 W. R. 52 393
Arnold, *Re*, Ravenscroft *v.* Workman (1888), 37 Ch. D. 637 ; 57 L. J. (CH.) 682 ; 58 L. T. 469 ; 36 W. R. 424 146
——— *v.* Arnold (1837), 2 My. & Cr. 256 ; 6 L. J. (CH.) 218 ; 1 Jur. 255 . . 238
——— *v.* Bath and Wells (Bishop) (1829), 2 Moo. & P. 559 ; 5 Bing. 316 ; 7 L. J. (O. S.) (C. P.) 120 474, 538
——— *v.* Cheque Bank (1876), 1 C. P. D. 578 ; 45 L. J. (Q. B.) 562 ; 34 L. T. 729 ; 24 W. R. 759 398, 399, 401
——— *v.* Dixon (1874), L. R. 19 Eq. 113 ; 23 W. R. 513 114
——— *v.* Kayess, *Re* Taber. *See* Taber, *Re*, Arnold *v.* Kayess.
Arnot's Case (1887), 36 Ch. D. 702 ; 57 L. J. (CH.) 195 ; 57 L. T. 353, C. A. . 555
Arnott, *Re*, *Ex parte* Chief Official Receiver (1888), 60 L. T. 109 ; 37 W. R. 223 ; 5 Morr. 286 572
——— *v.* Hayes (1887), 36 Ch. D. 731 ; 56 L. J. (CH.) 844 ; 57 L. T. 299 ; 36 W. R. 246, C. A. 555
Arthur *v.* Dudgeon (1872), L. R. 15 Eq. 102 599
Arundell (Lady) *v.* Phipps (1804), 10 Ves. 139 11
——— *v.* White (1811), 14 East, 216 552
Ascherson *v.* Tredegar Dry Dock and Wharf Co., Ltd., [1909] 2 Ch. 401 ; 78 L. J. (CH.) 697 ; 101 L. T. 519 52
Ashby *v.* Day (1886), 54 L. T. 408 ; 34 W. R. 312, C. A. 396
——— *v.* Palmer (1816), 1 Mer. 296 106, 112, 114, 115
Asher *v.* Whitlock (1865), L. R. 1 Q. B. 1 ; 35 L. J. (Q. B.) 17 ; 13 L. T. 254 ; 11 Jur. (N. S.) 925 ; 14 W. R. 26 374
Ashforth *v.* Redford (1873), L. R. 9 C. P. 20 ; 43 L. J. (C. P.) 57 430
Ashley *v.* Baillie (1751), 2 Ves. Sen. 368 31
Ashpitel *v.* Bryan (1863), 3 B. & S. 474 ; 32 L. J. (Q. B.) 91 ; 9 Jur. (N. S.) 791 ; 7 L. T. 706 ; 11 W. R. 279 322, 350, 351, 382, 383, 394
——— *v.* Sercombe (1850), 5 Exch. 147 ; 6 Ry. & Can. Cas. 224 ; 19 L. J. (EX.) 82 . . 430
Ashton, *Re*, Ingram *v.* Papillon, [1897] 2 Ch. 574 ; 66 L. J. (CH.) 731 ; 77 L. T. 49 ; 46 W. R. 138 129, 131
——— *v.* M'Dougall (1842), 5 Beav. 56 ; 11 L. J. (CH.) 344 ; 6 Jur. 447 . . 127
——— *v.* Stock (1877), 6 Ch. D. 719 ; 25 W. R. 862 71
Askew *v.* Poulterers' Co. (1750), 2 Ves. Sen. 89 518
Assheton-Smith *v.* Owen, [1906] 1 Ch. 179 ; 75 L. J. (CH.) 188 ; 94 L. T. 42 ; 22 T. L. R. 182 ; 10 Asp. M. L. C. 164 ; affirmed, [1907] A. C. 124 ; 76 L. J. (CH.) 308 ; 96 L. T. 478 ; 23 T. L. R. 385, C. A. 469, 564
Assicurazioni Generali de Trieste *v.* Empress Assurance Corporation, Ltd., [1907] 2 K. B. 814 ; 76 L. J. (K. B.) 980 ; 23 T. L. R. 700 ; 13 Com. Cas. 37 . 149
"Assyrian," The (1890), 63 L. T. 91 ; 6 Asp. M. L. C. 525, C. A. 480
Astbury *v.* Astbury, [1898] 2 Ch. 111 ; 67 L. J. (CH.) 471 ; 78 L. T. 494 ; 46 W. R. 536 461
——— *v.* Belbin (1850), 3 Car. & Kir. 20 588
Astley *v.* Essex (Earl) (1874), L. R. 18 Eq. 290 ; 43 L. J. (CH.) 817 ; 30 L. T. 485 ; 22 W. R. 620 153
——— *v.* Micklethwait (1880), 15 Ch. D. 59 ; 49 L. J. (CH.) 672 ; 43 L. T. 58 ; 28 W. R. 811 94
——— *v.* Milles (1827), 1 Sim. 298 147
Aston *v.* Aston (1749), 1 Ves. Sen. 264 90
——— *v.* Exeter (Lord) (1801), 6 Ves. 288 39
Atcheson *v.* Everitt (1776), 1 Cowp. 382 591
Atchley *v.* Sprigg (1864), 3 New Rep. 360 ; 33 L. J. (CH.) 345 ; 10 L. T. 16 ; 10 Jur. (N. S.) 144 ; 12 W. R. 364 504
Athlone's (Earl) Claim (1841), 8 Cl. & Fin. 262 535
Athol (Earl) *v.* Derby (Earl) (1672), 1 Cas. in Ch. 220 65
Atkins *v.* Humphreys (1836), 1 Mood. & R. 523 546
——— *v.* Owen (1834) 2 Ad. & El. 35 ; 4 Nev. & M. (K. B.) 123 ; 4 L. J. (K. B.) 15 519
——— *v.* Palmer (1821), 4 B. & Ad. 377 618
——— *v.* Shephard, *Re* Shephard. *See* Shephard, *Re*, Atkins *v.* Shephard.
Atkinson, *Re*, Waller *v.* Atkinson, [1899] 2 Ch. 1 ; 68 L. J. (CH.) 404 ; 80 L. T. 505 ; 47 W. R. 469, C. A. 120
——— *v.* Anderson (1882), 21 Ch. D. 100 ; 51 L. J. (CH.) 452 ; 46 L. T. 850 ; 30 W. R. 562 283
——— *v.* Leonard (1791), 3 Bro. C. C. 218 11, 26

PAGE
Atkinson *v.* Littlewood (1874), L. R. 18 Eq. 595; 31 L. T. 225 . . . 137, 138
——— *v.* Lord, *Re* Taylor. *See* Taylor, *Re*, Atkinson *v.* Lord.
——— *v.* Morris, [1897] P. 40; 66 L. J. (P.) 17; 75 L. T. 440; 45 W. R. 293, C. A. 471, 472
——— *v.* Webb (1704), Prec. Ch. 236; 2 Vern. 478 136, 138, 139
Attenborough *v.* St. Katharine's Dock Co. (1878), 3 C. P. D. 450; 47 L. J. (C. P.) 763; 38 L. T. 404; 26 W. R. 583, C. A. 407, 408
Atterbury *v.* Wallis (1856), 8 De G. M. & G. 454; 25 L. J. (CH.) 792; 2 Jur. (N. S.) 117; 4 W. R. 734, C. A. 85
A.-G. *v.* Abdy (1862), 1 H. & C. 266; 32 L. J. (EX.) 9; 6 L. T. 756; 8 Jur. (N. S.) 798 264, 268
——- *v.* Aberdare (Lord, [1892] 2 Q. B. 684; 61 L. J. (Q. B.) 615; 67 L. T. 588; 56 J. P. 806 283
——- *v.* Ailesbury (Marquis) (1887), 12 App. Cas. 672; 57 L. J. (Q. B.) 83; 58 L. T. 192; 36 W. R. 737 114, 239, 307
——- *v.* Alford (1855), 4 De G. M. & G. 843; 1 Jur. (N. S.) 361; 3 W. R. 200...67, 158
——- *v.* Antrobus, [1905] 2 Ch. 188; 74 L. J. (CH.) 599; 92 L. T. 790; 69 J. P. 141; 21 T. L. R. 471; 3 L. G. R. 1,071 529, 531
——- *v.* Bacchus (1823), 11 Price, 547 244, 247
——- *v.* Baker (1859), 4 H. & N. 19 268, 269
——- *v.* Beatson (1819), 7 Price, 560 238
——- *v.* Beech, [1899] A. C. 53; 68 L. J. (Q. B.) 130; 79 L. T. 565; 63 J. P. 116; 47 W. R. 257; 15 T. L. R. 85 187, 193
——- *v.* Biggs, [1907] 2 I. R. 400 269
——- *v.* Biphosphated Guano Co. (1878), 11 Ch. D. 327; 49 L. J. (CH.) 68; 40 L. T. 201; 27 W. R. 621, C. A. 82
——- *v.* Birmingham, Tame and Rea District Drainage Board, [1910] 1 Ch. 48; 79 L. J. (CH.) 137; 101 L. T. 796; 74 J. P. 57; 26 T. L. R. 93; 54 Sol. Jo. 198; 8 L. G. R. 110, C. A. 50
—— *v.* Bond (1839), 9 C. & P. 189 602
—— *v.* Booth (1894), 63 L. J. (Q. B.) 356; 10 R. 175 188
—— *v.* Bouwens (1838), 4 M. & W. 171; 1 Horn & H. 319; 7 L. J. (EX.) 297...306, 309
—— *v.* Brackenbury (1863), 1 H. & C. 782; 32 L. J. (EX.) 108; 8 L. T. 822; 9 Jur. (N. S.) 257; 11 W. R. 380 237
—— *v.* Bradford Canal (Proprietors) (1866), L. R. 2 Eq. 71; 35 L. J. (CH.) 619; 14 L. T. 248; 14 W. R. 579 169
—— *v.* Bradlaugh (1885), Cab. & El. 467, C. A. 440, 473, 527, 591
—— *v.* Briant (1846), 15 M. & W. 169; 15 L. J. (EX.) 265 573
—— *v.* Bruce, [1901] 2 K. B. 391; 70 L. J. (K. B.) 767; 85 L. T. 114; 65 J. P. 329; 49 W. R. 519; 17 T. L. R. 475 253, 257
—— *v.* Brunning (1860), 8 H. L. Cas. 243; 30 L. J. (EX.) 379; 6 Jur. (N. S.) 1083; 8 W. R. 362 34, 304, 306, 307, 308, 313
—— *v.* Bulpit (1821), 9 Price, 4 594
—— *v.* Bumsted (1893), 37th Report of Inland Revenue Commissioners, App., li...264
—— *v.* Burnie (1830), 3 Y. & J. 531 244, 247
—— *v.* Campbell (1872), L. R. 5 H. L. 524; 41 L. J. (CH.) 611 . 274, 275, 276
—— *v.* Cavendish (Lord G.) (1810), Wight. 82 245, 249, 250
—— *v.* Cecil (1870), L. R. 5 Exch. 263; 39 L. J. (EX.) 201; 23 L. T. 20; 18 W. R. 949 267, 270
—— *v.* Chamberlain (1904), 90 L. T. 581; 20 T. L. R. 359 188, 229
—— *v.* Chapman, [1891] 2 Q. B. 526; 60 L. J. (Q. B.) 602; 65 L. T. 119; 40 W. R. 79 190, 191, 199
—— *v.* Charlton (1877), 2 Ex. D. 398; 46 L. J. (EX.) 750; 37 L. T. 211; 26 W. R. 154, C. A. 265
—— *v.* Clarkson, [1900] 1 Q. B. 156; 69 L. J. (Q. B.) 81; 81 L. T. 617; 48 W. R. 216; 16 T. L. R. 51, C. A. 229
—— *v.* Cleave (1873), 31 L. T. 86 236, 277
—— *v.* Cleaver (1811), 18 Ves. 211 49
—— *v.* Cobham (Viscount) (1904), 90 L. T. 816; 20 T. L. R. 337 . 189, 195, 210
—— *v.* Cockerell (1814), 1 Price, 165 238
—— *v.* Cornthwaite (1788), 2 Cox, Eq. Cas. 44 31
—— *v.* Coulson, [1899] 2 Q. B. 253; 68 L. J. (Q. B.) 779; 81 L. T. 121; 63 J. P. 611; 15 T. L. R. 381 184, 229, 230
—— *v.* Dakin (1870), L. R. 4 H. L. 338; 39 L. J. (EX.) 113; 23 L. T. 1; 18 W. R. 1111 485
—— *v.* Dardier (1883), 11 Q. B. D. 16; 52 L. J. (Q. B.) 329; 48 L. T. 582; 47 J. P. 484; 31 W. R. 499 261

PAGE
A.-G. *v.* Darell (1871), 6 I. R. C. L. 491 306
—— *v.* Davison (1825), 1 M'Cle. & Yo. 160 422, 433, 547
—— *v.* Deane (1861), 5 L. T. 122 269
—— *v.* De Préville, [1900] 1 Q. B. 223; 69 L. J. (Q. B.) 283; 81 L. T. 690; 48 W. R. 193; 16 T. L. R. 125, C. A. 187, 188
—— *v.* Dimond (1831), 1 Cr. & J. 356; 1 Tyr. 243; 9 L. J. (O. S.) (EX.) 90. 306, 309
—— *v.* Dobree, [1900] 1 Q. B. 442; 69 L. J. (Q. B.) 223; 81 L. T. 607; 64 J. P. 24; 48 W. R. 413; 16 T. L. R. 80 192, 195
—— *v.* Dodd, [1894] 2 Q. B. 150; 63 L. J. (Q. B.) 319; 70 L. T. 660; 58 J. P. 526; 42 W. R. 524; 10 R. 177 239, 307
—— *v.* Dodington, [1897] 1 Q. B. 722; [1897] 2 Q. B. 373; 66 L. J. (Q. B.) 684; 77 L. T. 299; 61 J. P. 644; 45 W. R. 657, C. A. 199
—— *v.* Donaldson (1842), 10 M. & W. 117; 11 L. J. (EX.) 338 485
—— *v.* Doughty (1752), 2 Ves. Sen. 453 50
—— *v.* Dowling (1880), 6 Q. B. D. 177; 50 L. J. (Q. B.) 192; 44 L. T. 234; 45 J. P. 422; 29 W. R. 327, C. A. 270
—— *v.* Dublin Corporation (1827), 1 Bli. (N. S.) 312 27
—— *v.* —————— (1841), 1 Dr. & War. 545 327, 380
—— *v.* Ellis, [1895] 2 Q. B. 466; 64 L. J. (Q. B.) 813; 73 L. T. 190; 59 J. P. 774; 44 W. R. 13; 15 R. 584 191
—— *v.* Emerson, [1891] A. C. 649; 61 L. J. (Q. B.) 79; 65 L. T. 564; 55 J. P. 709 540
—— *v.* Eyres, [1909] 1 K. B. 723; 78 L. J. (K. B.) 384; 100 L. T. 396; 25 T. L. R. 298 196, 266
—— *v.* Fairley, [1897] 1 Q. B. 698; 66 L. J. (Q. B.) 454; 76 L. T. 526; 45 W. R. 589 229
—— *v.* Felce (1894), 10 T. L. R. 337 275, 276
—— *v.* Fitzgerald (1843), 13 Sim. 83; 7 Jur. 569 239
—— *v.* Fitzjohn (1857), 2 H. & N. 465; 27 L. J. (EX.) 79; 5 W. R. 876 . . 265, 266, 280
—— *v.* Floyer (1862), 9 H. L. Cas. 477; 31 L. J. (EX.) 404; 7 L. T. 47; 9 Jur. (N. S.) 1; 10 W. R. 762 267, 268, 269, 270, 285, 290
—— *v.* Fullerton (1813), 2 Ves. & B. 263 39
—— *v.* Gardner (1863), 1 H. & C. 639; 32 L. J. (EX.) 84; 7 L. T. 682; 11 W. R. 378 266, 285
—— *v.* Gell (1865), 3 H. & C. 615; 34 L. J. (EX.) 145; 12 L. T. 461; 11 Jur. (N. S.) 566; 13 W. R. 900 184, 266
—— *v.* Giles (1860), 5 H. & N. 255; 29 L. J. (EX.) 176; 1 L. T. 553; 8 W. R. 342 254, 257
—— *v.* Glendining (1904), 92 L. T. 87 193
—— *v.* Glossop, [1907] 1 K. B. 163; 76 L. J. (K. B.) 199; 95 L. T. 823; 22 T. L. R. 103, C. A. 193, 194
—— *v.* Gosling, [1892] 1 Q. B. 545; 61 L. J. (Q. B.) 429; 66 L. T. 284; 56 J. P. 358; 40 W. R. 366 181, 191
—— *v.* Grey (Earl), [1898] 1 Q. B. 318; 67 L. J. (Q. B.) 76; 77 L. T. 531; 46 W. R. 251 190
—— *v.* ————, [1898] 2 Q. B. 534; 67 L. J. (Q. B.) 947; 79 L. T. 235; 47 W. R. 37; 14 T. L. R. 585, C. A. 189
—— *v.* Hallett (1857), 2 H. & N. 368; 27 L. J. (EX.) 89 185, 282
—— *v.* Hancock (1837), 2 M. & W. 563; Murp. & H. 159; 6 L. J. (EX.) 168...232, 250
—— *v.* Hannen (1904), 48th Report of Inland Revenue Commissioners 121...194, 229
—— *v.* Hawkins, [1901] 1 K. B. 285; 70 L. J. (K. B.) 195; 83 L. T. 725; 64 J. P. 791; 49 W. R. 320; 17 T. L. R. 85 192
—— *v.* Hay, [1899] 2 Q. B. 245; 68 L. J. (Q. B.) 557; 80 L. T. 712; 15 T. L. R. 290 198
—— *v.* Henniker (Lord) (1852), 7 Exch. 331; 21 L. J. (EX.) 293; affirmed, Henniker (Lord) *v.* A.-G., 8 Exch. 257; 22 L. J. (EX.) 41; 16 Jur. 1143 238
—— *v.* Hertford (Marquis) (1845), 14 M. & W. 284; 14 L. J. (EX.) 266 . . 242
—— *v.* —————— (1849), 3 Exch. 670; 18 L. J. (EX.) 332 242
—— *v.* Heywood (1887), 19 Q. B. D. 326; 56 L. J. (Q. B.) 326; 67 L. T. 271; 35 W. R. 772 191
—— *v.* Higgins (1857), 2 H. & N. 339; 26 L. J. (EX.) 403 310
—— *v.* Hitchcock (1847), 1 Exch. 91; 16 L. J. (EX.) 259; 11 Jur. 478 . 601, 602
—— *v.* Holbrook (1823), 3 Y. & J. 114; 12 Price, 407 234, 245
—— *v.* Holden, [1903] 1 K. B. 832; 72 L. J. (K. B.) 420; 88 L. T. 729; 67 J. P. 135; 51 W. R. 685; 19 T. L. R. 385 188
—— *v.* Holford (1815), 1 Price, 426 264

PAGE
A.-G. *v.* Hollingworth (1857), 2 H. & N. 416 ; 27 L. J. (EX.) 102 ; 5 W. R. 684 . 234
—— *v.* Hope (1834), 1 Cr. M. & R. 530 ; 4 Tyr. 878 ; 2 Cl. & Fin. 84 ; 8 Bli. (N. S.) 44 306, 309, 310
—— *v.* Hotham (Lord) (1823), Turn. & R. 209 402, 529, 539
—— *v.* Hubbuck (1884), 13 Q. B. D. 275 ; 53 L. J. (Q. B.) 146 ; 50 L. T. 374, C. A. 74, 307, 308
—— *v.* Jackson (1831), 2 Cr. & J. 101 264, 296
—— *v.* Jacobs-Smith, [1895] 2 Q. B. 341 ; 64 L. J. (Q. B.) 605 ; 72 L. T. 714 ; 59 J. P. 468 ; 43 W. R. 657 ; 14 R. 531, C. A. 188, 191
—— *v.* Jameson, [1904] 2 I. R. 644 185, 207
—— *v.* ——, [1905] 2 I. R. 218, C. A. 207, 208
—— *v.* Jewish Colonization Association, [1901] 1 K. B. 123 ; 70 L. J. (K. B.) 101 ; 83 L. T. 561 ; 65 J. P. 21 ; 49 W. R. 230 ; 17 T. L. R. 106, C. A. 273, 274, 275, 276
—— *v.* Johnson, [1902] 1 K. B. 416 ; 71 L. J. (K. B.) 187 ; 86 L. T. 296 ; 66 J. P. 328 ; 50 W. R. 366 ; 18 T. L. R. 233 289
—— *v.* ——, [1903] 1 K. B. 617 ; 72 L. J. (K. B.) 323 ; 88 L. T. 445 ; 67 J. P. 113 ; 51 W. R. 487 ; 19 T. L. R. 324, C. A. ... 190, 195, 273, 277, 289
—— *v.* ——, [1907] 2 K. B. 885 ; 76 L. J. (K. B.) 1150 274
—— *v.* Jones (1849), 1 Mac. & G. 574 ; 1 H. & Tw. 493 ; 19 L. J. (CH.) 266 ; 14 Jur. 379 235, 307
—— *v.* Jones and Bartlett (1817), 3 Price, 368 236
—— *v.* King (1817), 5 Price, 195 340, 343
—— *v.* Lethbridge, [1905] 2 K. B. 323 ; 74 L. J. (K. B.) 710 ; 93 L. T. 4 ; 53 W. R. 645 ; 21 T. L. R. 573 192
—— *v.* Littledale (1871), L. R. 5 H. L. 290 ; 40 L. J. (EX.) 241 ; 24 L. T. 921 ; 20 W. R. 473 266, 267, 280
—— *v.* Lomas (1873), L. R. 9 Exch. 29 ; 43 L. J. (EX.) 32 ; 22 W. R. 188...109, 239, 264, 307
—— *v.* Londesborough (Earl), [1904] 1 K. B. 749 ; 73 L. J. (K. B.) 503 ; 91 L. T. 52 ; 20 T L. R. 336 198
—— *v.* —— [1905] 1 K. B. 98 ; 74 L. J. (K. B.) 81 ; 92 L. T. 39 ; 53 W. R. 147 ; 21 T. L. R. 36, C. A. 199
—— *v.* Longford, [1909] 2 I. R. 436 278
—— *v.* Lorton (Lord) (1861), 11 I. C. L. R. 429 290
—— *v.* Loscombe (1860), 5 H. & N. 564 ; 29 L. J. (EX.) 305 250
—— *v.* Loyd, [1895] 1 Q. B. 496 ; 64 L. J. (Q. B.) 365 ; 15 R. 277 . . 237, 309
—— *v.* Malkin (1846), 2 Ph. 64 ; 10 Jur. 955 236, 308
—— *v.* Manchester Corporation, [1893] 2 Ch. 87 ; 62 L. J. (CH.) 459 ; 68 L. T. 608 ; 59 J. P. 343 ; 41 W. R. 459 49, 52
—— *v.* Mander (1896), 65 L. J. (Q. B.) 246 ; 74 L. T. 103 ; 44 W. R. 413 . . 299
—— *v.* Mangles (1839), 5 M. & W. 120 ; 2 Horn & H. 74 ; 3 Jur. 281 . . 264
—— *v.* Manners (Lady L.) (1815), 1 Price, 411 250
—— *v.* Maule (1886), 56 L. T. 611 269
—— *v.* Maxwell (1860), 10 I. C. L. R. 262 236, 308
—— *v.* Metcalfe (1851), 6 Exch. 26 ; 20 L. J. (EX.) 329 235, 250
—— *v.* Middleton (Lord) (1858), 3 H. & N. 125 ; 27 L. J. (EX.) 229 . . 262, 265, 266
—— *v.* Mitchell (1881), 6 Q. B. D. 548 ; 50 L. J. (Q. B.) 406 ; 44 L. T. 580 ; 45 J. P. 618 ; 29 W. R. 683 270, 272, 280
—— *v.* Montagu (Lord), [1904] A. C. 316 ; 73 L. J. (K. B.) 707 ; 90 L. T. 726 ; 53 W. R. 115 ; 20 T. L. R. 523 212
—— *v.* Montefiore (1888), 21 Q. B. D. 461 ; 59 L. T. 534 ; 37 W. R. 237 . . 263
—— *v.* —— (1909), 52nd Report of Inland Revenue Commissioners, 85 . 231
—— *v.* Morgan (1826), 2 Russ. 306 53
—— *v.* Munby (1858), 3 H. & N. 826 237
—— *v.* Murray (1887), 20 L. R. Ir. 124, C. A. 234, 314, 318
—— *v.* ——, [1904] 1 K. B. 165 ; 73 L. J. (K. B.) 66 ; 89 L. T. 710 ; 68 J. P. 89 ; 52 W. R. 258 ; 20 T. L. R. 137, C. A. 192
—— *v.* Napier (1851), 6 Exch. 217 ; 20 L. J. (EX.) 173 ; 15 Jur. 253 . . . 238
—— *v.* Newcastle-upon-Tyne Corporation, [1899] 2 Q. B. 478 ; 68 L. J. (Q. B.) 1012 ; 81 L. T. 311 ; 48 W. R. 38 ; 15 T. L. R. 495, C. A. 574
—— *v.* Nichol (1809), 16 Ves. 338 50
—— *v.* Norwich Corporation (1837), 2 My. & Cr. 406 159
—— *v.* Nottingham Corporation, [1904] 1 Ch. 673 ; 73 L. J. (CH.) 512 ; 90 L. T. 308 ; 68 J. P. 125 ; 52 W. R. 281 ; 20 T. L. R. 257 ; 2 L. G. R. 698 52, 573

PAGE

A.-G. *v.* Noyes (1881), 8 Q. B. D. 125; 51 L. J. (Q. B.) 135; 45 L. T. 520; 30 W. R. 434, C. A. 266, 272, 273, 286, 289
—— *v.* Odell, [1906] 2 Ch. 47; 75 L. J. (CH.) 425; 94 L. T. 659; 54 W. R. 566; 20 T. L. R. 466, C. A. 410, 474
—— *v.* Owen, [1899] 2 Q. B. 253; 68 L. J. (Q. B.) 779; 89 L. T. 121; 63 J. P. 611; 15 T. L. R. 381 184, 229, 230
—— *v.* Partington (1862), 1 H. & C. 457; 10 Jur. (N. S.) 617 . . . 309, 312
—— *v.* Penhryn (1900), 83 L. T. 103; 64 J. P. 552; 16 T. L. R. 464 . . 194
—— *v.* Pickard (1838), 3 M. & W. 552; Horn & H. 174; affirmed Pickard *v.* A.-G. (1840), 6 M. & W. 348 238
—— *v.* Power, [1906] 2 I. R. 272 186, 193, 209
—— *v.* Pratt (1874), L. R. 9 Exch. 140; 43 L. J. (EX.) 108; 30 L. T. 531; 22 W. R. 615 309, 310
—— *v.* Rathdonnell (Lord) (1893), 32 L. R. Ir. 574 191, 278
—— *v.* Reynolds (1804), 5 Price, 195 343
—— *v.* Riall, [1906] 2 I. R. 122 190, 269, 271
—— *v.* Richmond (Duke) (No. 1), [1907] 2 K. B. 923; 23 T. L. R. 739 . . 210
—— *v.* ———— (No. 2), [1907] 2 K. B. 940; 76 L. J. (K. B.) 1049; 22 T. L. R. 742 209
—— *v.* Richmond and Gordon (Duke), [1909] A. C. 466; 78 L. J. (K. B.) 998; 101 L. T. 241; 25 T. L. R. 775; 53 Sol. Jo. 713 188, 210
—— *v.* Richmond Corporation (1903), 89 L. T. 700; 68 J. P. 73; 2 L. G. R. 628; 20 T. L. R. 131 101
—— *v.* Robertson, [1893] 1 Q. B. 293; 62 L. J. (Q. B.) 282; 68 L. T. 371; 57 J. P. 421; 41 W. R. 241; 4 R. 260, C. A. . . 271, 291, 292, 294, 295
—— *v.* Robinson, [1901] 2 I. R. 67 185, 190, 192, 208
—— *v.* Rowsell (1844), 36 Ch. D. 67, n. 242, 264
—— *v.* Rushton (1864), 2 H. & C. 812; 33 L. J. (EX.) 184; 9 L. T. 832 . . 285
—— *v.* Sands (1669), Hard. 488; Freem. (CH.) 129; 3 Ch. Rep. 33. . . . 95
—— *v.* Scott (1735), Cas. *temp.* Talb. 133 96
—— *v.* Sefton (Earl) (1865), 11 H. L. Cas. 257; 5 New Rep. 436; 12 L. T. 242...263, 286, 288, 293, 294
—— *v.* Selborne (Earl), [1902] 1 K. B. 388; 71 L. J. (K. B.) 289; 85 L. T. 714; 66 J. P. 132; 50 W. R. 210; 18 T. L. R. 111, C. A. . . . 277
—— *v.* Sharpe (1891), 7 T. L. R. 558, C. A. 233, 237
—— *v.* Sibthorp (1858), 3 H. & N. 424; 28 L. J. (EX.) 9; 6 W. R. 774 . 270, 285
—— *v.* Simcox (1848), 1 Exch. 7; 18 L. J. (EX.) 61 274
—— *v.* Skinners' Co. (1837), Coop. Pr. Cas. 1 588
—— *v.* Smith, [1893] 1 Q. B. 239; 62 L. J. (Q. B.) 288; 68 L. T. 6; 57 J. P. 389; 41 W. R. 245; 4 R. 233, C. A. 261, 316
—— *v.* ———, [1892] 2 Q. B. 289; 66 L. T. 857; 56 J. P. 758; 40 W. R. 671 . 305
—— *v.* Smith-Marriott, [1899] 2 Q. B. 595; 69 L. J. (Q. B.) 59; 81 L. T. 359; 74 J. P. 54; 48 W. R. 12; 15 T. L. R. 497 195
—— *v.* Smyth, [1905] 2 I. R. 553 185, 188, 191, 195, 229
—— *v.* Smythe (1862), 9 H. L. Cas. 497 270
—— *v.* Sothon (1705), 2 Vern. 497 19
—— *v.* Staff (1833), 2 Cr. & M. 124; 4 Tyr. 14; 3 L. J. (EX.) 6 307
—— *v.* Stephens (1855), 6 De G. M. & G. 111; 25 L. J. (CH.) 888; 2 Jur. (N. S.) 51; 4 W. R. 191 39, 405, 512
—— *v.* Strange, [1898] 2 Q. B. 39; 67 L. J. (Q. B.) 629; 78 L. T. 516; 46 W. R. 663; 14 T. L. R. 419, C. A. 195
—— *v.* Sudeley (Lord), [1896] 1 Q. B. 354; 65 L. J. (Q. B.) 281; 74 L. T. 91; 60 J. P. 260; 44 W. R. 340, C. A. 274
—— *v.* Theakstone (1820), 8 Price, 39 473
—— *v.* Theobald (1890), 24 Q. B. D. 557; 62 L. T. 768; 38 W. R. 527 . . 197
—— *v.* Twyford (1849), 9 Hare, 730, n. 248
—— *v.* Upton (1866), L. R. 1 Exch. 224; 4 H. & C. 336; 35 L. J. (EX.) 138; 14 L. T. 334; 12 Jur. (N. S.) 489; 14 W. R. 732 270, 272
—— *v.* Wack (1899), *Times*, June 14th 217
—— *v.* Wade, [1910] 1 K. B. 703; 79 L. J. (K. B.) 569; 102 L. T. 494 . 237, 264
—— *v.* Waghorn (1909), *Times*, February 6th 189
—— *v.* Wakefield (1797), 5 Price, 195 343
—— *v.* Walker, *Re* Reversionary Interest Society. *See* Reversionary Interest Society, *Re*, A.-G. *v.* Walker.
—— *v.* Wendt (1895), 65 L. J. (Q. B.) 54; 73 L. T. 255; 43 W. R. 701; 15 R. 528 190, 191
—— *v.* Wheate (1759), 1 Eden, 177; 1 Wm. Bl. 121 68, 73, 93, 95
—— *v.* Whorwood (1750), 1 Ves. Sen. 534 140

PAGE
A.-G. *v.* Wilkins (1853), 17 Beav. 285 ; 22 L. J. (CH.) 830; 17 Jur. 885 ; 1 W. R. 472 77
—— *v.* Wilson (1839), 9 Sim. 526 580
—— *v.* Wilson's Executor (1869), Hanson's Death Duties, 5th ed., p. 470 . . 239
—— *v.* Wood (1828), 2 Y. & J. 290 250
—— *v.* ——, [1897] 2 Q. B. 102 ; 66 L. J. (Q. B.) 684 ; 77 L. T. 299 ; 61 J. P. 644 ; 45 W. R. 657, C. A. 193, 194
—— *v.* Worrall, [1895] 1 Q. B. 99 ; 64 L. J. (Q. B.) 141 ; 71 L. T. 807 ; 59 J. P. 467 ; 43 W. R. 118 ; 14 R. 1, C. A. 190
—— *v.* Wyndham (1862), 1 H. & C. 563 ; 32 L. J. (EX.) 1 ; 7 L. T. 386 ; 8 Jur. (N. S.) 1182 ; 11 W. R. 185 265
—— *v.* Wynford (Lord) (1854), 9 Exch. 746 ; 23 L. J. (EX.) 223 245
—— *v.* Yelverton (1861), 7 H. & N. 306 ; 30 L. J. (EX.) 333 ; 5 L. T. 451 ; 7 Jur. (N. S.) 1250 264, 266, 269, 285
—— for Cape of Good Hope *v.* Van Reenan, [1904] A. C. 114 ; 73 L. J. (P. C.) 13 ; 89 L. T. 591 ; 20 T. L. R. 90 363
—— for Ireland *v.* Kenmare (Lord) (1881), Trevor's Taxes on Succession, 4th ed. 202 291
—— for Trinidad and Tobago *v.* Eriché, [1893] A. C. 518 ; 63 L. J. (P. C.) 6 ; 69 L. T. 505 ; 1 R. 440 329, 353
Atwell *v.* Atwell (1871), L. R. 13 Eq. 23 ; 41 L. J. (CH.) 23 ; 25 L. T. 526 ; 20 W. R. 108 105
Aubert *v.* Walsh (1812), 4 Taunt. 293 562
Aughtie, *Re*, *Ex parte* Dugard (1835), 4 Deac. & Ch. 524 593
Auriferous Properties, Ltd., *Re*, [1898] 1 Ch. 691 ; 67 L. J. (CH.) 367 ; 79 L. T. 71 ; 14 T. L. R. 390 ; 5 Mans. 260 164
Austen *v.* Taylor (1759), 1 Eden, 361 94
Austerberry *v.* Oldham Corporation (1885), 29 Ch. D. 750 ; 55 L. J. (CH.) 633 ; 53 L. T. 543 ; 49 J. P. 532 ; 33 W. R. 807, C. A. 100
Austin *v.* Evans (1841), 2 Man. & G. 430 581
——— *v.* Ramsey (1849), 2 Car. & Kir. 736 605
Averall *v.* Wade (1835), L. & G. *temp.* Sugd. 252 101, 143
Aveson *v.* Kinnaird (Lord) (1805), 6 East, 188 ; 2 Smith, K. B. 286 . . . 439
Awdry *v.* Cayley, *Re* Cayley. *See* Cayley, *Re*, Awdry *v.* Cayley.
Ayerst *v.* Jenkins (1873), L. R. 16 Eq. 275 ; 42 L. J. (CH.) 490 ; 29 L. T. 126 ; 21 W. R. 878 54, 73
Aylesford (Earl) *v.* Morris (1873), 8 Ch. App. 484 ; 42 L. J. (CH.) 546 ; 28 L. T. 541 ; 21 W. R. 424 17, 21
Aylesford Peerage, The (1885), 11 App. Cas. 1 427, 438, 470, 505
Aylward *v.* Kearney (1814), 2 Ball & B. 463 170

B.

BABBAGE *v.* Babbage (1870), L. R. 2 P. D. 222 576
Babcock *v.* Lawson (1879), 4 Q. B. D. 394 ; 48 L. J. (Q. B.) 524 ; 27 W. R. 866 ; affirmed (1880), 5 Q. B. D. 284 ; 49 L. J. (Q. B.) 408 ; 42 L. T. 289 ; 27 W. R. 591, C. A. 393, 398
Backhouse *v.* Alcock (1885), 28 Ch. D. 669 ; 54 L. J. (CH.) 842 ; 52 L. T. 342 ; 33 W. R. 407 622
Bacon, *Ex parte*, *Re* Bond. *See* Bond, *Re*, *Ex parte* Bacon.
———, *Re*, Toovey *v.* Turner, [1907] 1 Ch. 475 ; 76 L. J. (CH.) 213 ; 96 L. T. 690...107
——— *v.* Bacon (1640), Toth. 133 91
——— *v.* Cosby (1851), 4 De G. & Sm. 261 ; 20 L. J. (CH.) 213 ; 15 Jur. 695 . 118
——— *v.* Jones (1839), 4 My. & Cr. 433 ; 3 Jur. 994 50
Badar Bee *v.* Habib Merican Noordin, [1909] A. C. 615 ; 78 L. J. (P. C.) 161 ; 101 L. T. 161 326, 331, 332, 333, 334
Badart's Trusts, *Re* (1870), L. R. 10 Eq. 288 ; 39 L. J. (CH.) 645 ; 24 L. T. 13 ; 18 W. R. 885 275, 276
Baddeley *v.* Bailey, [1893] W. N. 56 610, 612
——— *v.* Gilmore (1836), 1 M. & W. 50 ; 1 Gale, 410 ; Tyr. & Gr. 369 ; 5 L. J. (EX.) 115 612
Badeley *v.* Consolidated Bank (1886), 34 Ch. D. 536 ; 55 L. T. 635 ; 35 W. R. 136 336
Baden *v.* Pembroke (Earl) (1688), 2 Vern. 52 107
Badische Anilin und Soda Fabrik *v.* Isler, [1906] 1 Ch. 605 ; 75 L. J. (CH.) 411 ; 94 L. T. 367 ; 22 T. L. R. 326 ; affirmed, [1906] 2 Ch. 443 ; 75 L. J. (CH.) 749 ; 95 L. T. 273 ; 22 T. L. R. 710 ; 23 R. P. C. 633, C. A. . . . 390

PAGE
Baerlein *v.* Chartered Mercantile Bank, [1895] 2 Ch. 488 ; 65 L. J. (CH.) 54; 72 L. T. 850 ; 43 W. R. 692 ; 12 R. 581, C. A. 419
Bagot *v.* Bagot (1878), 1 L. R. Ir. 308 440
——— (Lord) *v.* Williams (1824), 3 B. & C. 235 ; 5 Dow. & Ry. (K. B.) 87 . . 335, 356, 359
Bagshaw *v.* Spencer (1748), 2 Atk. 577 ; 1 Ves. Sen. 142 95
Bagster *v.* Fackerell (1859), 26 Beav. 469 109
Bahia and San Francisco Rail. Co., Ltd., *Re* (1868), L. R. 3 Q. B. 584 ; 9 B. & S. 844 ; 37 L. J. (Q. B.) 176 ; 18 L. T. 467 ; 16 W. R. 862 . . 408, 410
Bailey *v.* Barnes, [1894] 1 Ch. 25 ; 63 L. J. (CH.) 73 ; 69 L. T. 542 ; 42 W. R. 66 ; 7 R. 9, C. A. 81, 83, 84, 87
——— *v.* Bidwell (1844), 13 M. & W. 73 511, 606
——— *v.* Ekins (1802), 7 Ves. 319 34
——— *v.* Hammond (1802), 7 Ves. 590 503
——— *v.* Macaulay (1849), 13 Q. B. 815 ; 19 L. J. (Q. B.) 73 ; 14 Jur. 80 . . 571
——— *v.* Richardson (1852), 9 Hare, 734 147
Baillie *v.* Butterfield (1787), 1 Cox, Eq. Cas. 393 554
Baillie's (Captain) Case (1779), 21 State Tr. 1359 572
Baily *v.* Boult (1851), 14 Beav. 595 ; 21 L. J. (CH.) 277 ; 22 L. T. 221 . 240, 241
——— *v.* De Crespigny (1869), L. R. 4 Q. B. 180 ; 38 L. J. (Q. B.) 98 ; 19 L. T. 681 ; 17 W. R. 494 102
——— & Co. *v.* Clark, Son, and Morland, [1902] 1 Ch. 649 ; 71 L. J. (CH.) 396 ; 86 L. T. 309 ; 50 W. R. 511 ; 18 T. L. R. 364, C. A. 506
Bain *v.* Case (1829), 3 C. & P. 496 ; Mood. & M. 262 473
——— *v.* Cooper (1842), 9 M. & W. 701 ; 1 Dowl. (N. S.) 11 ; 11 L. J. (EX.) 325 . 461
——— *v.* Mason (1824), 1 C. & P. 202 538
——— *v.* Whitehaven and Furness Junction Rail. Co. (1850), 3 H. L. Cas. 1 . 420
Bainbridge *v.* Smith (1889), 41 Ch. D. 462 ; 60 L. T. 879 ; 37 W. R. 594, C. A. 97
Bainbrigge *v.* Baddeley (1847), 2 Ph. 705 346
——— *v.* ——— (1851), 3 Mac. & G. 413 55
——— *v.* Brown (1881), 18 Ch. D. 188 ; 50 L. J. (CH.) 522 ; 44 L. T. 705 ; 29 W. R. 782 78
Baines *v.* Chadwick, *Re* Fearnsides. *See* Fearnsides, *Re*, Baines *v.* Chadwick.
Baird *v.* Wells (1890), 44 Ch. D. 661 ; 59 L. J. (CH.) 673 ; 63 L. T. 312 ; 39 W. R. 61 49
Bake *v.* French, [1907] 1 Ch. 428 ; 76 L. J. (CH.) 299 ; 96 L. T. 496 ; 97 L. T. 131 163, 332
Baker, *Re*, Collins *v.* Rhodes (1881), 20 Ch. D. 230 ; 51 L. J. (CH.) 315 ; 45 L. T. 658 ; 30 W. R. 858, C. A. 168
——— *Re*, Connell *v.* Baker (1885), 29 Ch. D. 711 ; 54 L. J. (CH.) 844 ; 52 L. T. 421 577, 621, 622
——— *v.* Ambrose, [1896] 2 Q. B. 372 ; 65 L. J. (Q. B.) 589 628
——— *v.* Baker (1863), 32 L. J. (P. & M.) 145 601
——— *v.* Beaumont (1664), 3 Rep. Ch. 7 47
——— *v.* Bradley (1855), 7 De G. M. & G. 597 ; 25 L. J. (CH.) 7 ; 2 Jur. (N. S.) 98 ; 4 W. R. 78, C. A. 18
——— *v.* Cave (1857), 1 H. & N. 674 ; 26 L. J. (EX.) 190 ; 5 W. R. 345 . . 477
——— *v.* Courage & Co., [1910] 1 K. B. 56 ; 79 L. J. (K. B.) 313 ; 101 L. T. 854 . 170, 175
——— *v.* Dale (1858), 1 F. & F. 271 517
——— *v.* Monk (1864), 4 De G. J. & Sm. 388 ; 10 L. T. 86 ; 10 Jur. (N. S.) 691 ; 12 W. R. 779 22
——— *v.* Read (1854), 18 Beav. 398 173
Balby-with-Hexthorpe District Council *v.* Millard (No. 1) (1903), 68 J. P. 81 ; 2 L. G. R. 330 332
Balcetti v. Serani (1792), Peake, 192 451
Balch *v.* Wastall (1718), 1 P. Wms. 445 56
Baldney *v.* Ritchie (1816), 1 Stark. 338 521
Baldwin *v.* Belcher, *Re* Cornwall. *See* Cornwall, *Re*, Baldwin *v.* Belcher.
Balkis Consolidated Co. *v.* Tomkinson, [1893] A. C. 396 ; 63 L. J. (Q. B.) 134 ; 69 L. T. 598 ; 42 W. R. 204 ; 1 R. 178 369, 381, 409, 410
Ball *v.* Harris (1839), 4 My. & Cr. 264 ; 8 L. J. (CH.) 114 ; 3 Jur. 140 . . 35
Ballantyne *v.* Mackinnon, [1896] 2 Q. B. 455 ; 65 L. J. (Q. B.) 616 ; 75 L. T. 95 ; 45 W. R. 70 ; 8 Asp. M. L. C. 173, C. A. 328, 339, 340, 342
Ballard *v.* Marsden (1880), 14 Ch. D. 374 ; 49 L. J. (CH.) 614 ; 42 L. T. 763 ; 28 W. R. 914 164
——— *v.* Way (1836), 1 M. & W. 520 ; 2 Gale, 61 ; Tyr. & Gr. 851 ; 5 L. J. (EX.) 207 473

PAGE
Balls, *Re*, Trewby *v.* Balls, [1909] 1 Ch. 791 ; 78 L. J. (CH.) 341 ; 100 L. T. 780. 145
——— *v.* Westwood (1809), 2 Camp. 11 404
Bamfield *v.* Gibson, *Re* Glubb. *See* Glubb, *Re*, Bamfield *v.* Gibson.
——— *v.* Massey (1808), 1 Camp. 460 455
Bamford *v.* Creasy (1862), 3 Giff. 675 153
Banbury Peerage Case (1811), 1 Sim. & St. 153 504
Bancroft *v.* Bancroft (1864), 3 Sw. & Tr. 597 326, 356, 359
——— *v.* ——— (1864), 3 Sw. & Tr. 610; 34 L. J. (P. M. & A.) 31 ; 11 L. T. 515 ; 13 W. R. 506 545
Bandon (Earl) *v.* Becher (1835), 3 Cl. & Fin. 479 ; 9 Bli. (N. S.) 532 . . 351, 352
Banfather's Claim, Allen *v.* Southampton (Lord), *Re* Southampton's (Lord) Estate. *See* Southampton's (Lord) Estate, *Re*, Allen *v.* Southampton (Lord), Banfather's Claim.
Bank of Australasia *v.* Nias (1851), 16 Q. B. 717 ; 20 L. J. (Q. B.) 284 ; 15 Jur. 967 354
——— *v.* Palmer, [1897] A. C. 540; 66 L. J. (P. C.) 105 . . 568
Bank of England, *Ex parte*, *Re* South American and Mexican Co. *See* South American and Mexican Co., *Re*, *Ex parte* Bank of England.
——— *v.* Cutler, [1908] 2 K. B. 208; 77 L. J. (K. B.) 889 ; 98 L. T. 336 ; 24 T. L. R. 518 ; 52 Sol. Jo. 442 C. A. . . . 373, 411
——— *v.* Vagliano Brothers, [1891] A. C. 107 ; 60 L. J. (Q. B.) 145 ; 64 L. T. 353 ; 55 J. P. 676 ; 39 W. R. 657 388, 395, 400, 401
Bank of Hindustan, China, and Japan, *Re*, Alison's Case (1873), 9 Ch. App. 1 ; 43 L. J. (CH.) 1 ; 29 L. T. 524 ; 22 W. R. 113, C. A. . . . 331, 340, 356
Bank of Ireland (Governor & Co.) *v.* Evans' Charities in Ireland (Trustees) (1855), 5 H. L. Cas. 389 ; 3 W. R. 573 398, 399, 400, 412
Bank of New Zealand *v.* Simpson, [1900] A. C. 182 ; 62 L. J. (P. C.) 22 ; 82 L. T. 102 ; 48 W. R. 591 ; 16 T. L. R. 211 568
Bankes *v.* Jarvis, [1903] 1 K. B. 549 ; 72 L. J. (K.B.) 267 ; 88 L. T. 20 ; 51 W. R. 412; 19 T. L. R. 190 62
Banks *v.* Braithwaite (1862), 32 L. J. (CH.) 35 ; 7 L. T. 149 ; 10 W. R. 612 . 241
——— *v.* Sutton (1732), 2 P. Wms. 700 96
Bannatyne *v.* MacIver, [1906] 1 K. B. 103 ; 75 L. J. (K. B.) 120 ; 94 L. T. 150 ; 54 W. R. 293, C. A. 63, 150
Banner *v.* Jackson (1847), 1 De G. & Sm. 472 571
——— *v.* Lowe (1806), 13 Ves. 135 29
Banque Franço-Egyptienne *v.* Lutscher (1879), 41 L. T. 468 615
Barber *v.* Gingell (1800), 3 Esp. 60 390
——— *v.* Nottingham Canal Co. (1864), 15 C. B. (N. S.) 726 ; 33 L. J. (C. P.) 193 ; 9 L. T. 829 ; 10 Jur. (N. S.) 260 ; 12 W. R. 376 353
——— *v.* Wood (1838), 2 Mood. & R. 172 578
Barclay, *Re*, Barclay *v.* Andrew, [1899] 1 Ch. 674 ; 68 L. J. (CH.) 383 ; 80 L. T. 702 67, 158
——— *v.* Innes, *Re* Innes. *See* Innes, *Re*, Barclay *v.* Innes.
——— *v.* Messenger (1874), 43 L. J. (CH.) 449 ; 30 L. T. 350 ; 22 W. R. 522 . 174
Barden, *In the Goods of* (1867), L. R. 1 P. & D. 325 106
Bargent *v.* Thomson (1864), 4 Giff. 473 ; 9 L. T. 365 ; 9 Jur. (N. S.) 1192 . . 153
Barham *v.* Thanet (Earl) (1834), 3 My. & K. 607 ; 3 L. J. (CH.) 228 . . . 313
Baring *v.* Clagett (1802), 3 Bos. & P. 215 ; 5 East, 398 341
——— *v.* Nash (1813), 1 Ves. & B. 551 40
——— *v.* Royal Exchange Assurance Co. (1804), 5 East, 99 341
Barker, *Re* (1861), 7 H. & N. 109 ; 30 L. J. (EX.) 404 ; 5 L. T. 206 ; 7 Jur. (N. S.) 1061 270, 272
——— *v.* Boucher (1784), 1 Bro. C. C. 140, n. 34
——— *v.* Dacie (1802), 6 Ves. 681 28
——— *v.* Dumeres (1741), Barn. (CH.) 277 31
——— *v.* Furlong, [1891] 2 Ch. 172 ; 60 L. J. (CH.) 368 ; 64 L. T. 411 ; 39 W. R. 621 600
——— *v.* May (1829), 9 B. & C. 489 ; 4 Man. & Ry. (K. B.) 386 34
——— *v.* Vansomner (1782), 1 Bro. C. C. 149 21
Barksdale *v.* Gilliat (1818), 1 Swan. 562 240
Barnes *v.* Addy (1874), 9 Ch. App. 244 ; 43 L. J. (CH.) 513 ; 30 L. T. 4 ; 22 W. R. 505 156
——— *v.* Mawson (1813), 1 M. & S. 77 441
——— *v.* Merritt & Co. (1899), 15 T. L. R. 419 453
——— *v.* Parker (1866), 15 L. T. 218 544
——— *v.* Rackster (1842), 1 Y. & C. Ch. Cas. 401 ; 11 L. J. (CH.) 228 ; 6 Jur. 595 144

PAGE
Barnes v. Richards (1902), 71 L. J. (K. B.) 341 ; 86 L. T. 231 ; 50 W. R. 363 ; 18 T. L. R. 328 19
——— v. Toye (1884), 13 Q. B. D. 410 ; 53 L. J. (Q. B.) 567 ; 51 L. T. 292 ; 48 J. P. 664 ; 33 W. R. 15 432
——— v. Williams (1832), 1 Dowl. 615 589
Barnesly v. Powel (1749), 1 Ves. Sen. 284 13, 47
Barnett v. Aldridge Colliery Co., Ltd. (1887), 4 T. L. R. 16 509
——— v. Allen (1858), 3 H. & N. 376 ; 1 F. & F. 125 ; 27 L. J. (EX.) 412 ; 4 Jur. (N. S.) 488 607
——— v. South London Tramways Co. (1887), 18 Q. B. D. 815 ; 56 L. J. (Q. B.) 452 ; 57 L. T. 436 ; 35 W. R. 640, C. A. 385
——— v. Tugwell (1862), 31 Beav. 232 503
Barnhart v. Greenshields (1853), 9 Moo. P. C. C. 18 84, 88
Barnsdale v. Lowe (1831), 2 Russ. & M. 142 45
Barnstaple Second Annuitant Society, *Re* (1884), 50 L. T. 424 567
Barough v. White (1825), 4 B. & C. 325 ; 2 C. & P. 8 ; 6 Dow. & Ry. (K. B.) 379 ; 3 L. J. (O. S.) (K. B.) 227 460
Barr's Trusts, *Re* (1858), 4 K. & J. 212 604
Barraclough v. Greenhough (1867), L. R. 2 Q. B. 612 ; 8 B. & S. 623 ; 36 L. J. (Q. B.) 251 ; 15 W. R. 934 477
——— v. Johnson (1838), 8 Ad. & El. 99 ; 3 Nev. & P. (K. B.) 233 ; 7 L. J. (Q. B.) 172 ; 2 Jur. 839 479
Barratt v. Kearns, [1905] 1 K. B. 504 ; 74 L. J. (K. B.) 318 ; 92 L. T. 255 ; 53 W. R. 354 ; 21 T. L. R. 212, C. A. 588
Barrell v. Sabine (1684), 1 Vern. 268 ; 3 Salk. 241 153
Barret v. Beckford (1750), 1 Ves. Sen. 519 138
Barrett v. Beales, *Re* Beales' Settlement. *See* Beales' Settlement, *Re*, Barrett v. Beales.
——— v. Blagrave (1800), 5 Ves. 555 50
——— v. Irvine, [1907] 2 I. R. 462, C. A. 452
——— v. Long (1856), 3 H. L. Cas. 395 453
Barrett's Case, *Re* Moseley Green Coal and Coke Co., Ltd. *See* Moseley Green Coal and Coke Co., Ltd., *Re*, Barrett's Case.
Barrick v. Buba (1855), 16 C. B. 492 ; 3 C. L. R. 921 ; 1 Jur. (N. S.) 1020 ; 3 W. R. 524 615
Barron v. Willis, [1900] 2 Ch. 121 ; 69 L. J. (CH.) 532 ; 82 L. T. 729 ; 48 W. R. 579 ; 16 T. L. R. 371, C. A. 19
Barrow v. Barrow (1858), 4 K. & J. 409 ; 27 L. J. (CH.) 678 ; 4 Jur. (N. S.) 1049 ; 6 W. R. 714 127
——— v. Dyster (1884), 13 Q. B. D. 635 ; 51 L. T. 573 ; 33 W. R. 199 . . 445
——— v. Humphreys (1820), 3 B. & Ald. 598 579, 589
——— v. Isaacs & Son, [1891] 1 Q. B. 417 ; 60 L. J. (Q. B.) 179 ; 64 L. T. 686 ; 55 J. P. 517 ; 39 W. R. 338, C. A. 153
Barrow's Case (1880), 14 Ch. D. 432 ; 49 L. J. (CH.) 498 ; 41 L. T. 755 ; 28 W. R. 270, C. A. 82, 410
Barrow Mutual Ship Insurance Co. v. Ashburner (1885), 54 L. J. (Q. B.) 377 ; 54 L. T. 58 ; 5 Asp. M. L. C. 527, C. A. 370, 380, 389
Barrs v. Jackson (1845), 1 Ph. 582 ; 14 L. J. (CH.) 433 ; 9 Jur. 609 . 331, 339, 554
Barsht v. Tagg, [1900] 1 Ch. 231 ; 69 L. J. (CH.) 91 ; 81 L. T. 777 ; 48 W. R. 220 ; 16 T. L. R. 100 100
Barstow v. Palmes (1704), Prec. Ch. 233 547
Bartholomew v. George (1851), Best, Law of Evidence, p. 133 569
Bartlett v. Charles, *Re* Eyton. *See* Eyton, *Re*, Bartlett v. Charles.
——— v. Gillard (1827), 3 Russ. 149 ; 6 L. J. (O. S.) (CH.) 19 138
——— v. Higgins, [1901] 2 K. B. 230 ; 70 L. J. (K. B.) 621 ; 84 L. T. 509 ; 49 W. R. 449, C. A. 612
——— v. Smith (1843), 11 M. & W. 483 ; 12 L. J. (EX.) 287 ; 7 Jur. 448 . . 428
Barton v. Bank of New South Wales (1890), 15 App. Cas. 379 567
——— v. London and North-Western Railway (1889), 24 Q. B. D. 77 ; 59 L. J. (Q. B.) 33 ; 62 L. T. 164 ; 38 W. R. 197, C. A. 395, 409
Barwick d. Richmond Corporation v. Thompson (1798), 7 Term Rep. 488 . 402, 405
Basan, *Ex parte*, *Re* Foster. *See* Foster, *Re*, *Ex parte* Basan.
Basden, *Ex parte*, *Re* Drucker (No. 2). *See* Drucker (No. 2), *Re*, *Ex parte* Basden.
Basébé v. Matthews (1867), L. R. 2 C. P. 684 ; 36 L. J. (M. C.) 93 ; 16 L. T. 417 ; 15 W. R. 839 326
Basingstoke Corporation v. Bolton (Lord) (1852), 1 Drew. 270 ; 22 L. J. (CH.) 305 ; 17 Jur. 57 ; 1 W. R. 76 (1854), 3 Drew. 50 ; 3 W. R. 142 39

PAGE
Basset *v.* Nosworthy (1673), Cas. *temp.* Finch, 102 76
——— *v.* St. Levan (1894), 71 L. T. 718; 43 W. R. 165; 13 R. 225 . . . 107
Bassil *v.* Lister (1852), 10 Hare, 140 144
Bastin *v.* Carew (1824), Ry. & M. 127 595
Batchelor, *Re*, Sloper *v.* Oliver (1873), L. R. 16 Eq. 481; 43 L. J. (CH.) 101; 21 W. R. 901 163
——— *v.* Honeywood (Sir J.) (1799), 2 Esp. 714 607
Bate, *Re*, Bate *v.* Bate (1890), 43 Ch. D. 600; 59 L. J. (CH.) 277; 62 L. T. 559...37, 145
——— *v.* Hooper (1855), 5 De G. M. & G. 338 173
——— *v.* Kinsey (1834), 1 Cr. M. & R. 38; 4 Tyr. 662; 3 L. J. (EX.) 304 . . 520
——— *v.* Payne (1849), 13 Q. B. 900; 18 L. J. (Q. B.) 273; 13 Jur. 609 . 245, 253
Bateman (Lady) *v.* Faber, [1897] 2 Ch. 223; 66 L. J. (CH.) 721; 77 L. T. 71 . 72
——— *v.* ——— [1898] 1 Ch. 144; 67 L. J. (CH.) 130; 77 L. T. 576; 46 W. R. 215; 14 T. L. R. 81, C. A. . . 168, 327, 371, 380, 456
——— *v.* Hunt, [1904] 2 K. B. 530; 73 L. J. (K. B.) 782; 91 L. T. 331; 52 W. R. 609; 20 T. L. R. 628, C. A. 372
——— *v.* Willoe (1803), 1 Sch. & Lef. 201 48
Bater *v.* Bater, [1906] P. 209; 75 L. J. (P.) 209; 94 L. T. 835; 22 T. L. R. 408, C. A. 328, 338, 352
Bates *v.* Eley (1876), 1 Ch. D. 473; 45 L. J. (CH.) 270; 34 L. T. 50; 24 W. R. 424 599
——— *v.* Johnson (1855), John. 304; 28 L. J. (CH.) 509; 5 Jur. (N. S.) 842; 7 W. R. 512 81, 83
Bath (Earl) *v.* Mountague (Earl) (1693), 3 Cas. in Ch. 55; 2 Rep. Ch. 417...17, 168
——— *v.* Sherwin (1706), Prec. Ch. 261 59
——— *v.* ——— (1709), 4 Bro. Parl. Cas. 373, n. 59
——— *v.* ——— (1710), 10 Mod. Rep. 1 8, 69
Batson, *Re*, *Ex parte* Hastie (1894), 70 L. T. 382; 10 R. 135; 1 Mans. 45 . . 585
Batt *v.* Rookes (1577), Cary, 87 588
Battison *v.* Hobson, [1896] 2 Ch. 403; 65 L. J. (CH.) 695; 74 L. T. 689; 44 W. R. 615 86, 87
Batty *v.* Chester (1842), 5 Beav. 103 73
Bauerman *v.* Radenius (1798), 7 Term Rep. 663; 2 Esp. 653 456
Baugh *v.* Cradocke (1832), 1 Mood. & R. 182 571
——— *v.* Read (1790), 1 Ves. 257 135
Bawden *v.* London, Edinburgh and Glasgow Assurance Co., [1892] 2 Q. B. 534; 61 L. J. (Q. B.) 792; 57 J. P. 116, C. A. 84, 386
Bawtree *v.* Watson (1834), 3 My. & K. 339 21
Bax, *Ex parte* (1751), 2 Ves. Sen. 388 27
Baxendale *v.* Bennett (1878), 3 Q. B. D. 525; 47 L. J. (Q. B.) 624; 26 W. R. 899, C. A. 351, 401
——— *v.* De Valmer (1887), 57 L. T. 556 605
Baxter, *Re*, Baxter *v.* Baxter (1898), 42 Sol. Jo. 611 222
——— *v.* Combe (1850), 1 I. Ch. R. 284 413
——— *v.* Portsmouth (Earl) (1826), 5 B. & C. 170; 2 C. & P. 178; 7 Dow. & Ry. (K. B.) 614 16
Bayley *v.* Bishop (1803), 9 Ves. 6 246
——— *v.* Bradley (1848), 5 C. B. 396; 16 L. J. (C. P.) 206 404
——— *v.* Tindal (1853), 2 Eq. Rep. 538; 18 Jur. 668; 2 W. R. 129 . . . 301
——— *v.* Wylie (1807), 6 Esp. 85 551
Baylis *v.* Lawrence (1840), 11 Ad. & El. 920; 3 Per. & Dav. 526; 9 L. J. (Q. B.) 196; 4 Jur. 652 431
Beal *v.* Grimthorpe (Baron), *In the Goods of* Grimthorpe (Baron). *See* Grimthorpe (Baron), *In the Goods of*, Beal *v.* Grimthorpe (Baron).
Beale *v.* Kyte, [1907] 1 Ch. 564; 76 L. J. (CH.) 294; 96 L. T. 390 . . . 25
Beales' Settlement, *Re*, Barrett *v.* Beales, [1905] 1 Ch. 256; 74 L. J. (CH.) 67; 92 L. T. 268; 53 W. R. 216; 21 T. L. R. 101 119
Beamon *v.* Ellice (1831), 4 C. & P. 585 594
Beaney *v.* Elliott, [1886] W. N. 99 618
Beard *v.* London General Omnibus Co., [1900] 2 Q. B. 530; 69 L. J. (Q. B.) 895; 83 L. T. 362; 48 W. R. 658; 16 T. L. R. 499, C. A. 435
Beardsley *v.* Beardsley, [1899] 1 Q. B. 746; 68 L. J. (Q. B.) 270; 80 L. T. 51; 47 W. R. 284; 15 T. L. R. 173 328, 346
Beasley *v.* Magrath (1804), 2 Sch. & Lef. 31 543
Beasney's Trusts, *Re* (1869), L. R. 7 Eq. 498; 38 L. J. (CH.) 159; 19 L. T. 630...501
Beatagh *v.* Beatagh (1824), 1 Hog. 98 597
Beatson *v.* Skene (1860), 5 H. & N. 838; 29 L. J. (EX.) 430; 2 L. T. 378; 6 Jur. (N. S.) 780; 8 W. R. 544 573

PAGE
Beatty *v.* Cullingsworth (1896), 60 J. P. 740; affirmed (1897), *Times*, January 14th 446
——— *v.* Ebury (Lord) (1872), 7 Ch. App. 777; 41 L. J. (CH.) 804; 27 L. T. 398; 20 W. R. 994; affirmed (1874), L. R. 7 H. L. 102; 44 L. J. (CH.) 20; 30 L. T. 581; 22 W. R. 897 378, 379
Beauchamp *v.* Parry (1830), 1 B. & Ald. 89 460
——— (Earl) *v.* Winn (1873), L. R. 6 H. L. 223; 22 W. R. 193 . 24, 170
Beauclerk *v.* James, *Re* Brooksbank. *See* Brooksbank, *Re*, Beauclerk *v.* James.
——— *v.* Mead (1741), 2 Atk. 167 107
Beaufort (Duke) *v.* Crawshay (1866), L. R. 1 C. P. 699; Har. & Ruth. 638; 35 L. J. (C. P.) 342; 14 L. T. 729; 12 Jur. (N. S.) 709; 14 W. R. 989 428, 618
——— *v.* Smith (1849), 4 Exch. 450; 19 L. J. (EX.) 97 . 473, 475, 528, 529, 530
Beaumont *v.* Mountain (1834), 10 Bing. 404; 3 L. J. (C. P.) 118; 4 Moo. & S. 177 525
Beavan *v.* M'Donnell (1854), 10 Exch. 184 448
——— *v.* Oxford (Earl) (1856), 6 De G. M. & G. 507; 25 L. J. (CH.) 299; 2 Jur. (N. S.) 121; 4 W. R. 275 79
Bechuanaland Exploration Co. *v.* London Trading Co., [1898] 2 Q. B. 658; 3 Com. Cas. 285; 67 L. J. (Q. B.) 986; 79 L. T. 270; 14 T. L. R. 587 . 394, 399, 444
Beck *v.* Pierce (1889), 23 Q. B. D. 316; 58 L. J. (Q. B.) 516; 61 L. T. 448; 54 J. P. 198; 38 W. R. 29, C. A. 335
——— and Jackson, *Re* (1857), 1 C. B. (N. S.) 695 552
Beckett *v.* Grimthorpe (Lord), *Re* Grimthorpe (Lord). *See* Grimthorpe (Lord), *Re*, Beckett *v.* Grimthorpe (Lord).
——— *v.* Midland Rail. Co. (1866), L. R. 1 C. P. 241; 35 L. J. (C. P.) 163; Har. & Ruth. 189; 13 L. T. 672; 12 Jur. (N. S.) 231; 14 W. R. 393 . 545
——— *v.* Ramsdale, *Re* Hodgson. *See* Hodgson, *Re*, Beckett *v.* Ramsdale.
Beckford *v.* Wade (1805), 17 Ves. 87 174, 175
Bective *v.* Hodgson (1864), 10 H. L. Cas. 656; 10 L. T. 202; 10 Jur. (N. S.) 375; 12 W. R. 625; 3 New Rep. 654 108
Beddington, *Re*, Micholls *v.* Samuel, [1900] 1 Ch. 771; 69 L. J. (CH.) 374; 82 L. T. 557; 48 W. R. 552; 16 T. L. R. 291 220
Bedford (Duke) *v.* British Museum (Trustees) (1822), 2 My. & K. 552; 2 L. J. (CH.) 129 102
Beech, *In the Goods of* (1904), *Times*, August 9th 215
——— *v.* Jones (1848), 5 C. B. 696 596
Beeman *v.* Duck (1843), 11 M. & W. 251; 12 L. J. (EX.) 198 394
Beer *v.* Beer (1852), 12 C. B. 60; 21 L. J. (C. P.) 124; 16 Jur. 223 373
Bees *v.* Williams (1835), 2 Cr. M. & R. 581 375
Beetham, *Re*, *Ex parte* Broderick (1886), 18 Q. B. D. 380; 56 L. J. (Q. B.) 635; 35 W. R. 613, C. A. 92
Behrens *v.* Richards, [1905] 2 Ch. 614; 74 L. J. (CH.) 615; 93 L. T. 623; 69 J. P. 381; 54 W. R. 141; 21 T. L. R. 705; 3 L. G. R. 1228 . . 50
——— *v.* Sieveking (1837), 2 My. & Cr. 602 330, 350
Belbin *v.* Skeates (1858), 1 Sw. & Tr. 148; 27 L. J. (P. & M.) 56 605
Bell, *In the Goods of* (1871), 25 L. T. 163 305
——— *Re*, Lake *v.* Bell (1886), 34 Ch. D. 462; 56 L. J. (CH.) 307; 55 L. T. 757; 35 W. R. 212 156
——— *v.* Chaytor (Sir Wm.) (1843), 1 Car. & Kir. 162 606
——— *v.* Marsh, [1903] 1 Ch. 528; 72 L. J. (CH.) 360; 88 L. T. 605; 51 W. R. 325, C. A. 384, 398
Bellamy, *Re*, Elder *v.* Pearson (1883), 25 Ch. D. 620; 53 L. J. (CH.) 174; 49 L. T. 708; 32 W. R. 358 94
——— *v.* Jones (1802), 8 Ves. 31 613
Bellasis *v.* Uthwatt (1737), 1 Atk. 426 133
"Bellcairn," The (1885), 10 P. D. 161; 55 L. J. (P.) 3; 53 L. T. 686; 34 W. R. 55, C. A. 351
——— (1885), 11 P. D. 1, C. A. 342
Belmore (Countess) *v.* Kent County Council, [1901] 1 Ch. 873; 70 L. J. (CH.) 501; 84 L. T. 523; 65 J. P. 456; 49 W. R. 459; 17 T. L. R. 360 . . 442
Bengough *v.* Walker (1808), 15 Ves. 507 133
Benham's Trusts, *Re* (1867), 37 L. J. (CH.) 265 500
Beningfield *v.* Baxter (1886), 12 App. Cas. 167; 56 L. J. (P. C.) 13; 56 L. T. 127 173
Benjamin, *Re*, Neville *v.* Benjamin, [1902] 1 Ch. 723; 71 L. J. (CH.) 319; 86 L. T. 387; 18 T. L. R. 283 501

PAGE
Bennet, *Ex parte* (1743), 2 Atk. 527 152
——— *v.* Davis (1725), 2 P. Wms. 316 9
——— *v.* Hartford (Hundred) (1650), Sty. 233 570
Bennett, *Ex parte* (1805), 10 Ves. 381 157
———, *Re*, Masonic and General Life Assurance Co. *v.* Sharpe, *Re* Sharpe. *See* Sharpe, *Re*, *Re* Bennett, Masonic and General Life Assurance Co. *v.* Sharpe.
——— *v.* Bennett, *Re* Fish. *See* Fish, *Re*, Bennett *v.* Bennett.
——— *v.* Colley (1833), 2 My. & K. 225; Coop. *temp.* Brough. 248 . . . 170
——— *v.* Gamgee (1876), 2 Ex. D. 11; 46 L. J. (EX.) 33; 35 L. T. 764; 25 W. R. 81 346
——— *v.* Houldsworth (1877), 6 Ch. D. 671; 46 L. J. (CH.) 646; 36 L. T. 648 128, 132
——— *v.* White, [1910] W. N. 167, C. A. 163
——— and Young *v.* Bacon (John), Ltd. (1897), 2 Com. Cas. 102, C. A. . 563
Bennison *v.* Cartwright (1864), 5 B. & S. 1; 33 L. J. (Q. B.) 137; 10 L. T. 266; 10 Jur. (N. S.) 847; 12 W. R. 425 442
——— *v.* Jewison (1848), 12 Jur. 485 428
Bennitt *v.* Whitehouse (1860), 8 W. R. 251 509
Bensley *v.* Burton (1830), 8 L. J. (CH.) 85 366, 367, 373
Benson *v.* Benson (1710), 1 P. Wms. 130 113
——— *v.* Gibson (1746), 3 Atk. 395 151
——— *v.* Hadfield (1844), 4 Hare, 32 389
——— *v.* Olive (1731), 2 Stra. 920 500, 547
Bensusan *v.* Nehemias (1851), 4 De G. & Sm. 381 139
Bentham *v.* Alston (1690), 2 Vern. 204 29
Bentley *v.* Mackay (1862), 4 De G. F. & J. 279, C. A. 24
——— (Henry) & Co., and the Yorkshire Breweries, Ltd., *Re*, *Ex parte* Harrison (1893), 69 L. T. 204, C. A. 382, 390
Benyon *v.* Benyon (1810), 17 Ves. 34 129
——— *v.* Fitch (1866), 35 Beav. 570 22
——— *v.* Nettlefold (1850), 3 Mac. & G. 94; 20 L. J. (CH.) 186; 15 Jur. 209 . 73
Berdan *v.* Greenwood (1878), 3 Ex. D. 251; 47 L. J. (EX.) 628; 39 L. T. 223; 26 W. R. 902, C. A. 358
——— *v.* ——— (1880), 20 Ch. D. 764; 46 L. T. 524, n., C. A. . 612, 614, 615
Beresford *v.* St. Albans Justices (1905), 22 T. L. R. 1 440
Berkeley Peerage Case (1811), 4 Camp. 401 468, 471, 560, 561
———, The (1861), 8 H. L. Cas. 21; 4 L. T. 686; 8 Jur. (N. S.) 21 . 565
Bermon *v.* Woodbridge (1781), 2 Doug. (K. B.) 781 458
Bermondsey Vestry *v.* Ramsey (1871), L. R. 6 C. P. 247; 40 L. J. (C. P.) 206; 24 L. T. 429; 19 W. R. 774 336
Bernardi *v.* Motteaux (1781) 2 Doug. (K. B.) 575 341
Berne (City) *v.* Bank of England (1804), 9 Ves. 347 493
Berney *v.* Read (1845), 7 Q. B. 79; 14 L. J. (Q. B.) 247; 9 Jur. 620 . . . 552
——— *v.* Sewell (1820), 1 Jac. & W. 647 55
Berrisford *v.* Milward (1740), 2 Atk. 49; Barn. (CH.) 101 168
Berry *v.* Banner (1792), Peake, 212 343, 468
——— *v.* Gaukroger, [1903] 2 Ch. 116; 72 L. J. (CH.) 435; 88 L. T. 521; 51 W. R. 449; 19 T. L. R. 445, C. A. 217, 221, 222, 223
——— *v.* Usher (1805), 11 Ves. 87 108, 109
Berryman *v.* Wise (1792), 4 Term Rep. 366 443
Bertie *v.* Beaumont (1816), 2 Price, 303 513, 563
Berwick *v.* Horsfall (1858), 4 C. B. (N. S.) 450; 27 L. J. (C. P.) 193; 4 Jur. (N. S.) 615; 6 W. R. 471 430
——— & Co. *v.* Price, [1905] 1 Ch. 632; 74 L. J. (CH.) 249; 92 L. T. 110...81, 84, 85, 88
Berwick Corporation *v.* Murray (1850), 19 L. J. (CH.) 281 598
Beryl, The (1884), 9 P. D. 137; 53 L. J. (ADM.) 75; 51 L. T. 554; 33 W. R. 191; 5 Asp. M. L. C. 321, C. A. 433
Bessela *v.* Stern (1877), 2 C. P. D. 265; 46 L. J. (C. P.) 467; 37 L. T. 88; 25 W. R. 561, C. A. 459, 603
Bessey *v.* Windham (1844), 6 Q. B. 166; 14 L. J. (Q. B.) 7; 8 Jur. 824 . 370, 544
Best *v.* Hill (1872), L. R. 8 C. P. 10; 42 L. J. (C. P.) 10; 27 L. T. 490; 21 W. R. 147 162
Beswick *v.* Orpen, *Re* Orpen. *See* Orpen, *Re*, Beswick *v.* Orpen.
Bethell *v.* Abraham (1874), 22 W. R. 745, C. A. 135
Betjemann *v.* Betjemann, [1895] 2 Ch. 474; 64 L. J. (CH.) 641; 73 L. T. 2; 44 W. R. 182; 12 R. 455, C. A. 171
Betteley *v.* MacLeod (1837), 3 Bing. (N. C.) 405 584

PAGE
Betteley *v.* Read (1843), 4 Q. B. 511 ; 3 Gal. & Dav. 561 ; 12 L. J. (Q. B.) 172 ; 7 Jur. 507 407
Betts, *Re*, *Ex parte* Board of Trade (1887), 19 Q. B. D. 39 ; 56 L. J. (Q. B.) 370; 56 L. T. 804 ; 35 W. R. 530 ; 4 Morr. 170, C. A.; affirmed *sub nom.* Board of Trade *v.* Block (1888), 13 App. Cas. 570 ; 58 L. J. (Q. B.) 113 ; 59 L. T. 734 ; 53 J. P. 164 ; 37 W. R. 259, C. A. . . . 508
——— *v.* Burch (1859), 4 H. & N. 506; 1 F. & F. 485 ; 28 L. J. (EX.) 267 ; 7 W. R. 546 151
——— *v.* Menzies (1862), 10 H. L. Cas. 117 ; 31 L. J. (Q. B.) 233 ; 7 L. T. 110 ; 9 Jur. (N. S.) 29 ; 11 W. R. 1 481
Betts' Patent, *Re* (1862), 1 Moo. P. C. C. (N. S.) 49 527
Bevan *v.* M'Mahon (1859), 28 L. J. (P. & M.) 40 ; 2 Sw. & Tr. 55 . . . 599
Beverley Corporation *v.* Craven (1838), 2 Mood. & R. 140 549, 551
Beverley's Case (1603), 4 Co. Rep. 123 b 16
Beyfus *v.* Lawley, [1903] A. C. 411 ; 72 L. J. (CH.) 781 ; 89 L. T. 309 . . 34, 37
Beynon, *In the Goods of*, [1901] P. 141 ; 70 L. J. (P.) 31 ; 84 L. T. 271 ; 65 J. P. 246 ; 17 T. L. R. 324 503
——— *v.* Cook (1875), 10 Ch. App. 389 ; 32 L. T. 353 ; 23 W. R. 531 . 21, 173
Bickerton *v.* Walker (1885), 31 Ch. D. 151 ; 55 L. J. (CH.) 227 ; 53 L. T. 731 ; 34 W. R. 141, C. A. 372
Bickford *v.* Darcy (1866), L. R. 1 Exch. 354 ; 4 H. & C. 534 ; 35 L. J. (EX.) 202 ; 14 L. T. 629 ; 12 Jur. (N. S.) 816 ; 14 W. R. 900 575
Bicknell *v.* Bicknell, [1908] W. N. 97, C. A. 610
Bidder *v.* Bridges (1884), 26 Ch. D. 1 ; 50 L. T. 287 ; 32 W. R. 445, C. A. 613, 626
——— *v.* ——— (No. 2) (1886), 54 L. T. 529 ; 34 W. R. 514 . 505, 514, 537, 564
Biddle *v.* Bond (1865), 6 B. & S. 225 ; 34 L. J. (Q. B.) 137 ; 12 L. T. 178 ; 13 W. R. 561 324, 406, 407, 408
Biddulph *v.* Biddulph (1806), 12 Ves. 161 107
——-——— *v.* Camoys (Lord) (1855), 20 Beav. 402 45
Bidwell's Settlement, *Re* (1862), 1 New Rep. 176 ; 32 L. J. (CH.) 71 ; 8 L. T. 107 ; 9 Jur. (N. S.) 37 ; 11 W. R. 161 121, 122
Biggar *v.* Rock Life Assurance Co. (1901), 85 L. T. 636 ; [1902] 1 K. B. 516 ; 71 L. J. (K. B.) 79 386
Biggerstaff *v.* Rowatt's Wharf, Ltd., [1896] 2 Ch. 93 ; 65 L. J. (CH.) 536 ; 74 L. T. 473 ; 44 W. R. 536, C. A. 164, 381, 390
Biggs *v.* Andrews (1832), 5 Sim. 424 106, 110
——— *v.* Hoddinott, [1898] 2 Ch. 307 ; 67 L. J. (CH.) 540 ; 79 L. T. 201 ; 47 W. R. 84 ; 14 T. L. R. 504, C. A. 91, 92
——— *v.* Peacock (1882), 22 Ch. D. 284 ; 52 L. J. (CH.) 1 ; 47 L. T. 341 ; 31 W. R. 148, C. A. 113
Bigland *v.* Huddlestone (1789), 3 Bro. C. C. 285, n. 118, 128
Bignold *v.* Giles (1858), 28 L. J (CH.) 238 ; 7 W. R. 99 254, 257
Bigsby *v.* Dickinson (1876), 4 Ch. D. 24 ; 46 L. J. (CH.) 280 ; 35 L. T. 679 ; 25 W. R. 89, C.A. 508, 599
Bilbie *v.* Lumley (1802), 2 East, 469 22, 499
Bill *v.* Cureton (1835), 2 My. & K. 503 ; 4 L. J. (CH.) 98 17
—— *v.* Price (1687), 1 Vern. 467 71
Bills *v.* Tatham, *Re* Patrick. *See* Patrick, *Re*, Bills *v.* Tatham.
Bingham *v.* Bingham (1748), 1 Ves. Sen. 126 25
Binks *v.* Rokeby (Lord) (1818), 2 Swan. 222 99
Binns, *Re*, Lee *v.* Binns, [1896] 2 Ch. 584 ; 65 L. J. (CH.) 830 ; 75 L. T. 99 . 164
——— *v.* Nichols (1866), L. R. 2 Eq. 256 ; 35 L. J. (CH.) 635 ; 14 W. R. 727 . 142
Birch, *Re*, Roe *v.* Birch (1884), 27 Ch. D. 622 ; 54 L. J. (CH.) 119 ; 51 L. T. 777 ; 33 W. R. 72 168
——— *v.* Birch, [1902] P. 130 ; 71 L. J. (P.) 58 ; 86 L. T. 364 ; 50 W. R. 437 ; 18 T. L. R. 485, C. A. 352, 483
——— *v.* Ellames (1794), 2 Anst. 427 88
——— *v.* Ridgway (1858), 1 F. & F. 270 508, 608
——— *v.* Somerville (1852), 2 I. C. L. R. 243 592
Birchall *v.* Bullough, [1896] 1 Q. B. 325 ; 65 L. J. (Q. B.) 252 ; 74 L. T. 27 ; 44 W. R. 300 516
Bircham *v.* Springfield, *Re* Dalrymple. *See* Dalrymple, *Re*, Bircham *v.* Springfield.
Bird, *Re*, Pitman *v.* Pitman, [1892] 1 Ch. 279 ; 61 L. J. (CH.) 288 ; 66 L. T. 274 ; 40 W. R. 359 105
—— *v.* Godfrey, *Re* Chant. *See* Chant, *Re*, Bird *v.* Godfrey.
—— *v.* Lake (1863), 1 Hem. & M. 111 626
Birmingham *v.* Kirwan (1805), 2 Sch. & Lef. 444 117, 121

PAGE
Birmingham and District Land Co. and Allday, *Re*, [1893] 1 Ch. 342; 62 L. J. (CH.) 90; 67 L. T. 850; 41 W. R. 189; 3 R. 84 101
Birmingham Canal Co. *v.* Lloyd (1812), 18 Ves. 515 169
"Birnam Wood," The, [1907] P. 1; 76 L. J. (P.) 1; 96 L. T. 140; 10 Asp. M. L. C. 325; 23 T. L. R. 58, C. A. 86
Birrell *v.* Dryer (1884), 9 App. Cas. 345; 51 L. T. 130; 5 Asp. M. L. C. 267; 11 Rettie (H. L.), 41; 21 Sc. L. R. 590 481, 493
Birt *v.* Barlow (1779), 1 Doug. (K. B.) 171 504, 536, 538
—— *v.* Rothwell (1697), 1 Ld. Raym. 210 493
Bisco *v.* Banbury (Earl) (1676), 1 Cas. in Ch. 287. 87
Bishop *v.* Balkis Consolidated Co. (1890), 25 Q. B. D. 512; 59 L. J. (Q. B.) 563; 63 L. T. 601; 39 W. R. 99; 2 Meg. 292, C. A. 378, 380, 385, 411, 412
——— *v.* Church (1748), 3 Atk. 691; 2 Ves. Sen. 100 163
Biss, *Re*, Biss *v.* Biss, [1903] 2 Ch. 40; 72 L. J. (CH.) 473; 88 L. T. 403; 51 W. R. 504, C. A 155
Bittlestone *v.* Cooke (1856), 6 E. & B. 296; 25 L. J. (Q. B.) 281; 2 Jur. (N. S.) 758; 4 W. R. 493 370
Bizzey *v.* Flight (1876), 3 Ch. D. 269; 45 L. J. (CH.) 852; 24 W. R. 957 . . 117
Bjorkman *v.* Kimberley (Lord), *Re* Currie. *See* Currie, *Re*, Bjorkman *v.* Kimberley (Lord).
Black *v.* Williams, [1895] 1 Ch. 408; 64 L. J. (CH.) 137; 43 W. R. 346; 13 R. 224; 2 Mans. 86 87
—— & Co.'s Case (1872), 8 Ch. App. 254; 42 L. J. (CH.) 404; 28 L. T. 50; 21 W. R. 249 163
Blackborn *v.* Edgley (1719), 1 P. Wms. 600 18
Blackburn *v.* Mason (1893), 68 L. T. 510; 4 R. 297, C. A. 445
Blackburn and District Benefit Building Society *v.* Cunliffe, Brooks & Co. (1885), 29 Ch. D. 902; 54 L. J. (CH.) 1091; 53 L. T. 741, C. A. 371
Blackburn Building Society *v.* Cunliffe, Brooks & Co. (1882), 22 Ch. D. 61; 52 L. J. (CH.) 92; 48 L. T. 33; 31 W. R. 98, C. A. 150
Blackburn Union *v.* Brooks (1877), 7 Ch. D. 68; 47 L. J. (CH.) 156; 37 L. T. 427; 25 W. R. 57 624
Blacket *v.* Lamb (1851), 14 Beav. 482; 21 L. J. (CH.) 46; 16 Jur. 142 . 119, 124
Blackett *v.* Lowes (1814), 2 M. & S. 493 442
Blackham's Case (1709), 1 Salk. 290 355, 364
Blackie *v.* Pidding (1848), 6 C. B. 196 519
Blackstone *v.* Wilson (1857), 26 L. J. (EX.) 229 462
Blackwood *v.* London Chartered Bank of Australia (1874), L. R. 5 P. C. 92; 43 L. J. (P. C.) 25; 30 L. T. 45; 22 W. R. 419 83
Blades *v.* Lawrence (1874), L. R. 9 Q. B. 374; 43 L. J. (Q. B.) 133; 30 L. T. 378; 22 W. R. 643 497
Blagden, *Ex parte* (1815), 19 Ves. 465; 2 Rose, 249 162
Blagrave *v.* Blagrave (1847), 1 De G. & Sm. 252; 16 L. J. (CH.) 346; 11 Jur. 744...547
Blaiklock *v.* Grindle (1868), L. R. 7 Eq. 215; 38 L. J. (CH.) 247; 17 W. R. 114...120
Blair *v.* Ormond (1847), 1 De G. & Sm. 428; 11 Jur. 665 516
Blake *v.* Albion Life Assurance Co. (1878), 4 C. P. D. 94; 48 L. J. (C. P.) 169; 40 L. T. 211; 27 W. R. 321; 14 Cox, C. C. 246 452, 453
—— *v.* Bunbury (1792), 1 Ves. 514; 4 Bro. C. C. 21 117, 121, 122
—— *v.* Foster (1813), 2 Ball & B. 387 94
—— *v.* Gale (1885), 31 Ch. D. 196; 55 L. J. (CH.) 319; 53 L. T. 689; 34 W. R. 177 172
—— *v.* —— (1886), 32 Ch. D. 571; 55 L. J. (CH.) 559; 55 L. T. 234; 34 W. R. 555, C. A. 173
—— *v.* Johnson (1700), Prec. Ch. 142 90
—— *v.* O'Kelly (1874), 9 I. R. Eq. 54 356
—— *v.* Pilfold (1832), 1 Mood. & R. 198 573
Blakemore, *Re* (1845), 14 L. J. (CH.) 336 508
——— *v.* Glamorganshire Canal Co. (1835), 2 Cr. M. & R. 133; 1 Gale, 78; 5 Tyr. 603 346
Blaker *v.* Tillstone, [1894] 1 Q. B. 345; 63 L. J. (M. C.) 72; 70 L. T. 31; 58 J. P. 184; 42 W. R. 253; 10 R. 94 449
Blamey *v.* Blamey, [1902] W. N. 138; 37 L. J. 364; 113 L. T. Jo. 262 . . 625
Blanchet *v.* Powell's Llantivit Collieries Co. (1874), L. R. 9 Exch. 74; 43 L. J. (EX.) 50; 30 L. T. 28; 22 W. R. 490 387
Blandford *v.* De Tastet (1813), 5 Taunt. 260; 1 Marsh. 42 579, 589
Blandy *v.* Widmore (1716), 1 P. Wms. 324 141
Blandy-Jenkins *v.* Dunraven (Earl) (1898), 62 J. P. 661 528

PAGE
Blandy-Jenkins *v.* Dunraven (Earl), [1899] 2 Ch. 121; 68 L. J. (CH.) 589; 81 L. T. 209, C. A. 442, 460, 515
Blatch *v.* Wilder (1738), West *temp.* Hard. 322 34
Blaydes *v.* Calvert (1820), 2 Jac. & W. 211 60
Bleckley, *Re*, *Re* Exhall Coal Co., Ltd. *See* Exhall Coal Co., Ltd., *Re*, *Re* Bleckley.
Blenkarn *v.* Longstaffe, *Re* Longstaffe. *See* Longstaffe, *Re*, Blenkarn *v.* Longstaffe.
Blewett *v.* Millett (1774), 7 Bro. Parl. Cas. 367 155
——— *v.* Tregonning (1835), 5 Nev. & M. (K. B.) 308 599
Blewitt *v.* Tritton, [1892] 2 Q. B. 327; 61 L. J. (Q. B.) 773; 67 L. T. 72; 41 W. R. 36, C. A. 515
Bliss *v.* Putnam (1843), 7 Beav. 40 257
Blockley, *Re*, Blockley *v.* Blockley (1885), 29 Ch. D. 250; 54 L. J. (CH.) 722; 33 W. R. 777 130
Blogg *v.* Johnson (1867), 2 Ch. App. 225; 36 L. J. (CH.) 859; 16 L. T. 306; 15 W. R. 626 158
Bloomenthal *v.* Ford, [1897] A. C. 156; 66 L. J. (CH.) 253; 76 L. T. 205; 45 W. R. 449; 4 Mans. 156 383, 388, 410, 411
Bloomer *v.* Spittle (1872), L. R. 13 Eq. 427; 41 L. J. (CH.) 369; 26 L. T. 272; 20 W. R. 435 25
Blore *v.* Sutton (1817), 3 Mer. 237 67
Blount *v.* Layard, [1891] 2 Ch. 681, n. 541
Bloye's Trust, *Re* (1849), 1 Mac. & G. 488; 2 H. & Tw. 140; 19 L. J. (CH.) 89; 14 Jur. 49 157
Blundell, *Re*, Blundell *v.* Blundell (1890), 44 Ch. D. 1; 59 L. J. (CH.) 269; 62 L. T. 620; 38 W. R. 707, C. A. . . . 150
——— *Re*, ——— *v.* ———, [1906] 2 Ch. 222; 75 L. J. (CH.) 561; 94 L. T. 818; 22 T. L. R. 570 135
——— *v.* Brettargh (1811), 17 Ves. 232 27
Blunt *v.* Lock (1856), 26 L. J. (CH.) 148; 3 Jur. (N. S.) 195, C. A. . . . 128, 486
Boaler *v.* Power, [1910] 2 K. B. 229; 79 L. J. (K. B.) 486; 102 L. T. 450; 26 T. L. R. 358; 54 Sol. Jo. 360, C. A. 352
Board *v.* Board (1873), L. R. 9 Q. B. 48; 43 L. J. (Q. B.) 4; 29 L. T. 459; 22 W. R. 206 344, 374
Board of Trade, *Ex parte*, *Re* Betts, *See* Betts, *Re*, *Ex parte* Board of Trade.
——— *v.* Sailing Ship "Glenpark," Ltd., [1903] 2 K. B. 324; [1904] 1 K. B. 682; 73 L. J. (K. B.) 315; 90 L. T. 360; 52 W. R. 646; 20 T. L. R. 321; 9 Com. Cas. 193; 9 Asp. M. L. C. 550, C. A. 477
Boazman *v.* Johnston (1830), 3 Sim. 377 143
Bodger *v.* Arch (1854), 10 Exch. 333; 2 C. L. R. 1491; 24 L. J. (EX.) 19 . . 317
Boileau *v.* Rutlin (1848), 2 Exch. 665; 12 Jur. 899 327, 357, 458, 543
Bolckow *v.* Seymour (1864), 17 C. B. (N. S.) 107 430
Bold *v.* Hutchinson (1855), 5 De G. M. & G. 558; 25 L. J. (CH.) 598; 2 Jur. (N. S.) 97; 4 W. R. 3 25
Boldron *v.* Widdows (1824), 1 C. & P. 65 440
Boles and British Land Co.'s Contract, *Re*, [1902] 1 Ch. 244; 71 L. J. (CH.) 130; 85 L. T. 607; 50 W. R. 185 157
Bollard *v.* Spring (1887), 51 J. P. 501 356
Bolton *v.* Bolton (1876), 2 Ch. D. 217; 34 L. T. 123; 24 W. R. 426 . . . 616
——— *v.* Gladstone (1804), 5 East, 155; affirmed (1809), 2 Taunt. 85 . . 341
——— *v.* Powell (1852), 2 De G. M. & G. 1; 14 Beav. 275; 16 Jur. 24, C. A. . 31
——— (Duke) *v.* Williams (1793), 4 Bro. C. C. 297; 2 Ves. 138. 58
——— (Lord) *v.* Tomlin (1836), 5 Ad. & El. 856; 1 Nev. & P. (K. B.) 247; 2 Har. & W. 369; 6 L. J. (K. B.) 45 595
Bolton Estates Act, 1863, *Re*, [1904] 2 Ch. 289; 73 L. J. (CH.) 688; 91 L. T. 259 209, 220, 230
Bonaparte *v.* Bonaparte, [1892] P. 402; 62 L. J. (P.) 1; 67 L. T. 531; 1 R. 490 338, 339
Bond, *Re*, *Ex parte* Bacon (1881) 17 Ch. D. 447; 44 L. T. 834; 29 W. R. 574, C. A. 365
——— *v.* Barrow Hæmatite Steel Co., [1902] 1 Ch. 353; 71 L. J. (CH.) 246; 86 L. T. 10; 50 W. R. 295; 18 T. L. R. 249; 9 Mans. 69 . . . 481
——— *v.* Hopkins (1802), 1 Sch. & Lef. 413 48, 175
Bonelli, *In the Goods of* (1875), 1 P. D. 69; 45 L. J. (P.) 42; 34 L. T. 32; 24 W. R. 255 488
Bonfield *v.* Smith (1843), 2 Mood. & R. 519. 607
——— *v.* ——— (1844), 12 M. & W. 405; 13 L. J. (EX.) 105 437

PAGE
Bonnard *v.* Perryman, [1891] 2 Ch. 269; 60 L. J. (CH.) 617; 65 L. T. 506; 39 W. R. 435, C. A. 626
Bonner *v.* Bonner (1807), 13 Ves. 379 145
——— *v.* Wilkinson (1822), 1 Dow. & Ry. (K. B.) 328; 5 B. & Ald. 682 . . 366
Bonney *v.* Ridgard (1784), 1 Cox, Eq. Cas. 145 171
Booker *v.* Allen (1831), 2 Russ. & M. 270; 9 L. J. (O. S.) (CH.) 130 . . 131, 136
Boosey *v.* Davidson (1849), 13 Q. B. 257; 18 L. J. (Q. B.) 174; 13 Jur. 678 . 509
Booth, *Re*, Booth *v.* Robinson, [1906] 2 Ch. 321; 75 L. J. (CH.) 610; 95 L. T. 524 125
——— *v.* Alcock (1873), 8 Ch. App. 663; 42 L. J. (CH.) 557; 29 L. T. 231; 21 W. R. 743 374
——— *v.* Turle (1873), L. R. 16 Eq. 182; 21 W. R. 721 75
Bootle *v.* Blundell (1815), 19 Ves. 494; 1 Mer. 193; Coop. G. 136 . . 605, 608
Bor *v.* Bor (1756), 3 Bro. Parl. Cas. 167 117, 137
Borell *v.* Dann (1843), 2 Hare, 440 17
Borough *v.* Whichcote (1732), 3 Bro. Parl. Cas. 595 343, 344
Borrowes *v.* Delaney (1889), 24 L. R. Ir. 503 63
Bostock & Co., Ltd. *v.* Nicholson & Co., Ltd., [1904] 1 K. B. 725; 73 L. J. (K. B.) 524; 91 L. T. 629; 53 W. R. 155; 20 T. L. R. 342; 9 Com. Cas. 200...451
Bosvile *v.* A.-G. (1887), 12 P. D. 177; 56 L. J. (P.) 97; 57 L. T. 88; 36 W. R. 79 495, 504
Boswell *v.* Coaks (1884), 27 Ch. D. 424; 51 L. T. 242 169
——— *v.* ——— (No. 2) (1894), 86 L. T. 365, n. 334, 351, 352
——— *v.* Smith (1833), 6 C. & P. 60 562
Bottrell *v.* Summers (1828), 2 Y. & J. 407 371
Bouchier *v.* Taylor (1776), 4 Bro. Parl. Cas. 708 339
Boughton *v.* Boughton (1750), 2 Ves. Sen. 12 120, 128
Bourke *v.* Davis (1889), 44 Ch. D. 110; 62 L. T. 34; 38 W. R. 167 . . . 628
——— *v.* Warren (1826), 2 C. & P. 307 607
Bourne, *Re*, Martin *v.* Martin, [1893] 1 Ch. 188; 62 L. J. (CH.) 69; 67 L. T. 586; 41 W. R. 70; 3 R. 52 219, 316
——— *v.* Bourne (1842), 2 Hare, 35; 11 L. J. (CH.) 416; 6 Jur. 775 . . 112
Bourne's Trade-marks, *Re*, Bourne *v.* Swan and Edgar, Ltd., [1903] 1 Ch. 211; 72 L. J. (CH.) 168; 87 L. T. 589; 51 W. R. 213; 19 T. L. R. 59; 20 R. P. C. 105 509
Boursot *v.* Savage (1866), L. R. 2 Eq. 134; 35 L. J. (CH.) 627; 14 L. T. 299; 14 W. R. 565 84, 85
Bowden, *Re* (1904), 21 T. L. R. 13 500
——— *v.* Beauchamp (1740), 2 Atk. 82 327, 342
——— *v.* Henderson (1854), 2 Sm. & G. 360 502
Bowerman, *Re*, Porter *v.* Bowerman, [1908] 2 Ch. 340; 77 L. J. (CH.) 594; 99 L. T. 7 223
Bowes, *Re*, Strathmore *v.* Vane, [1907] W. N. 198 254
——— *v.* Foster (1858), 2 H. & N. 779; 27 L. J. (EX.) 262; 4 Jur. (N. S.) 95; 6 W. R. 257 370, 379, 383, 562
——— *v.* Shand (1877), 2 App. Cas. 455; 46 L. J. (Q. B.) 561; 36 L. T. 857; 25 W. R. 730 430, 481
——— *v.* Shrewsbury (Earl) (1758), 5 Bro. Parl. Cas. 144 116
Bowker *v.* Williamson (1889), 5 T. L. R. 382 515
Bowles *v.* Johnson (1748), 1 Wm. Bl. 36 578, 583
——— *v.* Langworthy (1793), 5 Term Rep. 366 606
Bowling and Welby's Contract, *Re*, [1895] 1 Ch. 663; 64 L. J. (CH.) 427; 72 L. T. 411; 43 W. R. 417, C. A. 329
Bowman *v.* Hodgson (1867), L. R. 1 P. & D. 362; 36 L. J. (P. M.) 124; 16 L. T. 392 511, 606
——— *v.* Manzelman (1809), 2 Camp. 315 522
——— *v.* Taylor (1834), 2 Ad. & El. 278; 4 Nev. & M. (K. B.) 264; 4 L. J. (K. B.) 58 366, 367, 413
Bowra *v.* Rhodes (1862), 8 Jur. (N. S.) 1050; 10 W. R. 747 255, 257
Bowser *v.* Colby (1841), 1 Hare, 109; 11 L. J. (CH.) 132; 5 Jur. 1106 . . 153
Box *v.* Barrett (1866), L. R. 3 Eq. 244; 15 W. R. 217 122
Boxer, *Re*, Morris *v.* Woore, [1910] 2 Ch. 69; 79 L. J. (CH.) 492; 103 L. T. 126 219
Boyd *v.* Belton (1844), 1 Jo. & Lat. 730 168
——— *v.* Boyd (1867), L. R. 4 Eq. 305; 36 L. J. (CH.) 877; 16 L. T. 600; 15 W. R. 1071 130
——— *v.* Hind (1855), 1 H. & N. 938; 26 L. J. (EX.) 164; 3 Jur. (N. S.) 566; 5 W. R. 361 567

PAGE
Boyes, *Re*, Boyes *v.* Carritt (1884), 26 Ch. D. 531 ; 53 L. J. (CH.) 654 ; 50 L. T. 581 : 32 W. R. 630 567
Boyle *v.* Wiseman (1855), 10 Exch. 647 ; 3 C. L. R. 482 ; 24 L. J. (EX.) 160 ; 1 Jur. (N. S.) 115 ; 3 W. R. 206 520, 575
—— *v.* ———— (1855), 11 Exch. 360 ; 3 C. L. R. 1071 ; 24 L. J. (EX.) 284 ; 1 Jur. (N. S.) 894 ; 3 W. R. 577 428, 429
Boynton *v.* Boynton (1785), 1 Bro. C. C. 445 124
———— *v.* Parkhurst (1784), 1 Bro. C. C. 576 ; 1 Cox, Eq. Cas. 106 . . . 145
Boys *v.* Ford (1819), 4 Madd. 40 32
Boyse, *Re*, Crofton *v.* Crofton (1882), 20 Ch. D. 760 ; 51 L. J. (CH.) 660 ; 46 L. T. 522 ; 30 W. R. 812. 612, 614
Brace *v.* Marlborough (Duchess) (1728), 2 P. Wms. 491 76, 79, 83
Bracebridge *v.* Buckley (1816), 2 Price, 200 153
Bracegirdle *v.* Bailey (1859), 1 F. & F. 536 601
Bradbrook, *Re*, *Ex parte* Hawkins (1889), 23 Q. B. D. 226 ; 58 L. J. (Q. B.) 442 ; 61 L. T. 584 ; 37 W. R. 700 ; 6 Morr. 188, C. A. 611
Bradburn *v.* Foley (1878), 3 C. P. D. 129 ; 47 L. J. (Q. B.) 331 ; 38 L. T. 421 ; 26 W. R. 423. 432
Bradford Corporation *v.* Pickles, [1895] A. C. 587 ; 64 L. J. (CH.) 759 ; 73 L. T. 353 ; 60 J. P. 3 ; 44 W. R. 190 ; 11 R. 286 449
Bradish *v.* Gee (1754), Amb. 229 ; 1 Keny. 73 115
Bradlaugh *v.* Gossett (1884), 12 Q. B. D. 271 ; 53 L. J. (Q. B.) 209 ; 53 L. T. 620 ; 32 W. R. 552 485
Bradley *v.* Arthur (1825), 4 B. & C. 292 ; 6 Dow. & Ry. (K. B.) 413 485
———— *v.* Carritt, [1903] A. C. 253 ; 72 L. J. (K. B.) 471 ; 88 L. T. 633 ; 51 W. R. 636 ; 19 T. L. R. 466 92
—— *v.* Crackenthorpe (1752), 1 Dick. 182 547
———— *v.* James (1853), 13 C. B. 822 ; 22 L. J. (C. P.) 193 ; 1 C. L. R. 494 ; 1 W. R. 388 561
———— *v.* Ricardo (1831), 8 Bing 57 ; 1 Moo. & S. 133 601
———— *v.* Riches (1878), 9 Ch. D. 189 ; 47 L. J. (CH.) 811 ; 38 L. T. 810 ; 26 W. R. 810 86
Bradshaw, *Re*, Bradshaw *v.* Bradshaw, [1902] 1 Ch. 436 ; 71 L. J. (CH.) 230 ; 86 L. T. 253 119
———— *v.* Bennett (1831), 1 Mood. & R. 143 ; 5 C. & P. 48 606
———— *v.* Huish, *Re* Huish. *See* Huish, *Re*, Bradshaw *v.* Huish.
———— *v.* Murphy (1836), 7 C. & P. 612 576
———— *v.* Salter (1858), 26 Beav. 161 ; 28 L. J. (CH.) 426 ; 5 Jur. (N. S.) 831 . 173
———— *v.* Widdrington, [1902] 2 Ch. 430 ; 71 L. J. (CH.) 627 ; 86 L. T. 726 ; 50 W. R. 561, C. A. 465
Brailey *v.* Rhodesia Consolidated, Ltd., [1910] 2 Ch. 95 ; 54 Sol. Jo. 475 . 397, 488
Brain *v.* Harris (1855), 10 Exch. 908 ; 24 L. J. (EX.) 177 564
—— *v.* Preece (1843), 11 M. & W. 773 465
Bramble, *Ex parte*, *Re* Toleman and England. *See* Toleman and England, *Re*, *Ex parte* Bramble.
Brampton and Longtown Rail. Co., *Re* (1871), L. R. 11 Eq. 428 ; 40 L. J. (CH.) 234 ; 24 L. T. 17 599
Brandlyn *v.* Ord (1738), 1 Atk. 571 330, 356
Brandon *v.* Barlow (1865), 13 L. T. 6 518
———— *v.* McHenry, [1891] 1 Q. B. 538 ; 60 L. J. (Q. B.) 448 ; 39 W. R. 372, C. A. 348
Brandt's (William) Sons & Co. *v.* Dunlop Rubber Co., [1905] A. C. 454 ; 74 L. J. (K. B.) 898 ; 93 L. T. 495 ; 21 T. L. R. 710 ; 11 Com. Cas. 1 . . . 103
Brassington *v.* Brassington (1823), 1 Sim. & St. 455 581
Brasyer *v.* Maclean (1875), L. R. 6 P. C. 398 ; 44 L. J. (P. C.) 79 ; 33 L. T. 1 . 360
Braun *v.* Ford, [1896] A. C. 44 ; 65 L. J. (Q. B.) 213 ; 73 L. T. 609 . . . 158
—— *v.* Mollett (1855), 16 C. B. 514 613
Bray *v.* Tofield, *Re* Greaves. *See* Greaves, *Re*, Bray *v.* Tofield.
Braybroke (Lord) *v.* A.-G. (1861), 9 H. L. Cas. 150 ; 31 L. J. (EX.) 177 ; 4 L. T. 218 ; 7 Jur. (N. S.) 741 ; 9 W. R. 601 . 198, 262, 266, 267, 268, 270, 285, 291
———— *v.* Inskip (1803), 8 Ves. 417 368
Braythwayte *v.* Hitchcock (1842), 10 M. & W. 494 ; 2 Dowl. (N. S.) 444 ; 12 L. J. (EX.) 38 ; 6 Jur. 976 515, 516
Brazier *v.* Jones (1828), 8 B. & C. 124 ; 2 Mood. & R. 88 552
Breadalbane (Earl) *v.* Lord Advocate (1870), 8 Macph. (Ct. of Sess.) 835 ; 42 Sc. Jur. 513 271
Breeze *v.* Hawker (1844), 14 Sim. 350 541

PAGE
Bremer *v.* Freeman (1857), 10 Moo. P. C. C. 306 489
Bremner, *Re, Ex parte* Harper (1875), 10 Ch. App. 379 ; 44 L. J. (BCY.) 57 ; 32 L. T. 317 ; 23 W. R. 433 329
Brent's Case (1577), 2 Leon. 14 89
Breslauer *v.* Barwick (1876), 36 L. T. 52 ; 24 W. R. 901 62
Breton *v.* Cope (1791), Peake, 43 458, 511, 605
Breton's Estate, *Re*, Breton *v.* Woollven (1881), 17 Ch. D. 416 ; 50 L. J. (CH.) 369 ; 44 L. T. 337 ; 29 W. R. 777 98
Brett *v.* Beales (1830), 10 B. & C. 508 ; 8 L. J. (O. S.) (K. B.) 141 . . 469, 525
——— *v.* ——— (1829), Mood. & M. 416 505, 545
——— *v.* Clowser (1880), 5 C. P. D. 376 378
——— *v.* Rigden (1568), 1 Plowd. 343 499
Brew *v.* Harem (1874), 9 I. R. C. L. 29 545
Brewster *v.* Sewell (1820), 3 B. & Ald. 296 421, 519
Briant, *Re*, Poulter *v.* Shackel (1888), 39 Ch. D. 471 ; 57 L. J. (CH.) 953 ; 59 L. T. 215 ; 36 W. R. 825 163
Brice *v.* Carroll, *Re* Carroll. *See* Carroll, *Re*, Brice *v.* Carroll.
——— *v.* Stokes (1805), 11 Ves. 319 172
Brickell *v.* Hulse (Bart.) (1837), 7 Ad. & El. 454 ; 2 Nev. & P. (Q. B.) 426 ; 7 L. J. (Q. B.) 18 544
Bridge *v.* Bridge (1852), 16 Beav. 315 ; 22 L. J. (CH.) 189 ; 16 Jur. 1031 ; 1 W. R. 4 97
——— *v.* Brown (1843), 2 Y. & C. Ch. Cas. 181 210
Bridgeman *v.* Green (1757), Wilm. 58 14, 18
Bridgman *v.* Gill (1857), 24 Beav. 302 156
——————— *v.* Green (1755), 2 Ves. Sen. 627 16
——————— *v.* Jennings (1699), 1 Ld. Raym. 734 564
Bridgwater's (Lord) Case (undated), cited Skin. 15 479
——————— Settlement, *Re*, Partridge *v.* Ward, [1910] W. N. 188 . . 104, 374
Briggs, *Ex parte*, *Re* Oriental Steam Navigation Co. *See* Oriental Steam Navigation Co., *Re*, *Ex parte* Briggs.
——— *v.* Chamberlain (1853), 11 Hare, 69 ; 23 L. J. (CH.) 635 ; 18 Jur. 56 . 114
——— *v.* Jones (1870), L. R. 10 Eq. 92 ; 22 L. T. 212 394
——— *v.* Wilson (1854), 5 De G. M. & G. 12 ; 2 Eq. Rep. 153 464
Bright *v.* Legerton (1861), 2 De G. F. & J. 606 ; 30 L. J. (CH.) 338 ; 3 L. T. 713 ; 7 Jur. (N. S.) 559 ; 9 W. R. 239 171, 444
Bringloe *v.* Goodson (1839), 5 Bing. (N. C.) 738 ; 8 L. J. (C. P.) 116 . . . 606
Brinkley *v.* Hann (1843), Drury *temp.* Sug. 175 19
Brinsmead *v.* Harrison (1871), L. R. 6 C. P. 584 ; 40 L. J. (C. P.) 281 ; 24 L. T. 798 ; 19 W. R. 956 ; affirmed, L. R. 7 C. P. 547 ; 27 L. T. 99 ; 20 W. R. 784 330, 335
Brisco *v.* Baillie Hamilton, [1902] P. 234 ; 71 L. J. (P.), 121 ; 87 L. T. 746 . 559
——— *v.* Lomax (1838), 8 Ad. & El. 198 ; 3 Nev. & P. (Q. B.) 308 ; 1 Will. Woll. & H. 235 ; 7 L. J. (Q. B.) 148 ; 2 Jur. 682 528, 544
Briscoe *v.* Stephens (1824), 2 Bing. 213 ; 9 Moore (C. P.), 413 ; 3 L. J. (O. S.) (C. P.) 257 354
Bristow *v.* Cormican (1878), 3 App. Cas. 641 442, 452
——————— *v.* Sequeville (1850), 5 Exch. 275 ; 19 L. J. (EX.) 289 ; 14 Jur. 674 . 488
——————— *v.* Warde (1794), 2 Ves. 336 123
Bristowe *v.* Fairclough (1840), 1 Man. & G. 143 ; 1 Scott (N. R.), 161 ; 9 L. J. (C. P.) 245 337
——————— *v.* Pegge (1785) 1 Term Rep. 758, n. 373
Britain *v.* Rossiter (1879), 11 Q. B. D. 123 ; 48 L. J. (Q. B.) 362 ; 40 L. T. 240 ; 27 W. R. 482, C. A. 65
British Empire Shipping Co. *v.* Somes (1857), 3 K. & J. 433 ; 26 L. J. (CH.) 759 ; 3 Jur. (N. S.) 883 ; 5 W. R. 813 11
British Linen Co. *v.* Cowan (1906), 8 F. (Ct. of Sess.) 704 ; 43 Sc. L. R. 512 ; 13 Scots Law Times, 941 379
British Mutual Banking Co. *v.* Charnwood Forest Railway (1887), 18 Q. B. D. 714 ; 56 L. J. (Q. B.) 449 ; 57 L. T. 833 ; 52 J. P. 150 ; 35 W. R. 590, C. A. ...371, 380
British Nation Life Assurance Association (Liquidators), *Ex parte*, *Re* European Society Arbitration Acts. *See* European Society Arbitration Acts, *Re*, *Ex parte* British Nation Life Assurance Association (Liquidators).
British South Africa Co. *v.* Companhia de Moçambique, [1893] A. C. 602 ; 63 L. J. (Q. B.) 70 ; 69 L. T. 604 ; 6 R. 1 66
——————————— *v.* De Beers Consolidated Mines, Ltd., [1910] 1 Ch. 354 ; 102 L. T. 95 ; 26 T. L. R. 285 ; 54 Sol. Jo. 289, affirmed (1910), 54 Sol. Jo. 679, C. A. 65, 92

PAGE
Brittain *v.* Kinnaird (1819), 1 Brod. & Bing. 432; 4 Moore (C. P.), 50; Gow, 164 . 542
Britten (D.), *Re*, *Ex parte* Britten (J.) (1840), 1 Mont. D. & De G. 278 . . 586
Brittlebank *v.* Smith (1884), 50 L. T. 491 628
Broadbent *v.* Barrow, *Re* Ovey. *See* Ovey, *Re*, Broadbent *v.* Barrow.
——— *v.* Imperial Gas Co. (1857), 7 De G. M. & G. 436; 26 L. J. (CH.) 276; 3 Jur. (N. S.) 221; 5 W. R. 272 49
Broadwood's Settled Estates, *Re* (1875), 1 Ch. D. 438; 45 L. J. (CH.) 168; 24 W. R. 108 114
Brocas *v.* Lloyd (1856), 23 Beav. 129; 26 L. J. (CH.) 758; 2 Jur. (N. S.) 555; 4 W. R. 540. 579, 583
Brocklebank *v.* Thompson, [1903] 2 Ch. 344; 72 L. J. (CH.) 626; 89 L. T. 209; 19 T. L. R. 285 468
Brocklesby *v.* Temperance Building Society, [1895] A. C. 173; 64 L. J. (CH.) 433; 72 L. T. 477; 59 J. P. 676; 43 W. R. 606; 11 R. 159 . 81, 379, 392, 394
Broder *v.* Saillard (1876), 2 Ch. D. 692; 45 L. J. (CH.) 414; 24 W. R. 456 . 571
Broderick, *Ex parte*, *Re* Beetham. *See* Beetham, *Re*, *Ex parte* Broderick.
Brodie *v.* Barry (1813), 2 Ves. & B. 127 120
——— *v.* Brodie (1861), 2 Sw. & Tr. 259; 30 L. J. (P. M. & A.) 185; 4 L. T. 307; 9 W. R. 815 449
Bromfield, *Ex parte* (1792), 1 Ves. 453 112
Bromley *v.* Hamond (1679), 2 Cas. in Ch. 23 71
——— *v.* Holland (1802), 7 Ves. 3 26, 53
——— *v.* Smith (1859), 26 Beav. 644; 29 L. J. (CH.) 18; 5 Jur. (N. S.) 833; 7 W. R. 557 21, 22
——— *v.* Wallace (1803), 4 Esp. 237 455
Brook *v.* Biggs (1836), 2 Bing. (N. C.) 572; 5 L. J. (C. P.) 143; 2 Scott, 803 . 405
——— *v.* Hook (1871), L. R. 6. Exch. 89; 40 L. J. (EX.) 50; 24 L. T. 34; 19 W. R. 508 430
Brooke *v.* Brooke (1881), 17 Ch. D. 833; 50 L. J. (CH.) 528; 44 L. T. 512; 30 W. R. 45 497
——— *v.* Garrod (1857), 2 De G. & J. 62; 27 L. J. (CH.) 226; 6 W. R. 121 153
——— *v.* Haymes (1868), L. R. 6 Eq. 25 254, 370
——— *v.* Mostyn (Lord) (1864), 2 De G. J. & Sm. 373, C. A. 24
——— *v.* Wigg (1878), 8 Ch. D. 510; 47 L. J. (CH.) 749; 38 L. T. 732; 26 W. R. 729, C. A. 620
Brooker *v.* Scott (1843), 11 M. & W. 67 432
Brookes *v.* Tichborne (1850), 5 Exch. 929; 14 Jur. 1122 509
Brooking *v.* Maudslay, Son and Field (1888), 38 Ch. D. 636; 57 L. J. (CH.) 1001; 58 L. T. 852; 36 W. R. 664; 6 Asp. M. L. C. 296 45, 46, 52, 54, 63
Brooks *v.* Muckleston, [1909] 2 Ch. 519; 79 L. J. (CH.) 12; 101 L. T. 343 . 172
——— *v.* Reynolds (1782), 1 Bro. C. C. 183 33
Brooksbank, *Re*, Beauclerk *v.* James (1886), 34 Ch. D. 160; 56 L. J. (CH.) 82; 55 L. T. 593; 35 W. R. 101 117, 119
——— *v.* Smith (1836), 2 Y. & C. (EX.) 58; 6 L. J. (EX.) (EQ.) 34 . 170, 175
Broome *v.* Gosden (1845), 1 C. B. 728 607
——— *v.* Monck (1805), 10 Ves. 597 110
Brothwood *v.* Keeling, *Re* Salt. *See* Salt, *Re*, Brothwood *v.* Keeling.
Brough *v.* Parkings (1704), 2 Ld. Raym. 992; 6 Mod. Rep. 80; 3 Salk. 69 . 492
Broughton *v.* Randall (1596), Cro. Eliz. 502; Moore (K. B.), 528; Noy, 64 . 503
Brounker (Lord) *v.* Atkyns (1681), Skin. 14; 1 Vent. 149; T. Jo. 176 . . 479
Brown, *Ex parte*, *Re* West of England Bank. *See* West of England Bank, *Re*, *Ex parte* Brown.
———, *Re*, *Ex parte* Plitt (1889), 60 L. T. 397; 37 W. R. 463; 6 Morr. 81 . 159
——— *v.* A.-G. (1898), 79 L. T. 572; 15 T. L. R. 109, H. L. . . . 195, 278
——— *v.* Bigg (1802), 7 Ves. 279 105
——— *v.* Booth (1690), 1 Eq. Cas. Abr. 163; 2 Vern. 184 348
——— *v.* Brown (1864), 33 Beav. 399; 10 L. T. 83; 10 Jur. (N. S.) 461 . . . 115
——— *v.* ——— (1866), L. R. 2 Eq. 481; 14 L. T. 694 118, 124, 128
——— *v.* ——— (1874), L. R. 3 P. & D. 198; 43 L. J. (P. & M.) 33; 22 W. R. 759; 30 L. T. 767 576
——— *v.* Byrne (1854), 3 E. & B. 703; 23 L. J. (Q. B.) 313; 2 C. L. R. 1599; 18 Jur. 700; 2 W. R. 471 445
——— *v.* Dean (1833), 5 B. & Ad. 848 544
——— *v.* Dibbs (1877), 37 L. T. 171; 25 W. R. 776 71
——— *v.* Dudbridge (1788), 2 Bro. C. C. 321 52
——— *v.* Eastern and Midlands Rail. Co. (1889), 22 Q. B. D. 391; 58 L. J. (Q. B.) 212, C. A. 451, 452

PAGE
Brown *v.* Elton (1733), 3 P. Wms. 202 31, 32
——— *v.* Hawkes, [1891] 2 Q. B. 718; 61 L. J. (Q. B.) 151; 65 L. T. 108; 55 J. P. 823, C. A. 431
——— *v.* H. M. Adv.-Gen. (1852), 1 Macq. 79; 1 Stu. M. & P. 1024; 24 Sc. Jur. 565 236
——— *v.* Howard (1791), 1 Eq. Cas. Abr. 163 348
——— *v.* Kennedy (1864), 4 De G. J. & Sm. 217, C. A. 19
——— *v.* Litton (1711), 1 P. Wms. 140; 10 Mod. Rep. 20 158
——— *v.* Newell (1837), 2 My. & Cr. 558; 6 L. J. (CH.) 348; 1 Jur. 422 . . 48
——— *v.* Perkins, *Re* Perkins. See Perkins, *Re*, Brown *v.* Perkins.
——— *v.* Powell Coal Co. (1875), L. R. 10 C. P. 562; 44 L. J. (C. P.) 289; 32 L. T. 621; 23 W. R. 549 387
——— *v.* Raindle (1796), 3 Ves. 256 70
——— *v.* Ryan, [1901] 2 I. R. 653. 91
——— *v.* Smith (1875), 46 L. J. (CH.) 866 303
——— *v.* Thornton (1837), 6 Ad. & El. 185; 1 Nev. & P. (K. B.) 339; Will. Woll. & Dav. 11; 6 L. J. (K. B.) 82 420
——— *v.* Wootton (1605), Cro. Jac. 73; Yelv. 67; Moore (K. B.), 762 . . 335
——— *v.* Wren Brothers, [1895] 1 Q. B. 390; 64 L. J. (Q. B.) 119; 72 L. T. 109; 43 W. R. 351; 15 R. 239 440, 458
Brown's Trustees *v.* Gow (1902), 40 Sc. L. R. 62; 5 F. (Ct. of Sess.) 127; 10 Scots Law Times, 379 241
Brown and Gregory, Ltd., *Re*, Shephard *v.* Brown and Gregory, Ltd., Andrews *v.* Brown and Gregory, Ltd., [1904] 1 Ch. 627; 73 L. J. (CH.) 430; 52 W. R. 412; 11 Mans. 218 104
Brown, Shipley & Co. *v.* Kough (1885), 29 Ch. D. 848; 54 L. J. (CH.) 1024; 53 L. T. 878; 34 W. R. 2; 5 Asp. M. L. C. 433, C. A. 103
Browne *v.* Lee (1827), 6 B. & C. 689; 9 Dow. & Ry. (K. B.) 700; 5 L. J. (O. S.) (K. B.) 276 30
——— *v.* McClintock (1873), L. R. 6 H. L. 456 171
——— *v.* Moore (1816), 3 Bli. 178, n. 509
Brownlie *v.* Campbell (1880), 5 App. Cas. 925 15, 25
Brownsword *v.* Edwards (1751), 2 Ves. Sen. 243 44, 574
Bruce, *In the Goods of* (1909), 26 T. L. R. 381 503
———, *Re* (1832), 2 Cr. & J. 436; 2 Tyr. 475; 1 L. J. (EX.) 153 238
——— *Re*, Lawford *v.* Bruce, [1908] 2 Ch. 682; 78 L. J. (CH.) 56; 99 L. T. 704, C. A. 164
——— *v.* Nicolopulo (1855), 11 Exch. 129; 3 C. L. R. 775; 24 L. J. (EX.) 321; 3 W. R. 483 520
——— *v.* Ruler (1828), 2 Man. & Ry. (K. B.) 3; 6 L. J. (O. S.) (K. B.) 228 . . 376
Bruff *v.* Great Northern Rail. Co. (1858), 1 F. & F. 344 461
Bruin *v.* Knott (1842), 12 Sim. 436 486
Brune *v.* Thompson (1842), 2 Q. B. 789; 2 Gal. & Dav. 110; Car. & M. 34...494, 544
Brunker, *Ex parte* (1734), 3 P. Wms. 312 60
Brünner, *Re* (1887), 19 Q. B. D. 572; 4 Morr. 255; 56 L. J. (Q. B.) 606; 57 L. T. 418; 35 W. R. 719 459
Brunsden *v.* Humphrey (1884), 14 Q. B. D. 141; 53 L. J. (Q. B.) 476; 51 L. T. 529; 49 J. P. 4; 32 W. R. 944, C. A. 332, 337
Brunswick (Duke) *v.* Harmer (1850), 3 Car. & Kir. 10 483, 607
Bryan *v.* Mansion (1857), 26 L. J. (CH.) 510; 3 Jur. (N. S.) 473; 4 W. R. 483 . 253, 255, 257
Bryant *v.* Foot (1868), L. R. 3 Q. B. 497; 9 B. & S. 444; 37 L. J. (Q. B.) 217; 18 L. T. 587; 16 W. R. 808 494
Brydges *v.* Branfill (1841), 11 L. J. (CH.) 12; 6 Jur. 310; 12 Sim. 334 . . 618
——— *v.* Walford (1817), 6 M. & S. 42 360
Bryson *v.* Warwick and Birmingham Canal Co. (1853), 1 W. R. 124 618
Buccleuch (Duke) *v.* Metropolitan Board of Works (1872), L. R. 5 H. L. 418; 41 L. J. (EX.) 137; 27 L. T. 1 427, 571
Buchanan *v.* Harrison (1861), 1 John. & H. 662; 31 L. J. (CH.) 74; 8 Jur. (N. S.) 965; 10 W. R. 118 109
——— & Co. *v.* Faber (1899), 4 Com. Cas. 223 487
Bucher *v.* Jarratt (1802), 2 Bos. & P. 143 521
Buckinghamshire (Earl) *v.* Hobart (1818), 3 Swan. 186 147
Buckland *v.* Johnson (1854), 15 C. B. 145; 2 C. L. R. 704; 23 L. J. (C. P.) 204; 18 Jur. 775; 2 W. R. 565 335
Buckle *v.* Mitchell (1812), 18 Ves. 100 17, 81
Buckley *v.* Cooke (1854), 1 K. & J. 29; 24 L. J. (CH.) 24; 3 Eq. Rep. 138; 3 W. R. 33 616

PAGE
Buckton, *Re*, Buckton *v.* Buckton, [1907] 2 Ch. 406; 76 L. J. (CH.) 584; 97 L. T. 332; 23 T. L. R. 692 94
Budd *v.* Davison (1881), 29 W. R. 192 599
Budden *v.* Wilkinson, [1893] 2 Q. B. 432; 63 L. J. (Q. B.) 32; 69 L. T. 427; 41 W. R. 657; 4 R. 525, C. A. 574
Bugg, *Ex parte*, *Re* East of England Banking Co. *See* East of England Banking Co., *Re*, *Ex parte* Bugg.
Bulkeley *v.* Hope (1855), 1 K. & J. 482; 24 L. J. (CH.) 356; 3 W. R. 360 . . 148
Bullen *v.* Michel (1816), 2 Price, 399 . . . 512, 513, 514, 515, 518, 533, 538
Bulley *v.* Bulley (1874), 9 Ch. App. 739 366
Bulley's Settlement, *Re*, [1886] W. N. 80 537
Bulli Coal Mining Co. *v.* Osborne, [1899] A. C. 351; 68 L. J. (P. C.) 49; 80 L. T. 430; 47 W. R. 545; 15 T. L. R. 257 171
Bullivant *v.* A.-G. for Victoria, [1901] A. C. 196; 70 L. J. (K. B.) 645; 84 L. T. 737; 50 W. R. 1; 17 T. L. R. 457 572
Bullock *v.* Corry (1878), 3 Q. B. D. 356; 47 L. J. (Q. B.) 352; 38 L. T. 102; 26 W. R. 330 572
Bulmer *v.* Bulmer (1883), 25 Ch. D. 409; 53 L. J. (CH.) 402; 32 W. R. 380 . 306
Bunbury *v.* Bunbury (1839), 2 Beav. 173; 9 L. J. (CH.) 1 571
——— *v.* Matthews (1844), 1 Car. & Kir. 380 443
Bunn's Case. *See* Electric Telegraph Co. of Ireland, *Re*, Bunn's Case.
Bunting *v.* Lepingwell (1585), 4 Co. Rep. 29 a; Moore (K. B.), 169 . . 328, 362
Burchard *v.* Macfarlane, *Ex parte* Tindall, [1891] 2 Q. B. 241; 60 L. J. (Q. B.) 587; 65 L. T. 282; 39 W. R. 694 582
Burden, *Ex parte*, *Re* Neil. *See* Neil, *Re*, *Ex parte* Burden.
Burdett *v.* Abbot (1811), 14 East, 1; (1817) 5 Dow, 165 485
Burdick *v.* Garrick (1870), 5 Ch. App. 233; 39 L. J. (CH.) 369; 18 W. R. 387 . 156
Burgess *v.* Bennett (1872), 20 W. R. 720 597
——— *v.* Booth, [1908] 2 Ch. 648; 78 L. J. (CH.) 32; 99 L. T. 677, C. A....111, 112
——— *v.* Langley (1843), 12 L. J. (C. P.) 257; 5 Man. & G. 722; 1 Dow. & L. 21; 6 Scott (N. R.), 518 571
——— *v.* Wheate (1759), 1 Eden, 177; 1 Wm. Bl. 123 . . . 68, 73, 93, 95
Burghart *v.* Angerstein (1834), 6 C. & P. 690 537
Burgis *v.* Constantine, [1908] 2 K. B. 484; 77 L. J. (K. B.) 1045; 99 L. T. 490; 24 T. L. R. 682; 13 Com. Cas. 299, C. A. . . 368, 372, 383, 391, 394, 398
Burgoyne *v.* Godfree (1904), 22 R. P. C. 168 389
Burke *v.* Crosbie (1811), 1 Ball & B. 503 327
——— *v.* South Eastern Rail. Co. (1879), 5 C. P. D. 1; 49 L. J. (Q. B.) 107; 41 L. T. 554; 44 J. P. 283; 28 W. R. 306 448
Burkinshaw *v.* Nicolls (1878), 3 App. Cas. 1004; 48 L. J. (CH.) 179; 39 L. T. 308; 26 W. R. 819 370, 410
Burkitt *v.* Blanshard (1848), 3 Exch. 89; 18 L. J. (EX.) 34 543
Burlace *v.* Cooke (1677), Freem. (CH.) 24 77
Burnaby *v.* Baillie (1889), 42 Ch. D. 282; 58 L. J. (CH.) 842; 61 L. T. 634; 38 W. R. 125. 427, 440, 505, 520, 534
——— *v.* Equitable Reversionary Interest Society (1885), 28 Ch. D. 416; 54 L. J. (CH.) 466; 52 L. T. 350; 33 W. R. 639. 127
Burnand *v.* Rodocanachi (1882), 7 App. Cas. 335; 51 L. J. (Q. B.) 548; 47 L. T. 277; 31 W. R. 65 373
Burnett *v.* Anderson (1816), 1 Mer. 405. 57
Burnside *v.* Dayrell (1849), 3 Exch. 224; 6 Ry. & Can. Cas. 67; 19 L. J. (EX.) 46 461
Burrell *v.* Baskerfield (1849), 11 Beav. 525; 18 L. J. (CH.) 422; 13 Jur. 311 . 105, 106
——— *v.* Egremont (Earl) (1844), 7 Beav. 205; 13 L. J. (CH.) 309; 7 Jur. 587 147
Burrough *v.* Martin (1809), 2 Camp. 112 595
Burrowes *v.* Lock (1805), 10 Ves. 470 377, 397
Burrows *v.* Bedford School Board (1902), 22 T. L. R. 292 532
——— *v.* Cottrell (1830), 3 Sim. 375 241
——— *v.* Lang, [1901] 2 Ch. 502; 70 L. J. (CH.) 607; 84 L. T. 623; 49 W. R. 564; 17 T. L. R. 514 506
——— *v.* Walls (1855), 5 De G. M. & G. 233; 3 Eq. Rep. 960; 3 W. R. 327...170, 172
Bursill *v.* Tanner (1885), 16 Q. B. D. 1; 55 L. J. (Q. B.) 53; 53 L. T. 445; 34 W. R. 35, C. A. 571
Burt *v.* Walker (1821), 4 B. & Ad. 697 605
Burton *v.* Barclay (1831), 7 Bing. 745; 5 Moo. & P. 785; 9 L. J. (o. s.) (C. P.) 231...146
——— *v.* Newbery (1875), 1 Ch. D. 234; 45 L. J. (CH.) 202; 34 L. T. 15; 24 W. R. 388 117

PAGE
Burton *v.* North Staffordshire Rail. Co. (1887), 35 W. R. 536 ; 56 L. T. 601 . 618
——— *v.* Payne (1827), 2 C. & P. 520 521
——— *v.* Plummer (1834), 2 Ad. & El. 341 ; 4 Nev. & M. (K. B.) 315 ; 4 L. J. (K. B.) 53 595, 596, 597
Bushby *v.* Ellis (1853), 17 Beav. 279 365
——— *v.* Munday (1821), 5 Madd. 297 47
Butcher *v.* Kemp (1820), 5 Madd. 61 121
Bute (Marquis) *v.* James (1886), 33 Ch. D. 157 ; 55 L. J. (CH.) 658 ; 55 L. T. 133 ; 34 W. R. 754 46, 610
Butler *v.* Butler, [1894] P. 25 ; 63 L. J. (P.) 1 ; 69 L. T. 545 ; 42 W. R. 49 ; 1 R. 535, C. A. 326, 331, 545
——— *v.* Carter (1868), L. R. 5 Eq. 276 ; 37 L. J. (CH.) 270 ; 18 L. T. 11 ; 16 W. R. 388 170
——— *v.* Ford (1833), 1 Cr. & M. 662 ; 3 Tyr. 677 ; 2 L. J. (M. C.) 109 . . 443
——— *v.* Mountgarret (Viscount) (1859), 7 H. L. Cas. 633 557, 560
——— *v.* Rice, [1910] 2 Ch. 277 ; 103 L. T. 94 148
Butler's Trusts, *Re*, Hughes *v.* Anderson (1888), 38 Ch. D. 286 ; 57 L. J. (CH.) 643 ; 59 L. T. 386 ; 36 W. R. 817, C. A. 70
Butriche *v.* Broadhurst (1790), 3 Bro. C. C. 88 ; 1 Ves. 171 125, 126
Buttemere *v.* Hayes (1839), 5 M. & W. 456 333
Butterfield *v.* Financial News (1889), 5 T. L. R. 279, C. A. 612, 614
Butterfill, *Ex parte*, *Ex parte* Rashleigh, *Re* Dingle. *See* Dingle, *Re*, *Ex parte* Butterfill, *Ex parte* Rashleigh.
Buxton *v.* Cornish (1844), 12 M. & W. 426 ; 1 Dow. & L. 585 ; 13 L. J. (EX.) 91 ; 8 Jur. 46 516
——— *v.* Lister (1746), 3 Atk. 383 12, 38
——— *v.* Snee (1748), 1 Ves. Sen. 154 8
Byam *v.* Booth (1816), 2 Price, 231 551
Byde *v.* Byde (1761), 1 Cox, Eq. Cas. 44 ; 2 Eden, 18 138
Byles *v.* Cox (1896), 74 L. T. 222 511, 605
Byne, *Ex parte* (1813), 1 Ves. & B. 316 ; 1 Rose, 451 586
——— *v.* Currey (1834), 2 Cr. & M. 603 ; 4 Tyr. 479 ; 3 L. J. (EX.) 177 . . 241
——— *v.* Vivian (1800), 5 Ves. 604 53
Bynoe *v.* Bank of England, [1902] 1 K. B. 467 ; 71 L. J. (K. B.) 208 ; 86 L. T. 140 ; 50 W. R. 359 ; 18 T. L. R. 276, C. A. 326, 588
Byrn *v.* Godfrey (1798), 4 Ves. 6 165
Byrne *v.* Frere (1828), 2 Mol. 157 171, 172, 174, 327, 359, 546
Bywater, *Re*, Bywater *v.* Clarke (1881), 18 Ch. D. 17 ; 30 W. R. 94, C. A. . 554

C.

CABALLERO *v.* Henty (1874), 9 Ch. App. 447 ; 43 L. J. (CH.) 635 ; 30 L. T. 314 ; 22 W. R. 446 88
Cadle *v.* Moody (1861), 30 L. J. (EX.) 385 ; 7 Jur. (N. S.) 1249 325
Cadman *v.* Horner (1810), 18 Ves. 10 72
Cadogan *v.* Lyric Theatre, Ltd., [1894] 3 Ch. 338 ; 63 L. J. (CH.) 775 ; 71 L. T. 8 ; 7 R. 594, C. A. 56
Cahill *v.* Cahill (1883), 8 App. Cas. 420 ; 49 L. T. 605 ; 31 W. R. 861 . . 72
——— *v.* Shepherd (1806), 12 Ves. 335 615
Caine *v.* Palace Steam Shipping Co., [1907] 1 K. B. 670 ; 76 L. J. (K. B.) 292 ; 96 L. T. 410 ; 23 T. L. R. 203 ; 12 Com. Cas. 96 ; 10 Asp. M. L. C. 380 ; affirmed *sub nom.* Palace Shipping Co., Ltd. *v.* Caine, [1907] A. C. 386 ; 76 L. J. (K. B.) 1079 ; 97 L. T. 587 ; 13 Com. Cas. 51 ; 23 T. L. R. 731, C. A. 344, 363
Caird *v.* Moss (1886), 33 Ch. D. 22 ; 55 L. J. (CH.) 854 ; 5 L. T. 453 ; 35 W. R. 52 ; 5 Asp. M. L. C. 565, C. A. 22, 355, 364
Cairncross *v.* Lorimer (1860), 3 Macq. 827 ; 3 L. T. 130 ; 7 Jur. (N. S.) 149 ; 1 Pater. App. 984 324, 395
Calcott and Elvin's Contract *Re*, [1898] 2 Ch. 460 ; 67 L. J. (CH.) 553 ; 78 L. T. 826 ; 46 W. R. 673 ; 5 Mans. 208, C. A. 87
Calcraft *v.* Guest, [1898] 1 Q. B. 759 ; 67 L. J. (Q. B.) 505 ; 78 L. T. 283 ; 46 W. R. 420, C. A. 572, 582
Calham *v.* Smith, *Re* Horlock. *See* Horlock, *Re*, Calham *v.* Smith.
Call *v.* Dunning (1803), 4 East, 53 605, 606
Callicott, *Re*, [1899] P. 189 ; 63 L. J. (P.) 67 ; 80 L. T. 421 500
Callow *v.* Jenkinson (1851), 6 Exch. 666 ; 20 L. J. (EX.) 321 349
Calmady *v.* Calmady (1795), 2 Ves. 568 40

PAGE
Calmady's Case (1640), Cro. Car. 595 5
Calvert *v.* Bovill (1798), 7 Term Rep. 523 341
——— *v.* Flower (1836), 7 C. & P. 386 597, 602
——— *v.* Laxton, *Re* Jones. *See* Jones, *Re*, Calvert *v.* Laxton.
——— *v.* Sebbon (1838), 2 Keen, 672; 7 L. J. (CH.) 275; 2 Jur. 438 . . 241
Cambefort *v.* Chapman (1887), 19 Q. B. D. 229; 56 L. J. (Q. B.) 639; 57 L. T. 625; 35 W. R. 838; 51 J. P. 455 336
Cameron *v.* Lightfoot (1778), 2 Wm. Bl. 1190 544
——— *v.* Wiggins, [1901] 1 K. B. 1; 70 L. J. (K. B.) 15; 83 L. T. 428; 49 W. R. 237; 19 Cox, C. C. 580 568
Cameron's Coalbrook etc. Rail. Co., *Re* (1857), 25 Beav. 1 581
Cammell, *Ex parte*, *Re* Printing, Telegraph and Construction Co. of the Agence Havas. *See* Printing, Telegraph and Construction Co. of the Agence Havas, *Re*, *Ex parte* Cammell.
——— *v.* Sewell (1858), 3 H. & N. 617; 4 Jur. (N. S.) 978; 27 L. J. (EX.) 447; affirmed (1860), 5 H. & N. 728; 6 Jur. (N. S.) 918; 29 L. J. (EX.) 350; 2 L. T. 799; 8 W. R. 630 329
Camoys Peerage, The (1839), 6 Cl. & Fin. 789 565, 608
Campbell, *Ex parte*, *Re* Wallace. *See* Wallace, *Re*, *Ex parte* Campbell.
——— *Re*, [1902] 1 K. B. 113; 71 L. J. (K. B.) 160; 85 L. T. 708; 18 T. L. R. 86, C. A. 184, 229
——— *v.* Dalhousie (Earl) (1869), L. R. 1 Sc. & Div. 462; 22 L. T. 879; 1 Pater. App. 1704; 7 Macph. (H. L.) 101 45
——— *v.* Ingilby (1856), 21 Beav. 567 17, 118
——— *v.* Rickards (1833), 5 B. & Ad. 840; 2 Nev. & M. (K. B.) 542; 2 L. J. (K. B.) 204 481
——— *v.* Rothwell (1877), 47 L. J. (Q. B.) 144; 38 L. T. 33 544
——— *v.* Walker (1800), 5 Ves. 678 157
Cann *v.* Cann (1721), 1 P. Wms. 723 24
Cannam *v.* Farmer (1849), 3 Exch. 698 380
Cannel *v.* Buckle (1724), 2 P. Wms. 243 12
Canning *v.* Canning (1854), 23 L. J. (CH.) 879; 18 Jur. 640; 2 W. R. 661; 2 Drew. 434; 2 Eq. Rep. 1147 41
Cannon, Son and Morten (Solicitors), *Re*, *Re* Coolgardie Goldfields, Ltd. *See* Coolgardie Goldfields, Ltd., *Re*, *Re* Cannon, Son and Morten (Solicitors).
Cantello *v.* Cantello (1896), *Times*, February 1st 452
Canterbury (Archbishop) *v.* Wills (1708), 1 Salk. 315 31
Canterbury Corporation *v.* Cooper (1908), 99 L. T. 612; 6 L. G. R. 916; 72 J. P. 465; affirmed (1909), 100 L. T. 597; 73 J. P. 225; 53 Sol. Jo. 301; 7 L. G. R. 908, C. A. 327, 378, 380
Capdevielle, *Re* (1864), 2 H. & C. 985; 33 L. J. (EX.) 306; 10 Jur. (N. S.) 1155; 12 W. R. 1110 274
Cape Copper Co. *v.* Comptoir d'Escompte de Paris (1890), 38 W. R. 763, C. A. 614
Capell *v.* Winter, [1907] 2 Ch. 376; 76 L. J. (CH.) 496; 97 L. T. 207; 23 T. L. R. 618 81
Capital and Counties Bank *v.* Henty (1882), 7 App. Cas. 741; 52 L. J. (Q. B.) 232; 47 L. T. 662; 47 J. P. 214; 31 W. R. 157...431
——— *v.* Rhodes, [1903] 1 Ch. 631; 72 L. J. (CH.) 336; 88 L. T. 255; 51 W. R. 470; 19 T. L. R. 280, C. A. 147, 474
Cardiff Corporation *v.* Cardiff Waterworks Co. (1859), 4 De G. & J. 596, C. A. . 50
Carew *v.* Carew, [1891] P. 360; 61 L. J. (P.) 24; 65 L. T. 167 . . . 582, 616
Carew's Claim, Pocock's Claim, Trickett's Claim, *Re* Romford Canal Co. *See* Romford Canal Co., *Re*, Pocock's Claim, Trickett's Claim, Carew's Claim.
Carey *v.* Cuthbert (1873), 7 I. R. Eq. 542; affirmed (1875), 9 I. R. Eq. 330 . . 172
——— *v.* Pitt (1797), Peake, Add. Cas. 130 607
Carlill *v.* Carbolic Smoke Ball Co., [1892] 2 Q. B. 484; 61 L. J. (Q. B.) 696; 56 J. P. 665 516
Carling, Hespeler, and Walsh's Cases (1875), 1 Ch. D. 115; 45 L. J. (CH.) 5; 33 L. T. 645; 24 W. R. 165 411
Carlisle Corporation *v.* Wilson (1807), 13 Ves. 276 27
Carlton *v.* Bowcock (1884), 51 L. T. 659 405
Carmalt *v.* Post (1839), 8 Watts, 411 607
Carmarthen and Cardigan Rail. Co. *v.* Manchester (Pennsylvania) and Mitford Rail. Co. (1873), L. R. 8 C. P 685; 42 L. J. (C. P.) 262. 420
Carne *v.* Nicoll (1835), 1 Scott, 466; 4 L. J. (C. P.) 89; 1 Bing. (N. C.) 430 . 463
Carnegie *v.* Carnegie (1886), 17 L. R. Ir. 430, C. A. 359
Carpenter, *Re*, Carpenter *v.* Disney (1884), 51 L. T. 773 122
——— *v.* Buller (1841), 8 M. & W. 209; 10 L. J. (EX.) 393 . . 368, 372, 458

PAGE
Carr *v.* Burdiss (1835), 4 L. J. (EX.) 60 ; 1 Cr. M. & R. 443 ; 5 Tyr. 136 . . 606
—— *v.* Eastabrooke (1797). 3 Ves. 561 138
—— *v.* Ellison (1786), 2 Bro. C. C. 56 ; Dick. 796 114
—— *v.* Fracis Times & Co., [1902] A. C. 176; 71 L. J. (K. B.) 361; 50 W. R. 257 327
—— *v.* London and North Western Rail. Co. (1875), L. R. 10 C. P. 307 ; 44 L. J. (C. P.) 109 ; 31 L. T. 785 ; 23 W. R. 747 . 324, 376, 382, 384, 387, 400
—— *v.* Mostyn (1850), 5 Exch. 69 ; 19 L. J. (EX.) 249 531
—— *v.* Roberts (1831), 2 B. & Ad. 905 ; 1 L. J. (K. B.) 33 305, 311
Carrington *v.* Carnock (1829), 2 Sim. 567 547
Carrett *v.* Real and Personal Advance Co. (1889), 42 Ch. D. 263 ; 58 L. J. (CH.) 688 ; 61 L. T. 163 ; 37 W. R. 677 81, 372
Carrodus *v.* Sharp (1855), 20 Beav. 56 100
Carroll, *Re*, Brice *v.* Carroll, [1902] 2 Ch. 175 ; 71 L. J. (CH.) 596 ; 86 L. T. 862 ; 50 W. R. 650 52
Carron Iron Co. *v.* Maclaren (1855), 5 H. L. Cas. 416 48
Carrow *v.* Ferrior, Dunn *v.* Ferrior (1868), 3 Ch. App. 719 ; 37 L. J. (CH.) 569 ; 18 L. T. 806 ; 16 W. R. 454 55
Carruthers *v.* Graham (1841), 9 Dowl. 947 ; 10 L. J. (Q. B.) 364 . . . 547, 613
———— *v.* ———— (1841), Car. & M. 5 ; 2 Mood. & R. 368 618
Carter *v.* Carter (1857), 3 K. & J. 617 82, 83, 84, 372
——— *v.* James (1844), 13 M. & W. 137 ; 2 Dow. & L. 236 ; 13 L. J. (EX.) 373 ; 8 Jur. 912 357
——— *v.* Wake (1877), 4 Ch. D. 605 ; 46 L. J. (CH.) 841 93, 96
Cartwright *v.* Cartwright (1878), 26 W. R. 684 488
———— *v.* ————, [1903] 2 Ch. 306 ; 72 L. J. (CH.) 622 ; 88 L. T. 855 ; 51 W. R. 666 128, 133
———— *v.* Del Balzo (Duke), *Re* Orford (Countess). *See* Orford (Countess), *Re*, Cartwright *v.* Del Balzo (Duke).
———— *v.* Green (1802), 8 Ves. 405 574
———— *v.* Pettus (1676), 2 Cas in Ch. 214 ; 1 Eq. Cas. Abr. 133 ; Cas. *temp.* Finch, 242 ; cited *sub nom.* Carteret *v.* Petty, 2 Swan. 323, n. . 66
———— *v.* Pultney (1742), 2 Atk. 380 41
Carver *v.* Bowles (1831), 2 Russ. & M. 301 ; 9 L. J. (O. S.) (CH.) 91 . . . 119
Carvick *v.* Blagrave (1820), 4 Moore (C. P.), 303 ; 1 Brod. & Bing. 531 . . 405
Cary *v.* Gerrish (1801), 4 Esp. 9 562
Casamajor *v.* Strode (1809), 19 Ves. 390, n. 108
Casborne *v.* Scarfe (1737), 1 Atk. 603 ; 2 White & Tud. L. C., 7th ed., 6 . 91, 93, 94, 96, 152
Cass *v.* Cass (otherwise Pfaff) (1910), 102 L. T. 397 ; 26 T. L. R. 305 ; 54 Sol. Jo. 328 339
Cassels *v.* Hudson, *Re* Hudson. *See* Hudson, *Re*, Cassels *v.* Hudson.
Castell and Brown, Ltd., *Re*, Roper *v.* Castell and Brown, Ltd., [1898] 1 Ch. 315 ; 67 L. J. (CH.) 169 ; 78 L. T. 109 ; 46 W. R. 248 ; 14 T. L. R. 194 . . 80
Castellain *v.* Preston (1883), 11 Q. B. D. 380 ; 52 L. J. (Q. B.) 366 ; 49 L. T. 29 ; 31 W. R. 559, C. A. 149
Castelli *v.* Groom (1852), 18 Q. B. 492 ; 21 L. J. (Q. B.) 308 ; 16 Jur. 888 . . 615
Castrique *v.* Behrens (1861), 3 E. & E. 709 ; 30 L. J. (Q. B.) 163 ; 7 Jur. (N. S.) 1024 ; 4 L. T. 52 326
———— *v.* Imrie (1860), 8 W. R. 344 542
———— *v.* —— (1870), L. R. 4 H. L. 414 . 327, 328, 330, 338, 339, 341, 343, 344, 351, 355
Cathcart, *Re*, *Ex parte* Campbell (1870), 5 Ch. App. 703 ; 23 L. T. 289 ; 18 W. R. 1056 571, 572
"Catherina Maria," The (1866), L. R. 1 A. & E. 53 ; 12 Jur. (N. S.) 380 . . 475
Caton *v.* Caton (1866), 1 Ch. App. 137 ; 35 L. J. (CH.) 292 ; 12 Jur. (N. S.) 171 ; affirmed L. R. 2 H. L. 127 ; 36 L. J. (CH.) 886 ; 16 W. R. 1 . 75, 76
—— *v.* Hamilton (1889), 53 J. P. 504 564
Cator *v.* Croydon Canal Co. (1841), 4 Y. & C. (EX.) 405 ; affirmed, 13 L. J. (CH.) 89 ; 8 Jur. 277 170, 596
Catt *v.* Howard (1820), 3 Stark. 3 461, 515, 595, 596
—— *v.* Tourle (1869), 4 Ch. App. 654 ; 38 L. J. (CH.) 665 ; 21 L. T. 188 ; 17 W. R. 939 50, 102
Cattlin *v.* Barker (1847), 5 C. B. 201 ; 17 L. J. (C. P.) 62 599
Cavan (Lady) *v.* Pulteney (1795), 2 Ves. 544 ; (1797) 3 Ves. 384. . . . 124
——— *v.* Stewart (1816), 1 Stark. 525 527
Cave *v.* Cave (1880), 15 Ch. D. 639 ; 49 L. J. (CH.) 505 ; 42 L. T. 730 ; 28 W. R. 793 79, 84, 85

PAGE
Cave *v.* Mills (1862), 7 H. & N. 913; 31 L. J. (EX.) 265; 6 L. T. 650; 8 Jur. (N. S.) 363; 10 W. R. 471 351, 388
Cavendish *v.* Dacre, *Re* Chesham (Lord). *See* Chesham (Lord), *Re*, Cavendish *v.* Dacre.
——— *v.* Geaves (1857), 24 Beav. 163; 27 L. J. (CH.) 314; 3 Jur. (N. S.) 1086; 5 W. R. 615 163
Cawdor (Lord) *v.* Lewis (1835), 1 Y. & C. (EX.) 427 167
Cayley, *Re*, Awdry *v.* Cayley, [1904] 2 Ch. 781; 74 L. J. (CH.) 31; 91 L. T. 743; 53 W. R. 144 231
Cazenove *v.* Vaughan (1813), 1 M. & S. 4 547
"Cella," The (1888), 13 P. D. 82; 57 L. J. (P.) 55; 59 L. T. 125; 36 W. R. 540; 6 Asp. M. L. C. 293, C. A. 328
Central Klondyke Gold Mining and Trading Co., *Re*, Savigny's Case (1898), 5 Mans. 336 287
Chadwick *v.* Grange, *Re* Grange. *See* Grange, *Re*, Chadwick *v.* Grange.
——— *v.* Manning, [1896] A. C. 231; 65 L. J. (P. C.) 42 377
Chalchman *v.* Wright (1606), Noy, 118 352
Chalinder and Herrington, *Re*, [1907] 1 Ch. 58; 76 L. J. (CH.) 71; 96 L. T. 196; 23 T. L. R. 71 159
Challinor *v.* Sykes, *Re* Dyson. *See* Dyson, *Re*, Challinor *v.* Sykes.
Chalmers *v.* Storil (1813), 2 Ves. & B. 222 124
Chaloner *v.* Butcher (1736), 3 Atk. 685 115
Chamberlain *v.* Stoneham (1889), 24 Q. B. D. 113; 59 L. J. (Q. B.) 95; 61 L. T. 560; 38 W. R. 107 583, 585
Chambers *v.* Bernasconi (1834), 1 Cr. M. & R. 347; 4 Tyr. 531; 3 L. J. (EX.) 373 467
——— *v.* Kingham (1878), 10 Ch. D. 743; 48 L. J. (CH.) 169; 39 L. T. 472; 27 W. R. 289 146
Champion *v.* Rigby (1830), 1 Russ. & M. 539; Taml. 421; 9 L. J. (O. S.) (CH.) 211 173
Champneys *v.* Peck (1816), 1 Stark. 404 465, 466
Chancey's Case (1718), 1 P. Wms. 408; *sub nom.* Chancy *v.* Wootton (1725), Cas. *temp.* King, 44. 137
Chandler *v.* Grieves (1796), 2 Hy. Bl. 606, n. 427, 485
——— *v.* Horne (1842), 2 Mood. & R. 423 593
——— *v.* Pocock (1880), 15 Ch. D. 491; 49 L. J. (CH.) 442; 43 L. T. 112; 28 W. R. 806; affirmed (1881), 16 Ch. D. 648; 50 L. J. (CH.) 380; 44 L. T. 115; 29 W. R. 877, C. A. 107
Chant, *Re*, Bird *v.* Godfrey, [1905] 2 Ch. 225; 74 L. J. (CH.) 542; 93 L. T. 265; 53 W. R. 526 175
——— *v.* Brown (1852), 9 Hare, 790; 16 Jur. 606 607
Chaplin *v.* Chaplin (1733), 3 P. Wms. 229 96
——— *v.* Horner (1718), 1 P. Wms. 483 107
——— *v.* Puttick, [1898] 2 Q. B. 160; 67 L. J. (Q. B.) 516; 78 L. T. 410; 46 W. R. 481; 14 T. L. R. 365, C. A. 614
——— & Co. *v.* Brammall, [1908] 1 K. B. 233; 77 L. J. (K. B.) 366; 97 L. T. 860, C. A. 19, 63
Chapman, *Re*, *Ex parte* Johnson (1884), 26 Ch. D. 338; 53 L. J. (CH.) 763; 50 L. T. 214; 32 W. R. 693, C. A. 626
——— *v.* Cowlan (1810), 13 East, 10 540
——— *v.* Davis (1841), 3 Man. & G. 609; 1 Dowl. (N. S.) 239; 4 Scott (N. R.), 319; 11 L. J. (C. P.) 51 579, 589
——— *v.* Michaelson, [1909] 1 Ch. 238; 78 L. J. (CH.) 272; 100 L. T. 109; 25 T. L. R. 101, C. A. 62, 72
——— *v.* Paynton (1741), 13 East, 16, n. 583
Chappell *v.* Davidson (1856), 8 De G. M. & G. 1, C. A. 50
"Charkieh," The (1873), L. R. 4 A. & E. 59; 42 L. J. (ADM.) 17; 28 L. T. 513; 1 Asp. M. L. C. 581 493
Charlton *v.* A.-G. (1879), 4 App. Cas. 427; 49 L. J. (Q. B) 86; 40 L. T. 760; 27 W. R. 921 270, 272
——— *v.* West (1861), 30 Beav. 124 139
Charnley *v.* Grundy (1854), 14 C. B. 608; 2 C. L. R. 822; 23 L. J. (C. P.) 121; 18 Jur. 653; 2 W. R. 372 519
Charnock *v.* Dewings (1853), 3 Car. & Kir. 378 593
——— *v.* Merchant, [1900] 1 Q. B 474; 69 L. J. (Q. B.) 221; 82 L. T. 89; 64 J. P. 183; 48 W. R. 334; 16 T. L. R. 139 601
Charrington & Co., Ltd. *v.* Camp, [1902] 1 Ch. 386; 71 L. J. (CH.) 196; 86 L. T. 15; 18 T. L. R. 152 52

PAGE
Charter *v.* Trevelyan (1844), 11 Cl. & Fin. 714 171
Chasemore *v.* Richards (1859), 7 H. L. Cas. 349 ; 29 L. J. (EX.) 81 ; 5 Jur. (N. S.) 873 ; 7 W. R. 685 506
Chatenay *v.* Brazilian Submarine Telegraph Co., [1891] 1 Q. B. 79 ; 60 L. J. (Q. B.) 295 ; 63 L. T. 739 ; 39 W. R. 65, C. A. 430, 490
Chatfield *v.* Berchtoldt (1872), 7 Ch. App. 192 ; 41 L. J. (CH.) 255 ; 26 L. T. 267 ; 20 W. R. 401 236, 238
Chatteris *v.* Young (1827), 2 Russ. 183 241
Chatterton *v.* Secretary of State for India in Council, [1895] 2 Q. B. 189 ; 64 L. J. (Q. B.) 676 ; 72 L. T. 858 ; 59 J. P. 596 ; 14 R. 504, C. A. . . . 487, 573
Chave *v.* Chave (1830), 2 John. & H. 713, n. 122
——— *v.* Farrant (1810), 18 Ves. 8 139
Cheale *v.* Kennard (1858), 3 De G. & J. 27 ; 27 L. J. (CH.) 784 ; 4 Jur. (N. S.) 981 ; 6 W. R. 810 12
Cheek *v.* Cheek, [1910] W. N. 37 ; 45 L. J. 222 ; 128 L. T. Jo. 476 626
Cheesman *v.* Exall (1851), 6 Exch. 341 ; 20 L. J. (EX.) 209 406, 407
Chelsea Waterworks Co. *v.* Cowper (1795), 1 Esp. 275 513
Cherry *v.* Boultbee (1839), 4 My. & Cr. 442 ; 9 L. J. (CH.) 118 ; 3 Jur. 1116 163, 164
——— *v.* Heming (1849), 4 Exch. 631 ; 19 L. J. (EX.) 64 426
——— *v.* Thompson (1872), L. R. 7 Q. B. 573 ; 41 L. J. (Q. B.) 243 ; 26 L. T. 791 ; 20 W. R. 1029 556
Chertsey Guardians *v.* Surrey Clerk of Peace (1893), 69 L. T. 384 ; 57 J. P. 807 ; 5 R. 532 477
Chesham (Lord), *Re*, Cavendish *v.* Dacre (1886), 31 Ch. D. 466 ; 55 L. J. (CH.) 401 ; 54 L. T. 154 ; 34 W. R. 321 117, 123
Chesmer *v.* Noyes (1815), 4 Camp. 129 497
Chesterfield (Lord) *v.* Harris, [1908] 2 Ch. 397 ; 77 L. J. (CH.) 888 ; 99 L. T. 558 ; 24 T. L. R. 763 ; 52 Sol. Jo. 639, C. A. . . . 506
——— (Earl) *v.* Janssen (1751), 2 Ves. Sen. 125 ; 1 Atk. 352 . 13, 14, 20, 21
Chetti *v.* Chetti, [1909] P. 67 ; 78 L. J. (P.) 23 ; 99 L. T. 885 ; 53 Sol. Jo. 163 ; 25 T. L. R. 146 339
Chetwynd *v.* Morgan, Morgan *v.* Chetwynd, *Re* Anstis. *See* Anstis, *Re*, Chetwynd *v.* Morgan, Morgan *v.* Chetwynd.
Chichester *v.* Bickerstaff (1693), 2 Vern. 295 116
——— (Lord) *v.* Coventry (1867), L. R. 2 H. L. 71 ; 36 L. J. (CH.) 673 ; 17 L. T. 35 ; 15 W. R. 849 . . . 128, 129, 131, 132, 133, 134, 135, 136, 137, 568
——— *v.* Donegall (Marquis) (1870), 5 Ch. App. 497 ; 39 L. J. (CH.) 694 ; 22 L. T. 458 ; 18 W. R. 531 574
Chifferiel, *Re*, Chifferiel *v.* Watson (1888), 58 L. J. (CH.) 137 ; 58 L. T. 877 ; 36 W. R. 806 619, 629
Child, *Ex parte*, *Re* Ottaway. *See* Ottaway, *Re*, *Ex parte* Child.
——— *v.* Grace (1825), 2 C. & P. 193 459
Childerston *v.* Barrett (1809), 11 East, 439 587
Chirgwin *v.* Russell (1910), *Times*, October 20th 626
Chisholm, *Re*, Goddard *v.* Brodie, [1902] 1 Ch. 457 ; 71 L. J. (CH.) 289 ; 86 L. T. 183 198, 219, 221, 222, 223
Chissum *v.* Dewes (1828), 5 Russ. 29 37
Chittenden *v.* Day (1860), 2 F. & F. 77 517
Chitty *v.* Parker (1793), 2 Ves. 271 ; 4 Bro. C. C. 411 108
Cholmondeley, *Re* (1832), 1 Cr. & M. 149 ; 3 Tyr. 10 ; 2 L. J. (EX.) 65...232, 233, 238
——— (Marquis) *v.* Clinton (Lord) (1817), 2 Mer. 171 368
——— *v.* ——— (1820), 2 Jac. & W. 1 . 4, 152, 168, 175
——— *v.* ——— (1821), 4 Bli. 1 69, 175
Chorley, *Ex parte*, *Re* South Essex Estuary Co. *See* South Essex Estuary Co., *Re*, *Ex parte* Chorley.
Christchurch Gas Co. *v.* Kelly (1887), 51 J. P. 374 388, 411
Christian *v.* Devereux (1841), 12 Sim. 264 305
Christie *v.* Secretan (1799), 8 Term Rep. 192 341
——— *v.* Taunton, Delmard, Lane & Co., *Re* Taunton, Delmard, Lane & Co. *See* Taunton, Delmard, Lane & Co., *Re*, Christie *v.* Taunton, Delmard, Lane & Co.
Christy *v.* Tancred (1842), 9 M. & W. 438 ; 11 L. J. (EX.) 109 343
Chubb *v.* Salomons (1852), 3 Car. & Kir. 75 573
Chudleigh's Case (1595), 1 Co. Rep. 120 a ; Poph. 70 ; Jenk. 276 ; 1 And. 309 . 89
Churchill *v.* Churchill (1867), L. R. 5 Eq. 44 ; 16 W. R. 182 119
Chynoweth s Case (1880), 15 Ch. D. 13 ; 42 L. T. 636 ; 28 W. R. 897, C. A. . 397

PAGE
Cigala's Settlement Trusts, *Re* (1878), 7 Ch. D. 351; 47 L. J. (CH.) 166; 38 L. T. 439; 26 W. R. 257 275, 276
Citizens' Bank of Louisiana *v.* First National Bank of New Orleans (1873), L. R. 6 H. L. 352; 43 L. J. (CH.) 269; 22 W. R. 194...166, 323, 377, 378, 382, 449
"City of Mecca," The (1881), 6 P. D. 106; 50 L. J. (P.) 53; 44 L. T. 750; 4 Asp. M. L. C. 412, C. A. 327, 328
Civil Service Musical Instrument Association *v.* Whiteman (1899), 68 L. J. (CH.) 484; 80 L. T. 685; 63 J. P. 441 167, 397
Clanmorris (Lady) *v.* Clanmorris (Lord) (1862), 14 I. Ch. R. 420 326
Clanricarde (Marquis) *v.* Henning (1860), 30 Beav. 175; 30 L. J. (CH.) 865; 5 L. T. 168; 7 Jur. (N. S.) 1113; 9 W. R. 912 170
Clare *v.* Bedford (Earl) (1690), 13 Vin. Abr. 536 168
Clare Hall (Master etc.) *v.* Harding (1848), 6 Hare, 273; 17 L. J. (CH.) 301; 12 Jur. 511 167
Clarence Hotel, Ilfracombe, Ltd., *Re* (1909), 54 Sol. Jo. 117 482
Clarendon (Earl) *v.* Hornby (1718), 1 P. Wms. 446 41
Clarges *v.* Sherwin (1699), 12 Mod. Rep. 343 544
Claridge *v.* Hoare (1807), 14 Ves. 59 574
——— *v.* Mackenzie (1842), 4 Man. & G. 143; 4 Scott (N. R.), 796; 11 L. J. (C. P.) 72 404
Clark, *Re* (1906), 40 I. L. T. 117 195
——— *v.* Adie (No. 2) (1877), 2 App. Cas. 423; 46 L. J. (CH.) 598; 37 L. T. 1; 26 W. R. 45 403, 413, 479, 482
——— *v.* Alexander (1844), 8 Scott (N. R.), 147; 13 L. J. (C. P.) 133; 8 Jur. 496. 440
——— *v.* Clark (1884), 9 App. Cas. 733; 52 L. J. (P. C.) 99; 51 L. T. 750 . . 158
——— *v.* Cort (1840), Cr. & Ph. 154; 10 L. J. (CH.) 113 162
——— *v.* Gill (1854), 1 K. & J. 19; 23 L. J. (CH.) 711; 2 W. R. 652 . . 583, 618
——— *v.* Malpas (1862), 4 De G. F. & J. 401, C. A. 22
——— *v.* Mullick (1840), 3 Moo. P. C. C. 252 420, 490
——— *v.* Sewell (1744), 3 Atk. 96 138
——— *v.* Wilmot (1841), 1 Y. & C. Ch. Cas. 53 464
Clarke, *Ex parte*, *Re* Sewer Krop. *See* Sewer Krop, *Re*, *Ex parte* Clarke.
———, *Re*, Coombe *v.* Carter (1887), 36 Ch. D. 348; 56 L. J. (CH.) 981; 57 L. T. 823; 36 W. R. 293, C. A. 104
——— *v.* Byne (1807), 13 Ves. 383 58
——— *v.* Clarke (1879), 5 L. R. Ir. 47, C. A. 472, 511
——— *v.* Clayton (1860), 2 Giff. 333; 3 L. T. 176; 6 Jur. (N. S.) 1238 . . 41
——— *v.* Franklin (1858), 4 K. & J. 257; 27 L. J. (CH.) 567; 6 W. R. 836 . 107, 108, 110
——— *v.* Hall (1888), 24 L. R. Ir. 316, C. A. 366
——— *v.* Henty (1838), 3 Y. & C. (EX.) 187 48
——— *v.* Law (1855), 2 K. & J. 28; 2 Jur. (N. S.) 228; 4 W. R. 35 . . 597, 622
——— *v.* Main (1904), *Times*, March 4th 437
——— *v.* Midland Great Western Rail. Co., [1895] 2 I. R. 294, C. A. . . 337
——— *v.* Moore (1844), 1 Jo. & Lat. 723; 7 I. Eq. R. 515 174
——— *v.* Ormonde (Earl) (1821), Jac. 108 33
——— *v.* Ramuz, [1891] 2 Q. B. 456; 60 L. J. (Q. B.) 679; 56 J. P. 5, C. A. . 99
——— *v.* Saffery (1824), Ry. & M. 126 600
——— *v.* Seton (1801), 6 Ves. 411 48
——— *v.* York (1882), 52 L. J. (CH.) 32; 47 L. T. 381; 31 W. R. 62 . . . 335
——— and Chapman *v.* Hart (1858), 6 H. L. Cas. 633; 27 L. J. (CH.) 615; 5 Jur. (N. S.) 447 172, 173, 382, 395, 396
Clarkson *v.* Hanway (1723), 2 P. Wms. 203 16
Clavering's Case. *See* Jackson *v.* Cator (1800), 5 Ves. 688.
Clay *v.* Stephenson (1835), 3 Ad. & El. 807; 5 Nev. & M. (K. B.) 318; 1 Har. & W. 409; 4 L. J. (K. B.) 212 617
——— *v.* Willis (1823), 1 B. & C. 364; 2 Dow. & Ry. (K. B.) 539; 1 L. J. (O. S.) (K. B.) 144 34
Clayton *v.* Leech (1889), 41 Ch. D. 103; 61 L. T. 69; 37 W. R. 663, C. A. . 25
Clayton's Case, Devaynes *v.* Noble, Baring *v.* Noble. *See* Devaynes *v.* Noble, Baring *v.* Noble, Clayton's Case.
Cleave *v.* Jones (1852), 7 Exch. 421; 21 L. J. (EX. 105 428
Clegg *v.* Edmondson (1857), 8 De G. M. & G. 787; 26 L. J. (CH.) 673; 3 Jur. (N. S.) 299, C. A. 174
——— *v.* Hands (1890), 44 Ch. D. 503; 59 L. J. (CH.) 477; 62 L. T. 502; 55 J. P. 180; 38 W. R. 433, C. A. 102
Clements *v.* Hall (1858), 2 De G. & J. 173; 27 L. J. (CH.) 349; 4 Jur. (N. S.) 494; 6 W. R. 358, C. A. 174

PAGE
Clementson *v.* Gandy (1836), 1 Keen, 309; 5 L. J. (CH.) 260 . . . 121, 122
Clemow, *Re*, Yeo *v.* Clemow, [1900] 2 Ch. 182; 69 L. J. (CH.) 522; 82 L. T. 550; 48 W. R. 541 . . . 219
——— *v.* Geach (1870), 6 Ch. App. 147; 40 L. J. (CH.) 44; 19 W. R. 53 . 344
Clerk *v.* Withers (1704), 6 Mod. Rep. 290; 1 Salk. 322; Holt (K. B.), 303; 11 Mod. Rep. 34; 2 Ld. Raym. 1072 . . . 360
Clermont (Viscount) *v.* Tasburgh (1819), 1 Jac. & W. 112 . . . 72
Cleveland's (Duke) Settled Estates, *Re*, [1893] 3 Ch. 244; 62 L. J. (CH.) 955; 69 L. T. 735; 13 R. 235, n., C. A. . . . 107
Clever *v.* Kirkman (1876), 33 L. T. 672 . . . 567
Cleverly *v.* Gaslight and Coke Co. (1907), 24 T. L. R. 93 . . . 355
Cliff's Trusts, *Re*, [1892] 2 Ch. 229; 61 L. J. (CH.) 397; 66 L. T. 483; 40 W. R. 439 . . . 554
Clifford *v.* Brooke (1806), 13 Ves. 131 . . . 67
——— *v.* Burton (1823), 6 Moore (C. P.), 16; 1 L. J. (O. S.) (C. P.) 61; 1 Bing. 199 . . . 462
——— *v.* Hunter (1827), 3 C. & P. 16; Mood. & M. 113 . . . 597
——— *v.* Parker (1841), 2 Man. & G. 909; 3 Scott (N. R.), 233; 10 L. J. (C. P.) 227 . . . 506
——— *v.* Timms, [1908] A. C. 12; 77 L. J. (CH.) 91; 98 L. T. 64 . . . 342
——— *v.* Turrell (1841), 1 Y. & C. Ch. Cas. 138; 14 L. J. (CH.) 390; 9 Jur. 633 . . . 567
Clifton *v.* Burt (1720), 1 P. Wms. 678; Prec. Ch. 540 . . . 142, 145
Clinan *v.* Cooke (1802), 1 Sch. & Lef. 22 . . . 12, 67
Clinton, *Re*, Clinton *v.* Clinton (1903), 88 L. T. 17; 51 W. R. 316; 19 T. L. R. 181 . . . 65, 66
Cloake, *Re* (1891), 61 L. J. (CH.) 69; 65 L. T. 455; 40 W. R. 74 . . . 627
Close *v.* Wilberforce (1838), 1 Beav. 112; 8 L. J. (CH.) 101; 3 Jur. 35 . . . 97
Closmadeuc *v.* Carrel (1856), 18 C. B. 36; 25 L. J. (C. P.) 216; 2 Jur. (N. S.) 474; 4 W. R. 547 . . . 506, 516
Clough *v.* Bond (1838), 3 My. & Cr. 490; 8 L. J. (CH.) 51; 2 Jur. 958 . . . 27
——— *v.* London and North Western Rail. Co. (1871), L. R. 7 Exch. 26; 41 L. J. (EX.) 17; 25 L. T. 708; 20 W. R. 189 . . . 397
Cloutte *v.* Storey, [1910] W. N. 163; 45 L. J. 442; 129 L. T. Jo. 215 . . . 355
Clun's Case (1613), 10 Co. Rep. 127 a; Cro. Jac. 309 . . . 29
Coales, *Re* (1841), 7 M. & W. 390; 10 L. J. (EX.) 207 . . . 238
Coates *v.* Coates (1864), 33 Beav. 249; 33 L. J. (CH.) 448; 9 L. T. 795; 10 Jur. (N. S.) 532; 12 W. R. 634 . . . 163
——— *v.* London and South Western Rail. Co. (1880), 41 L. T. 553 . . . 408
Cobbett, *Ex parte* (1857), 7 E. & B. 955; 26 L. J. (Q. B.) 293; 3 Jur. (N. S.) 665; 5 W. R. 708 . . . 586, 587
——— *v.* Hudson (1852), 1 E. & B. 11; 22 L. J. (Q. B.) 11; 17 Jur. 488; 1 W. R. 54 . . . 570, 593
——— *v.* Kilminster (1865), 4 F. & F. 490 . . . 508, 608
——— *v.* Wood, [1908] 2 K. B. 420; 77 L. J. (Q. B.) 878; 99 L. T. 482; 24 T. L. R. 615; 52 Sol. Jo. 517, C. A. . . . 487
Coch *v.* Allcock & Co. (1888), 21 Q. B. D. 178; 57 L. J. (Q. B.) 489; 36 W. R. 747, C. A. . . . 612, 614, 615
Cochrane, *Re*, [1905] 2 I. R. 626 . . . 190
———, *Re*, [1906] 2 I. R. 200, C. A. . . . 184, 190, 194
——— *v.* Moore (1890), 25 Q. B. D. 57; 59 L. J. (Q. B.) 377; 63 L. T. 153; 54 J. P. 804; 38 W. R. 588, C. A. . . . 567
Cock *v.* Ravie (1801), 6 Ves. 283 . . . 60
Cockburn *v.* Alexander (1848), 6 C. B. 791; 18 L. J. (C. P.) 74; 13 Jur. 13 . . . 567
Cockerell *v.* Cholmeley (1830), 1 Russ. & M. 418 . . . 170
——— *v.* Essex (Earl), *Re* Johnston. *See* Johnston, *Re*, Cockerell *v.* Essex (Earl).
Cocks *v.* Nash (1832), 9 Bing. 341; 4 Moo. & S. 162; 2 L. J. (C. P.) 17 . . . 566
——— *v.* Purday (1846), 2 Car. & Kir. 269 . . . 489
Codrington *v.* Codrington (1875), L. R. 7 H. L. 854; 45 L. J. (CH.) 660; 34 L. T. 221; 24 W. R. 648 . . . 117, 127
——— *v.* Lindsay (1873), 8 Ch. App. 578; 42 L. J. (CH.) 526; 28 L. T. 177; 21 W. R. 182 . . . 117, 118, 124
——— *v.* Parker (1810), 16 Ves. 469 . . . 55
Coffin *v.* Coffin (1821), Jac. 70 . . . 90
Cogan *v.* Stephens (1835), 5 L. J. (CH.) 17; 1 Beav. 482, n. . . . 108, 110
Coke *v.* Fountain (1686), 1 Vern. 413 . . . 546
Coker *v.* Farewell (1729), 2 P. Wms. 563; 1 Swan. 390, n. . . . 43, 546
Coldwell *v.* Fellowes (1870), L. R. 9 Eq. 410 . . . 70
Cole *v.* Gibbons (1734), 3 P. Wms. 290 . . . 21

PAGE
Cole *v.* Gibson (1750), 1 Ves. Sen. 503 20
—— *v.* Hadley (1840), 11 Ad. & El. 807 ; 3 Per. & Dav. 458 ; 4 Jur. 483 . . 548
—— *v.* Langford, [1898] 2 Q. B. 36 ; 67 L. J. (Q. B.) 698 ; 14 T. L. R. 427. . 334, 352
—— *v.* Sherrard (1855), 11 Exch. 482 427
—— *v.* Willard (1858), 25 Beav. 568 ; 4 Jur. (N. S.) 988 ; 6 W. R. 712 . . 137
Coleman *v.* Coleman, [1905] W. N. 160 ; 40 L. J. 789 ; 120 L. T. Jo. 63 ; 50 Sol. Jo. 43 630
——— *v.* Kirkaldy, [1882] W. N. 103 531
——— *v.* North (1898), 47 W. R. 57 377
——— *v.* Winch (1721), 1 P. Wms. 775 ; Prec. Ch. 511 ; 2 Eq. Cas. Abr. 498...71
Coles *v.* Bank of England (1839), 10 Ad. & El. 437 ; 2 Per. & Dav. 521 . 399, 401, 412
—— *v.* Coles and Brown (1866), L. R. 1 P. & D. 70 ; 35 L. J. (P. & M.) 40 ; 13 L. T. 608 ; 14 W. R. 290 600, 606
—— *v.* Trecothick (1804), 9 Ves. 234 ; 1 Smith, K. B. 233 17, 157
Coles' Will, *Re* (1869), L. R. 8 Eq. 271 241
Collett *v.* De Gols (1734), Cas. *temp.* Talb. 65 44
Collie, *Re*, *Ex parte* Adamson (1878), 8 Ch D. 807 ; 47 L. J. (BCY.) 103 ; 38 L. T. 917 ; 26 W. R. 890, C. A. 67, 365, 384
Collier *v.* Nokes (1849), 2 Car. & Kir. 1012 492
—— *v.* Simpson (1831), 5 C. & P. 73 482
—— *v.* Walters (1873), L. R. 17 Eq. 252 ; 43 L. J. (CH.) 216 331
Colling *v.* Treweek (1827), 6 B. & C. 394 ; 9 Dow. & Ry. (K. B.) 456 ; 5 L. J. (O. S.) (K. B.) 132 521, 522
Collingwood *v.* Row (1857), 26 L. J. (CH.) 649 ; 3 Jur. (N. S.) 785 ; 5 W. R. 484 111, 308
Collins *v.* Archer (1830), 1 Russ. & M. 284 42, 77
—— *v.* Bayntun (1841), 1 Q. B. 117 ; 10 L. J. (Q. B.) 98 ; 4 Per. & Dav. 544 ; 5 Jur. 530 606
—— *v.* Bishop (1878), 48 L. J. (CH.) 31 444
—— *v.* Blantern (1767), 1 Smith, L. C., 11th ed., 369 ; 2 Wils. 341 . 370, 567
—— *v.* Castle (1887), 36 Ch. D. 243 ; 57 L. J. (CH.) 76 ; 57 L. T. 764 ; 36 W. R. 300 101
—— *v.* Cave (1858), 27 L. J. (EX.) 146 ; 4 Jur. (N. S.) 31 359
—— *v.* Godefroy (1831), 1 B. & Ad. 950 ; 1 Dowl. 326 ; 9 L. J. (O. S.) (K. B.) 158 579, 583
—— *v.* Gough (1785), 7 Bro. Parl. Cas. 94 332, 355
—— *v.* Lewis (1869), L. R. 8 Eq. 708 145
—— *v.* Rhodes, *Re* Baker. *See* Baker, *Re*, Collins *v.* Rhodes.
—— and Harding's Case (1597), 13 Co. Rep. 57 ; Cro. Eliz. 606 ; Moore (K. B.), 544 ; Godb. 139 29
Collis *v.* Emett (1790), 1 Hy. Bl. 313 392, 394
Colls *v.* Home and Colonial Stores, Ltd., [1904] A. C. 179 ; 73 L. J. (CH.) 484 ; 90 L. T. 687 ; 53 W. R. 30 ; 20 T. L. R. 475 43, 50, 65
Collyer *v.* Isaacs (1881), 19 Ch. D. 342 ; 51 L. J. (CH.) 14 ; 45 L. T. 567 ; 30 W. R. 70, C. A. 74, 104
Colonial Bank *v.* Cady and Williams, London Chartered Bank of Australia *v.* Cady and Williams (1890), 15 App. Cas. 267 ; 60 L. J. (CH.) 131 ; 63 L. T. 27 ; 39 W. R. 17 379, 393
———————— *v.* Hepworth (1887), 36 Ch. D. 36 ; 56 L. J. (CH.) 1089 ; 57 L. T. 148 ; 36 W. R. 259 354, 412
———————— *v.* Whinney (1886), 11 App. Cas. 426 ; 56 L. J. (CH.) 43 ; 55 L. T. 362 ; 34 W. R. 705 ; 3 Morr. 207 409
Colonial Bank of Australasia *v.* Marshall, [1906] A. C. 559 ; 75 L. J. (P. C.) 76 ; 95 L. T. 310 ; 22 T. L. R. 746 400
Colt *v.* Dutton (1657), 2 Sid. 6 591
Coltman, *Re*, Coltman *v.* Coltman (1881), 19 Ch. D. 64 ; 51 L. J. (CH.) 3 ; 46 L. T. 392 ; 30 W. R. 342, C. A. 380, 389
Colverson *v.* Bloomfield (1885), 29 Ch. D. 341 ; 54 L. J. (CH.) 817 ; 52 L. T. 478 ; 33 W. R. 889, C. A. 60
Colvin *v.* Hartwell (1837), 5 Cl. & Fin. 484 71
——— *v.* Procurator-General (1827), 1 Hag. 192 503
Colyer *v.* Finch (1854), 19 Beav. 500 77
——— *v.* ——— (1856), 5 H. L. Cas. 905 ; 26 L. J. (CH.) 65 ; 3 Jur. (N. S.) 25 . 77
Comitti & Co. *v.* Maher (1905), 94 L. T. 158 ; 22 T. L. R. 121 365, 376
Commercial Gas Co., *Ex parte*, R. *v.* London County Council. *See* R. *v.* London County Council, *Ex parte* Commercial Gas Co.

PAGE
Commercial Union Assurance Co. *v.* Lister (1874), 9 Ch. App. 483; 43 L. J. (CH.) 601 149
Commings *v.* Heard (1869), L. R. 4 Q. B. 669; 10 B. & S. 606; 39 L. J. (Q. B.) 9; 20 L. T. 975; 18 W. R. 61 545
Compania Naviera Vasconzada *v.* Churchill and Sim, Same *v.* Burton & Co., [1906] 1 K. B. 237; 75 L. J. (K. B.) 94; 94 L. T. 59; 54 W. R. 406; 22 T. L. R. 85; 11 Com. Cas. 49; 10 Asp. M. L. C. 177 384, 385, 387
Companies Acts, *Re*, *Ex parte* Watson (1888), 21 Q. B. D. 301; 57 L. J. (Q. B.) 609; 59 L. T. 401; 36 W. R. 829; 52 J. P. 742 371
Compton *v.* Bagley, [1892] 1 Ch. 313; 61 L. J. (CH.) 113; 65 L. T. 706 . . 154
——— (Lord) *v.* Oxenden (1793), 2 Ves. 261 148
Concha *v.* Concha (1886), 11 App. Cas. 541; 56 L. J. (CH.) 257; 55 L. T. 522; 35 W. R. 477 323, 328, 340, 460, 548, 554, 611, 621
——— *v.* Murietta, De Mora *v.* Concha (1889), 40 Ch. D. 543; 60 L. T. 798, C. A. 489
Condon, *Re*, *Ex parte* James (1874), 9 Ch. App. 609; 43 L. J. (BCY.) 107; 30 L. T. 773; 22 W. R. 937 22
Conduitt *v.* Soane (1844), 1 Coll. 285 96
Connell *v.* Baker, *Re* Baker. *See* Baker, *Re*, Connell *v.* Baker.
Conner *v.* Browne (1784), 1 Ridg. Parl. Rep. 139 344
Connolly *v.* Consumers' Cordage Co. (1903), 89 L. T. 347 487
Connor, *In the Goods of* (1892), 29 L. R. Ir. 261 440, 501
Conradi *v.* Conradi (1868), L. R. 1 P. & D. 514 324, 326, 327, 344
Consort Deep Level Gold Mines, Ltd., *Re*, *Ex parte* Stark, [1897] 1 Ch. 575; 66 L. J. (CH.) 297; 76 L. T. 300; 45 W. R. 420, C. A. 490
Continental Oxygen Co., *Re*, Elias *v.* Continental Oxygen Co., [1897] 1 Ch. 511; 66 L. J. (CH.) 273; 76 L. T. 229; 45 W. R. 313 93
Conway (otherwise Beazley) *v.* Beazley (1831), 3 Hag. Ecc. 639 535
Cood (otherwise Coode) *v.* Cood (otherwise Coode) (1838), 1 Curt. 755 . . 534
Cook *v.* Culverhouse, *Re* Culverhouse. *See* Culverhouse, *Re*, Cook *v.* Culverhouse.
—— *v.* Fountain (1686), 3 Swan. 585; 1 Vern. 413; 1 Eq. Cas. Abr. 227; 1 Vent. 347 8
—— *v.* Frederick, *Re* Nash. *See* Nash, *Re*, Cook *v.* Frederick.
—— *v.* Gregson (1856), 3 Drew. 547; 25 L. J. (CH.) 706; 2 Jur. (N. S.) 510; 4 W. R. 581 34, 306
—— *v.* Martyn (1737), 2 Atk. 2 49
—— *v.* Nethercote (1835), 6 C. & P. 741 594
—— *v.* Rosslyn (Earl) (1859), 1 Giff. 167; 28 L. J. (CH.) 833; 5 Jur. (N. S.) 973; 7 W. R. 537 58
—— *v.* Tomlinson (1876), 24 W. R. 851 623
—— *v.* Ward (1830), 4 Moo. & P. 99; 8 L. J. (O. S.) (C. P.) 126; 6 Bing. 409 . 480
—— *v.* Whellock (1890), 24 Q. B. D. 658; 59 L. J. (Q. B.) 329; 62 L. T. 675; 38 W. R. 534, C. A. 402
Cooke, *Ex parte*, *Re* Strachan. *See* Strachan, *Re*, *Ex parte* Cooke.
——— *v.* Clayworth (1811), 18 Ves. 12 16
——— *v.* Dealey (1855), 22 Beav. 196 111
——— *v.* Eshelby (1887), 12 App. Cas. 271; 56 L. J. (Q. B.) 505; 56 L. T. 673; 35 W. R. 629 395
——— *v.* Loxley (1792), 5 Term Rep. 4 402
——— *v.* Maxwell (1817), 2 Stark. 183 520
——— *v.* Midland Great Western Railway of Ireland, [1909] A. C. 229; 2 I. R. 499; 78 L. J. (P. C.) 76; 100 L. T. 626; 25 T. L. R. 375 495
——— *v.* Sholl (1793), 5 Term Rep. 255 328, 350
——— *v.* Tanswell (1818), 8 Taunt. 450 511, 606
——— *v.* Turner (1850), cited Hanson's Death Duties, 5th ed., p. 361 . . 234
——— *v.* Wilby (1884), 25 Ch. D. 769; 53 L. J. (CH.) 592; 50 L. T. 152; 32 W. R. 379 628
——— *v.* Wilson (1856), 1 C. B. (N. S.) 153; 26 L. J. (C. P.) 15; 2 Jur. (N. S.) 1094; 5 W. R. 24 493
Cookes *v.* Cookes (1863), 3 New Rep. 97; 9 Jur. (N. S.) 843; 11 W. R. 871 . 561
Cookney *v.* Anderson (1863), 1 De G. J. & Sm. 365 66
Cookson *v.* Cookson (1845), 12 Cl. & Fin. 121 112, 116
——— *v.* Reay (1842), 5 Beav. 22; affirmed *sub nom.* Cookson *v.* Cookson (1845), 12 Cl. & Fin. 121; 9 Jur. 499 105
Coolgardie Goldfields, Ltd., *Re*, *Re* Cannon, Son and Morten (Solicitors), [1900] 1 Ch. 475; 69 L. J. (CH.) 215; 82 L. T. 23; 48 W. R. 461; 16 T. L. R. 161 515
Coombe *v.* Carter, *Re* Clarke. *See* Clarke, *Re*, Coombe *v.* Carter.

PAGE
Coombe *v.* Trist (1835), 1 My. & Cr. 69 250
Cooney *v.* Edeveain (1897), 14 T. L. R. 34, C. A. 431
Coope *v.* Arnold (1855), 4 De G. M. & G. 574 93
——— *v.* Twynam (1823), Turn. & R. 426 30
Cooper, *Re*, Cooper *v.* Cooper (1878), 26 W. R. 785 308
———, *Re*, ——— *v.* Vesey (1882), 20 Ch. D. 611 ; 51 L. J. (CH.) 862 ; 47 L. T. 89 ; 30 W. R. 648, C. A. 78, 448
———, *Re*, *Ex parte* Hall (1882), 19 Ch. D. 580 ; 51 L. J. (CH.) 556 ; 46 L. T. 549, C. A. 548, 630
——— *v.* Blandy (1834), 1 Bing. (N. C.) 45 ; 4 Moo. & S. 562 ; 3 L. J. (CH.) 274...402, 405, 406
——— *v.* Bockett (1846), 4 Moo. P. C. C. 419 ; 10 Jur. 931 506
——— *v.* Cooper (1870), 6 Ch. App. 15 ; 40 L. J. (CH.) 5 ; 23 L. T. 488 ; 19 W. R. 85 ; (1874), L. R. 7 H. L. 53 ; 44 L. J. (CH.) 6 ; 30 L. T. 409 ; 22 W. R. 713 117, 118, 119, 124, 127
——— *v.* ——— (1873), 8 Ch. App. 813 ; 29 L. T. 321 ; 21 W. R. 921 . . . 128
——— *v.* ——— (1888), 13 App. Cas. 88 ; 59 L. T. 1 485
——— *v.* Day (1817), 3 Mer. 154 241
——— *v.* De Tastet (1829), Taml. 177 57
——— *v.* Greene, Life Association of Scotland *v.* Siddal. *See* Life Association of Scotland *v.* Siddal, Cooper *v.* Greene.
——— *v.* Griffin, [1892] 1 Q. B. 740 ; 61 L. J. (Q. B.) 563 ; 66 L. T. 660 ; 40 W. R. 420, C. A. 97
——— *v.* Hubbuck (1860), 30 Beav. 160 ; 31 L. J. (CH.) 123 ; 7 Jur. (N. S.) 457 ; 9 W. R. 352 169
——— *v.* Joel (1859), 27 Beav. 313 ; 1 De G. F. & J. 240 ; 1 L. T. 351 . . . 54
——— *v.* Macdonald (1873), L. R. 16 Eq. 258 ; 28 L. T. 693 . . . 128, 132, 135
——— *v.* Marsden (1793), 1 Esp. 1 554
——— *v.* Metropolitan Board of Works (1883), 25 Ch. D. 472 ; 50 L. T. 602, C. A. 461
——— *v.* Meyer (1830), 10 B. & C. 468 394
——— *v.* Moon, [1884] W. N. 78 628
——— *v.* Phibbs (1867), L. R. 2 H. L. 149 ; 16 L. T. 678 ; 15 W. R. 1049 . 23, 25
——— *v.* Pitcher (1845), 4 Hare, 485 161
——— *v.* Simmons (1862), 7 H. & N. 707 ; 31 L. J. (M. C.) 138 ; 8 Jur. (N. S.) 81 ; 10 W. R. 270 ; 5 L. T. 712 371
——— *v.* Slade (1858), 6 H. L. Cas. 746 499
——— *v.* Trewby (1860), 28 Beav. 194 ; 8 W. R. 299 299
Cooper's Trusts, *Re*, *Ex parte* Sparks (1853), 4 De G. M. & G. 757 ; 2 Eq. Rep. 65 ; 23 L. J. (CH.) 25 ; 17 Jur. 1087 ; 2 W. R. 601, C. A. 112
Cooper and Allen's Contract for Sale to Harlech, *Re* (1876), 4 Ch. D. 802 ; 46 L. J. (CH.) 133 ; 25 W. R. 301 291, 299
Cooper-King *v.* Cooper-King, [1900] P. 65 ; 69 L. J. (P.) 33 489
Coote *v.* Boyd (1789), 2 Bro. C. C. 521 129
——— *v.* Ford, [1899] 2 Ch. 93 ; 68 L. J. (CH.) 508 ; 80 L. T. 697 ; 47 W. R. 548 ; 15 T. L. R. 379, C. A. 359
——— *v.* ——— (1900), 83 L. T. 482 ; 17 T. L. R. 58 540
Cooth *v.* Jackson (1801), 6 Ves. 12 9, 12, 27
Cope *v.* Breslin, [1903] 1 I. R. 418 221
——— *v.* Cope (1833), 1 Mood. & R. 269 ; 5 C. & P. 604 504, 537
Copestake *v.* Hoper, [1908] 2 Ch. 10 ; 77 L. J. (CH.) 610 ; 99 L. T. 371 ; 24 T. L. R. 628 ; 52 Sol. Jo. 516, C. A. 95
Copis *v.* Middleton (1818), 2 Madd. 410 17
——— *v.* ——— (1823), Turn. & R. 224 30
Copper Miners' Co. of England *v.* Fox (1851), 16 Q. B. 229 ; 20 L. J. (Q. B.) 174 ; 15 Jur. 703 358
Coppin *v.* Fernyhough (1788), 2 Bro. C. C. 291 87
Coppinger *v.* Norton, [1902] 2 I. R. 232 350
Coppock *v.* Bower (1838), 4 M. & W. 361 ; 8 L. J. (EX.) 9 517
Corbett, *Re*, Corbett *v.* Cobham (Lord), [1903] 2 Ch. 326 ; 72 L. J. (CH.) 775 ; 88 L. T. 591 ; 52 W. R. 75 129
——— *v.* Corbett (1813), 1 Ves. & B. 335 547
Corbishley's Trusts, *Re* (1880), 14 Ch. D. 846 ; 49 L. J. (CH.) 266 ; 28 W. R. 536...501
Cork (Bishop) *v.* Porter (1877), 11 I. R. C. L. 94 574
Cormack *v.* Barragry (1876), 10 I. R. C. L. 147 305
Cornick *v.* Pearce (1848), 7 Hare, 477 ; 12 Jur. 997 106
Cornish *v.* Abington (1859), 4 H. & N. 549 ; 28 L. J. (EX.) 262 ; 7 W. R. 504...324, 378, 382, 390, 396
——— *v.* Gest (1788), 2 Cox, Eq. Cas. 27 41

PAGE
Cornish *v.* Searell (1828), 8 B. & C. 471; 1 Man. & Ry. (K. B.) 703; 6 L. J. (O. S.) (K. B.) 254 404
Cornwall, *Re*, Baldwin *v.* Belcher (1842), 3 Dr. & War. 173; 6 I. Eq. R. 63; 2 Con. & Law. 131 143
——— *v.* Henson, [1899] 2 Ch. 710; 68 L. J. (CH.) 749; 81 L. T. 113; 48 W. R. 42; 15 T. L. R. 544 99
Cornwallis (Earl), *Re* (1856), 11 Exch. 580; 25 L. J. (EX.) 149; 4 W. R. 711 . 245
Cort *v.* Birkbeck (1779), 1 Doug. (K. B.) 218 544
Cory *v.* Bretton (1830), 4 C. & P. 462 557, 558
—— *v.* Cory (1747), 1 Ves. Sen. 19 18
—— *v.* Eyre (1863), 1 De G. J. & Sm. 149, C. A. 79, 80
—— *v.* Yarmouth and Norwich Rail. Co. (1844), 3 Hare, 593; 3 Ry. & Can. Cas. 524 50
Cosby *v.* Ashtown (Lord) (1859), 10 I. Ch. R. 219 121
Costa Rica (Republic) *v.* Erlanger (1874), L. R. 19 Eq. 33; 44 L. J. (CH.) 281; 31 L. T. 635; 23 W. R. 108 574
Cothay *v.* Sydenham (1788), 2 Bro. C. C. 391 86
Cotter *v.* Barrymore (1733), 4 Bro. Parl. Cas. 203 333, 352
Cotton's Trustees and London School Board, *Re* (1882), 19 Ch. D. 624; 51 L. J. (CH.) 514; 46 L. T. 813; 30 W. R. 610. 113
Couch *v.* Stratton (1799), 4 Ves. 391 141
Couling *v.* Coxe (1848), 6 C. B. 703; 6 Dowl. & L. 399; 18 L. J. (C. P.) 100; 13 Jur. 101 579, 590
Coulson *v.* Disborough, [1894] 2 Q. B. 316; 70 L. T. 617; 58 J. P. 784; 42 W. R. 449; 9 R. 390, C. A. 597, 599
Counhaye, *Re* (1873), L. R. 8 Q. B. 410; 42 L. J. (Q. B.) 217; 28 L. T. 761; 21 W. R. 883 527
Counter *v.* Macpherson (1845), 5 Moo. P. C. C. 83 99
County of Gloucester Bank *v.* Rudry Merthyr Steam and House Coal Colliery Co., [1895] 1 Ch. 629; 64 L. J. (CH.) 451; 72 L. T. 375; 43 W. R. 486; 12 R. 183; 2 Mans. 223, C. A. 381
Court Bureau, Ltd., *Re*, [1891] W. N. 9 497
Courteen *v.* Towse (1807), 1 Camp. 43 594
Courtenay *v.* Williams (1844), 3 Hare, 539; 15 L. J. (CH.) 204 163
Courteney (Lord) *v.* Godschall (1804), 9 Ves. 473 28
Courtney, *Re*, *Ex parte* Pollard (1840), Mont. & Ch. 239 65
Courtoy *v.* Vincent (1823), Turn. & R. 433 240
Cousins, *Re* (1886), 31 Ch. D. 671; 55 L. J. (CH.) 662; 54 L. T. 376; 34 W. R. 393 85
———, *Re*, Alexander *v.* Cross (1885), 30 Ch. D. 203, C. A. 111
Coutts *v.* Acworth (1870), L. R. 9 Eq. 519; 39 L. J. (CH.) 649; 18 W. R. 482 . 117
Coventry (Countess) *v.* Coventry (Earl) (1724), 2 P. Wms. 222; 1 Stra. 596; 1 Eq. Cas. Abr. 848; 9 Mod. Rep. 12; Gilb. (CH.) 160 74
——— *v.* Great Eastern Rail. Co. (1883), 11 Q. B. D. 776; 52 L. J. (Q. B.) 694; 49 L. T. 641, C. A. 324, 382, 384, 387, 399, 408
Cow *v.* Kinnersley (1844), 6 Man. & G. 981; 7 Scott (N. R.), 892; 1 Dow. & L. 906; 13 L. J. (C. P.) 114; 8 Jur. 364 612
Cowell *v.* Edwards (1800), 2 Bos. & P. 268 30
Cowley (Earl), *Re* (1866), L. R. 1 Exch. 288; 4 H. & C. 476; 35 L. J. (EX.) 177; 14 L. T. 663; 12 Jur. (N. S.) 607; 14 W. R. 836. 290
——— *v.* Hartstonge (1813), 1 Dow, 361 105
——— (Earl) *v.* Inland Revenue Commissioners, [1899] A. C. 198; 68 L. J. (Q. B.) 435; 80 L. T. 361; 63 J. P. 436; 47 W. R. 525; 15 T. L. R. 270 183, 185, 210, 212
——— (Earl) *v.* Wellesley (1866), 35 Beav. 635 296
Cowling *v.* Higginson (1838), 4 M. & W. 245; 1 Horn & H. 269; 7 L. J. (EX.) 265 442
Cowlishaw *v.* Hardy (1857), 25 Beav. 169 566
Cowper *v.* Clerk (1732), 3 P. Wms. 155; 2 Eq. Cas. Abr. 229 59
——— *v.* Cowper (Earl) (1734), 2 P. Wms. 720; 2 Eq. Cas. Abr. 538, 726. 7, 8, 69
Cox *v.* Allingham (1822), Jac. 514 553
—— *v.* Bishop (1857), 8 De G. M. & G. 815; 26 L. J. (CH.) 389; 3 Jur. (N. S.) 499; 5 W. R. 437, C. A. 97
—— *v.* Bruce (1886), 18 Q. B. D. 147; 56 L. J. (Q. B.) 121; 57 L. T. 128; 35 W. R. 207; 6 Asp. M. L. C. 152, C. A. 385, 563
—— *v.* Burbidge (1863), 13 C. B. (N. S.) 430; 32 L. J. (C. P.) 89; 9 Jur. (N. S.) 970; 11 W. R. 435 495

PAGE
Cox *v.* Cannon (1838), 4 Bing. (N. C.) 453 390
—— *v.* Couveless (1859), 2 F. & F. 139 429
—— *v.* English, Scottish and Australian Bank, [1905] A. C. 168; 74 L. J. (P. C.) 62; 92 L. T. 483 431
—— *v.* Lee (1869), L. R. 4 Exch. 284; 38 L. J. (EX.) 219; 21 L. T. 178 . . 431
—— and Neve's Contract, *Re*, [1891] 2 Ch. 109; 64 L. T. 733; 39 W. R. 412 . 87
Cox's (Sir Charles) Creditors' Case (1734), 3 P. Wms. 341; 2 Eq. Cas. Abr. 462, 463, 469 31, 33, 34
Coxwell's Trusts, *Re*, Kinloch-Cooke *v.* Public Trustee, [1910] 1 Ch. 63; 79 L. J. (CH.) 62; 101 L. T. 627 222
Crabtree *v.* Bramble (1747), 3 Atk. 680 73, 107, 113, 116
Cracknall *v.* Janson (1879), 11 Ch. D. 1; 48 L. J. (CH.) 168; 39 L. T. 32; 27 W. R. 55, C. A. 368, 626
Craig d. Annesley *v.* Anglesea (Earl) (1743), 17 State Tr. 1139 603
Craker *v.* Parrott (1677), 2 Cas. in Ch. 228 70
Crane *v.* London Dock Co. (1864), 5 B. & S. 313; 33 L. J. (Q. B.) 224; 10 L. T. 372; 10 Jur. (N. S.) 984; 12 W. R. 745 486
Crank *v.* Firth (1839), 2 Mood. & R. 262; 9 C. & P. 197 605
Cranmer's Case (1711), 2 Salk. 508 136
Cranstown (Lord) *v.* Johnston (1796), 3 Ves. 170 66
Craster *v.* Thomas, [1909] 2 Ch. 348; 78 L. J. (CH.) 734; 101 L. T. 66; 25 T. L. R. 659 489
Craven (Earl) *v.* Pridmore (1902), 18 T. L. R. 282, C. A. 458, 564
——— *v.* Smith (1869), L. R. 4 Exch. 146; 38 L. J. (EX.) 90; 20 L. T. 400; 17 W. R. 710 487
Crawcour *v.* Salter (1881), 18 Ch. D. 30; 51 L. J. (CH.) 495; 45 L. T. 62; 30 W. R. 21, C. A. 572
Crawford *v.* Crawford (1886), 11 P. D. 150; 35 W. R. 31 461
——— *v.* Fisher (1842), 1 Hare, 436; 11 L. J. (CH.) 273; 6 Jur. 576 . . 58
——— *v.* Toogood (1879), 13 Ch. D. 153; 49 L. J. (CH.) 108; 41 L. T. 549; 28 W. R. 248 154
——— and Lindsay Peerages, The (1848), 2 H. L. Cas. 534 549
Crawley's Case (1869), 4 Ch. App. 322; 20 L. T. 96; 17 W. R. 454 411
Crawshay *v.* Maule (1818), 1 Swan. 495; 1 Wils. (CH.) 181 38
——— *v.* Thornton (1837), 2 My. & Cr. 1; 6 L. J. (CH.) 179; 1 Jur. 19 . 57, 58
Craythorne *v.* Swinburne (1807), 14 Ves. 160 30
Creagh *v.* Blood (1845), 3 Jo. & Lat. 133 376
Crease *v.* Barrett (1835), 1 Cr. M. & R. 919; 5 Tyr. 458; 4 L. J. (EX.) 297 . 467, 468, 469, 539
Creed, *Re* (1852), 1 Drew. 235 502
———, *Re*, Thomas *v.* Hudson, [1905] W. N. 94 220
Creevy *v.* Carr (1835), 7 C. & P. 64 598
Crespin *v.* Doglioni (1863), 3 Sw. & Tr. 44; 32 L. J. (P. M. & A.) 109; 8 L. T. 91; 11 W. R. 500 520
Cresswell *v.* Jackson (1860), 2 F. & F. 24 508, 608
Crichton *v.* Crichton, [1895] 2 Ch. 853; 65 L. J. (CH.) 13; 73 L. T. 556; 59 J. P. 792; 44 W. R. 203; 13 R. 770 130, 138, 139
Cripps *v.* Hills (1844), 5 Q. B. 606 432
Crisp *v.* Anderson (1815), 1 Stark. 35 516
Crockett *v.* Bishton (1815), 2 Madd. 446 625
Croft, *Re*, Deane *v.* Croft, [1892] 1 Ch. 652; 61 L. J. (CH.) 190; 66 L. T. 157; 40 W. R. 425 222
—— *v.* Graham (1863), 2 De G. J. & Sm. 155; 9 L. T. 589, C. A. 21
Croft's (Lady) Executors *v.* Lyndsey (1676), Freem. (CH.) 1 48
Crofton, *Re* (1839), 1 I. Eq. R. 204 111
——— *v.* Crofton, *Re* Boyse. *See* Boyse, *Re*, Crofton *v.* Crofton.
Crofts *v.* Middleton (1852), 9 Hare, Appendix, xviii.; 17 Jur. 112; 1 W. R. 74...610, 613
——— *v.* ——— (1855), 2 K. & J. 194; 1 Jur. (N. S.) 1133 . . . 366, 367
Crompton *v.* Sale (1729), 2 P. Wms. 553; 1 Eq. Cas. Abr. 205 138
Cropper *v.* Smith (1884), 26 Ch. D. 700; 53 L. J. (CH.) 891; 51 L. T. 733; 33 W. R. 60; affirmed (1885), 10 App. Cas. 249; 55 L. J. (CH.) 12; 53 L. T. 330; 33 W. R. 753 349, 366, 383
Crosby *v.* Hetherington (1842), 4 Man. & G. 933; 5 Scott (N. R.), 637; 12 L. J. (C. P.) 261 486
——— *v.* Percy (1808), 1 Taunt. 364 605
Cross, *Re*, Harston *v.* Tenison (1882), 20 Ch. D. 109; 51 L. J. (CH.) 645; 45 L. T. 777; 30 W. R. 376, C. A. 166, 172

PAGE

Cross *v.* Addenbroke (1719). *See* Lechmere *v.* Carlisle (Earl).
——— & Co. *v.* Matthews and Wallace (1904), 91 L. T. 500; 20 T. L. R. 603...335, 336
Crosse *v.* Smith (1806), 7 East, 246; 3 Smith, K. B. 203 48
Crossley *v.* City of Glasgow Life Assurance Co. (1876), 4 Ch. D. 421; 46 L. J. (CH.) 65; 36 L. T. 285; 25 W. R. 264 96
——— *v.* Dixon (1863), 10 H. L. Cas. 293; 1 New Rep. 426; 32 L. J. (CH.) 617; 8 L. T. 260; 9 Jur. (N. S.) 607; 11 W. R. 716 413
Crossman *v.* R. (1886), 18 Q. B. D. 256; 56 L. J. (Q. B.) 241; 55 L. T. 848; 35 W. R. 303 190, 191
Crouch *v.* Crédit Foncier of England (1873), L. R. 8 Q. B. 374; 42 L. J. (Q. B.) 183; 29 L. T. 259; 21 W. R. 946 393
Croughton *v.* Blake (1843), 12 M. & W. 205; 13 L. J. (EX.) 78; 8 Jur. 275 . 514
Crow *v.* Robinson (1862), 4 De G. F. & J. 337; 31 L. J. (CH.) 516; 6 L. T. 372; 10 W. R. 306, C. A. 246
Crowder *v.* Tinkler (1816), 19 Ves. 617 52
Crowe *v.* Ballard (1790), 1 Ves. 215; 2 Cox, Eq. Cas. 253; 3 Bro. C. C. 117 . 19, 166
——— *v.* Clay (1854), 9 Exch. 604; 23 L. J. (EX.) 150; 18 Jur. 654; 2 W. R. 204 26
Crowly *v.* Burgtheil, [1899] A. C. 374; 68 L. J. (P. C.) 81; 80 L. T. 428 . . 86
Crowther *v.* Appleby (1873), L. R. 9 C. P. 23; 43 L. J. (C. P.) 7; 29 L. T. 580; 22 W. R. 265 581, 589
——— *v.* Elgood (1887), 34 Ch. D. 691; 56 L. J. (CH.) 416; 56 L. T. 415; 35 W. R. 369, C. A. 156
——— *v.* Nelson (1891), 7 T. L. R. 653 615
——— *v.* Solomons (1848), 6 C. B. 758; 18 L. J. (C. P.) 92 516
Crozier *v.* Cundey (1827), 6 B. & C. 232; 9 Dow. & Ry. (K. B.) 224; 5 L. J. (O. S.) (M. C.) 50 510
Cruse *v.* Barley (1727), 3 P. Wms. 19; 2 Eq. Cas. Abr. 543. 104, 109
——— *v.* Paine (1868), L. R. 6 Eq. 641; 37 L. J. (CH.) 711; 19 L. T. 127; 17 W. R. 44 97
Crutchley *v.* Mann (1814), 5 Taunt. 529 392
Cuddee *v.* Rutter (1719), 1 P. Wms. 570; Prec. Ch. 534; 2 Eq. Cas. Abr. 18; 5 Vin. Abr. 538 11
Cuddon *v.* Cuddon (1876), 4 Ch. D. 583; 46 L. J. (CH.) 257; 25 W. R. 341...289, 292
Cullen, *Ex parte*, *Re* Parrott. *See* Parrott, *Re*, *Ex parte* Cullen.
——— *v.* A.-G. for Ireland (1866), L. R. 1 H. L. 190; 14 L. T. 644; 12 Jur. (N. S.) 531; 14 W. R. 869 237
Culverhouse, *Re*, Cook *v.* Culverhouse, [1896] 2 Ch. 251; 65 L. J. (CH.) 484; 74 L. T. 347; 45 W. R. 10 219
Cumming *v.* Forrester (1820), 2 Jac. & W. 334 118
Cunliffe *v.* Sefton (1802), 2 East, 183 605
——— Smith *v.* Hankey, *Re* Hankey. *See* Hankey, *Re*, Cunliffe Smith *v.* Hankey.
Cunningham *v.* Foot (1878), 3 App. Cas. 974; 38 L. T. 889; 26 W. R. 858 . 154
——— *v.* Moody (1748), 1 Ves. Sen. 174 107, 113
Curling *v.* May (1734), 3 Atk. 255 105
Curre *v.* Bowyer (1818), 5 Beav. 6, n. 110
Currie, *Re*, Bjorkman *v.* Kimberley (Lord) (1888), 57 L. J. (CH.) 743; 59 L. T. 200; 36 W. R. 752 257, 317
——— *v.* Child (1813), 3 Camp. 283 605
——— *v.* Pye (1811), 17 Ves. 462 129
Curteis *v.* Wormald (1878), 10 Ch. D. 172; 40 L. T. 108; 27 W. R. 419, C. A. . 110
Curtin *v.* Evans (1875), 9 I. R. Eq. 553. 136
Curtis *v.* Curtis (1789), 2 Bro. C. C. 620 42
——— *v.* March (1858), 3 H. & N. 866; 28 L. J. (EX.) 36; 4 Jur. (N. S.) 1112 . 492
——— *v.* Peck (1864), 13 W. R. 230 594
——— *v.* Williamson (1874), L. R. 10 Q. B. 57; 44 L. J. (Q. B.) 27; 31 L. T. 678; 23 W. R. 236 365
Curzon *v.* Lomax (1803), 5 Esp. 60 469
Custance *v.* Bradshaw (1845), 4 Hare, 315; 14 L. J. (CH.) 358; 9 Jur. 486 . 308
Cuthbert *v.* Purrier (1847), 2 Ph. 199; 6 Jur. 447 503
Cuthbertson *v.* Irving (1859), 4 H. & N. 742; 5 Jur. (N. S.) 740; 28 L. J. (EX.) 306; affirmed (1860), 6 H. & N. 135; 29 L. J. (EX.) 485; 3 L. T. 335; 6 Jur. (N. S.) 1211; 8 W. R. 704 373, 374, 402, 403, 404, 405
Cutler *v.* Bower (1848), 11 Q. B. 973; 17 L. J. (Q. B.) 217; 12 Jur. 721 . 367, 413
——— *v.* Wright, [1890] W. N. 28 616
Cuts *v.* Pickering (1672), 1 Vent. 197; 3 Keb. 2; 3 Rep. Ch. 66 571, 572

D.

PAGE
D. *v.* D. and G., [1903] P. 144 ; 72 L. J. (P.) 51; 88 L. T. 51 ; 19 T. L. R. 387 . 594
Dabbs *v.* Nugent (1865), 11 Jur. (N. S.) 943 ; 14 W. R. 94 ; 13 L. T. 396 . . 28
Da Costa *v.* Pym (1797), Peake, Add. Cas. 144 607
——— *v.* Villa Real (1734), 2 Stra. 961 362
Dacres (Lord) *v.* Crompe (*circ.* 1668), 2 Cas. in Ch. 87. 71
Dagenham (Thames) Dock Co., *Re, Ex parte* Hulse (1873), 8 Ch. App. 1022 ; 43 L. J. (CH.) 261 ; 21 W. R. 898 152
D'Aglie *v.* Fryer (1844), 13 L. J. (CH.) 398 538
Daines *v.* Hartley (1848), 3 Exch. 200 ; 18 L. J. (EX.) 81 483, 607
Daintry, *Re, Ex parte* Holt, [1893] 2 Q. B. 116 ; 10 Morr. 158 ; 62 L. J. (Q. B.) 511 ; 69 L. T. 257 ; 41 W. R. 590 ; 5 R. 414 . . 457, 557, 558, 559
——— *v.* Brocklehurst (1848), 3 Exch. 207 ; 18 L. J. (EX.) 57 442
Dakers *v.* Lilburn (1865), 11 Jur. (N. S.) 292 ; 13 W. R. 568 ; 12 L. T. 167, C. A....241
Dalbiac *v.* Dalbiac (1809), 16 Ves. 116 16, 377
Dale *v.* Lolley (1808), 2 Bro. C. C. (5th ed. by Belt) 582, n. 52
—— *v.* Sollet (1767), 4 Burr. 2133 162
—— & Co., *Ex parte, Re* West of England and South Wales District Bank. *See* West of England and South Wales District Bank, *Re, Ex parte* Dale & Co.
Dalgleish *v.* Hodgson (1831), 7 Bing. 495 ; 5 Moo. & P. 407 . . . 340, 341
Dallas, *Re*, [1904] 2 Ch. 385 ; 73 L. J. (CH.) 365 ; 90 L. T. 177 ; 52 W. R. 567, C. A....103
Dalrymple, *Re*, Bircham *v.* Springfield (1901), 49 W. R. 627 242
——— *v.* Dalrymple (1811), 2 Hag. Con. 54 489
Dalston *v.* Coatsworth (1721), 1 P. Wms. 731 ; 2 Eq. Cas. Abr. 287 26
Dalton *v.* Angus (1881), 6 App. Cas. 740 ; 50 L. J. (Q. B.) 689 ; 44 L. T. 844 ; 46 J. P. 132 ; 30 W. R. 191 506
——— *v.* Fitzgerald, [1897] 2 Ch. 86 ; 66 L. J. (CH.) 604 ; 76 L. T. 700 ; 45 W. R. 685, C. A. 344, 374
——— *v.* Lloyd (1835), 1 Gale, 102 612
Daly *v.* Dublin, Wicklow and Wexford Rail. Co. (1892), 30 L. R. Ir. 514, C. A. 336, 347
Dan *v.* Brown (1825), 4 Cowen (New York), 483 461
Danby *v.* Danby (1859), 5 Jur. (N. S.) 54 503
Dance *v.* Robson (1829), Mood. & M. 294 486
Dandridge *v.* Corden (1827), 3 C. & P. 11 574
Dangerfield *v.* Jones (1865), 13 L. T. 142 413
Daniel *v.* Pitt (1808), 1 Camp. 366, n. ; Peake, Add. Cas. 238 ; 6 Esp. 74 . . 462
——— *v.* Wilkin (1852), 7 Exch. 429 ; 21 L. J. (EX.) 236 . 469, 475, 528, 532, 564
Daniels *v.* Davison (1809), 16 Ves. 249 ; (1811) 17 Ves. 433 88
Danks *v.* Harley (1853), 1 W. R. 291 332
Dann *v.* Spurrier (1802), 7 Ves. 231 167
Darby *v.* Ouseley (1856), 1 H. & N. 1 ; 25 L. J. (EX.) 227 ; 2 Jur. (N. S.) 497 . 424, 563, 601
D'Arcy *v.* Blake (1805), 2 Sch. & Lef. 387 96
Dare Valley Rail Co., *Re* (1868), L. R. 6 Eq. 429 ; 37 L. J. (CH.) 719 . . . 552
Darlington (Earl) *v.* Bowes (1759) 1 Eden, 270 39
——— *v.* Pritchard (1842), 4 Man. & G. 783 ; 2 Dowl. (N. S.) 664 ; 5 Scott (N. R.), 610 ; 12 L.J. (C. P.) 34 ; 7 Jur. 677 403
Darnley (Earl) *v.* London, Chatham and Dover Railway (1867), L. R. 2 H. L. 43 ; 36 L. J. (CH.) 404 ; 16 L. T. 217 ; 15 W. R. 817 165
Dashwood *v.* Magniac, [1891] 3 Ch. 306 ; 64 L. T. 99, C.A.. 444
——— *v.* Peyton (1811), 18 Ves. 27. 121, 122
Dauglish *v.* Tennent (1866), L. R. 2 Q. B. 49 ; 8 B. & S. 1 ; 36 L. J. (Q. B.) 10 ; 15 W. R. 196 20
Daun *v.* City of London Brewery Co. (1869), L. R. 8 Eq. 155 ; 38 L. J. (CH.) 454 ; 20 L. T. 601 495
Davenant *v.* Salisbury (Bishop) (1672), 1 Vent. 223 ; 2 Lev. 68 ; 3 Keb. 69 . 360
Davenport *v.* Coltman (1842), 12 Sim. 588 ; 6 Jur. 404 109
Davey *v.* Durrant (1857), 1 De G. & J. 535 ; 26 L. J. (CH.) 830 71
——— *v.* Shannon (1879), 4 Ex. D. 81 ; 48 L. J. (EX.) 459 ; 40 L. T. 628 ; 27 W. R. 599 426
David *v.* Rees, [1904] 2 K. B. 435 ; 73 L. J. (K. B.) 729 ; 91 L. T. 244 ; 52 W. R. 579 ; 20 T. L. R. 577, C. A. 163
Davidson, *Re*, Martin *v.* Trimmer, Davidson *v.* Trimmer (1879), 11 Ch. D. 341 ; 40 L. T. 726, C. A. 114, 115
——— *v.* Illidge, *Re* Illidge. *See* Illidge, *Re*, Davidson *v.* Illidge.

PAGE
Davies, *Re*, Davies *v.* Atkinson, [1909] W. N. 212 497
———-, *Re*, Issard *v.* Lambert (1890), 44 Ch. D. 253; 59 L. J. (CH.) 516; 62 L. T. 715; 38 W. R. 584, C. A. 622
——— *v.* Ashford (1845), 15 Sim. 42; 14 L. J. (CH.) 473; 9 Jur. 612 . . 115
——— *v.* Davies (1840), 9 C. & P. 252 602
——— *v.* ——— (1860), 6 Jur. (N. S.) 1320 377
——— *v.* ———, *Re* Hole. *See* Hole, *Re*, Davies *v.* Davies.
——— *v.* Fowler (1873), L. R. 16 Eq. 308; 43 L. J. (CH.) 90; 29 L. T. 285...316, 317
——— *v.* Games (1879), 12 Ch. D. 813; 28 W. R. 16 39
——— *v.* Gas Light and Coke Co., [1909] 1 Ch. 708; 78 L. J. (CH.) 445; 100 L. T. 553; 25 T. L. R. 428; 53 Sol. Jo. 399; 16 Mans. 147, C. A. . 47
——— *v.* Goodhew (1834), 6 Sim. 585 106
——— *v.* London and Provincial Marine Insurance Co. (1878), 8 Ch. D. 469; 47 L. J. (CH.) 511; 38 L. T. 478; 26 W. R. 794 15
——— *v.* Lowndes (1843), 7 Scott (N. R.), 141; 6 Man. & G. 473; 12 L. J. (C. P.) 506 468, 470, 471, 564, 565
——— *v.* Nicolson (1858), 2 De G. & J. 693; 27 L. J. (CH.) 719; 5 Jur. (N. S.) 49; 6 W. R. 790, C. A. 160
——— *v.* Otty (1865), 35 Beav. 208; 34 L. J. (CH.) 252; 12 L. T. 789; 13 W. R. 484; 5 New Rep. 391 75
——— *v.* Witts, *Re* Hole. *See* Hole, *Re*, Davies *v.* Witts.
Davis *v.* Bank of England (1824), 2 Bing. 393; 9 Moore (C. P.), 747; 3 L. J. (O. S.) (C. P.) 4 373, 411
——— *v.* Chambers (1857), 7 De G. M. & G. 386; 3 Jur. (N. S.) 297; 5 W. R. 245 128
——— *v.* Dale (1830), 4 C. & P. 335 597
——— *v.* Davis, [1894] 1 Ch. 393; 63 L. J. (CH.) 219; 70 L. T. 265; 42 W. R. 312; 8 R. 133 39
——— *v.* Forman, [1894] 3 Ch. 654; 64 L. J. (CH.) 187; 43 W. R. 168; 8 R. 725 50
——— *v.* Hedges (1871), L. R. 6 Q. B. 687; 40 L. J. (Q. B.) 276; 25 L. T. 155; 20 W. R. 60 332, 355, 358
——— *v.* Hone (1805), 2 Sch. & Lef. 341 12
——— *v.* Hutchings, [1907] 1 Ch. 356; 76 L. J. (CH.) 272; 96 L. T. 293 . . 88
——— *v.* Lloyd (1844), 1 Car. & Kir. 275 467, 538
——— *v.* Lovell (1839), 4 M. & W. 678; 1 Horn & H. 451; 7 Dowl. 178; 8 L. J. (EX.) 152; 3 Jur. 1225 579, 590
——— *v.* Lowndes (1838), 7 Dowl. 107 613
——— *v.* Marlborough (Duke) (1819), 2 Swan, 108 9, 21, 53, 55, 70
——— *v.* Martin, *Re* Queensland Land and Coal Co. *See* Queensland Land and Coal Co., *Re*, Davis *v.* Martin.
——— *v.* Page (1804), 9 Ves. 350 127
——— *v.* Reid (1832), 5 Sim. 443 575
——— *v.* Symonds (1787), 1 Cox, Eq. Cas. 402 566
——— *v.* Thomas (1831), 1 Russ. & M. 506 151, 153
——— *v.* Vass (1812), 15 East, 97 552
——— *v.* West (1806), 12 Ves. 475 153
——— *v.* Williams (1811), 13 East, 232 553
Davis's Trusts, *Re* (1869), L. R. 8 Eq. 98 628
Davison d. Bromley *v.* Stanley (1768), 4 Burr. 2210 375
——— *v.* Gent (1857), 1 H. & N. 744; 26 L. J. (EX.) 122; 3 Jur. (N. S.) 342; 5 W. R. 229 376
Davys *v.* Boucher (1839), 3 Y. & C. (EX.) 397; 3 Jur. 674 133
Dawkins *v.* Rokeby (Lord) (1873), L. R. 8 Q. B. 255; 42 L. J. (Q. B.) 63; 28 L. T. 134; 21 W. R. 544. 573
——— *v.* Tatham (1829), 2 Sim. 492 240
Dawson *v.* Clark (1811), 18 Ves. 247 159
——— *v.* Dawson (1803), 7 Ves. 173 60
——— *v.* ——— (1867), L. R. 4 Eq. 504 132, 137
——— *v.* ——— (1905), 22 T. L. R. 52 466, 467
——— *v.* Gregory (1845), 7 Q. B. 756; 14 L. J. (Q. B.) 286; 9 Jur. 688 . 331, 552
Day *v.* Turnell, *Re* Higgins. *See* Higgins, *Re*, Day *v.* Turnell.
——— *v.* Ward (1886), 17 Q. B. D. 703; 55 L. J. (Q. B.) 494; 55 L. T. 518; 35 W. R. 59 487
Dayman *v* Dayman (1894), 71 L. T. 699 606
Deacon *v.* Smith (1746), 3 Atk. 323 139, 140
Deane *v.* Croft, *Re* Croft. *See* Croft, *Re*, Dean *v.* Croft.
Dear *v.* Knight (1859), 1 F. & F. 433 600

PAGE
Deare *v.* Soutten (1869), L. R. 9 Eq. 151; 21 L. T. 523; 18 W. R. 203 . . 149
Dearle *v.* Hall (1828), 3 Russ. 1 103
De Beauvoir *v.* De Beauvoir (1852), 3 H. L. Cas. 524; 16 Jur. 1147 . . . 105
Debenham *v.* Sawbridge, [1901] 2 Ch. 98; 70 L. J. (CH.) 525; 84 L. T. 519; 49 W. R. 502; 17 T. L. R. 441 25
Debeze *v.* Mann (1787), 2 Bro. C. C. 165 136
De Bode's (Baron) Case (1845), 8 Q. B. 208 489
Debtor (A), *Re*, [1910] 2 K. B. 59; 26 T. L. R. 429, C. A. 574
De Burgh Lawson, *Re*, De Burgh Lawson *v.* De Burgh Lawson (1885), 34 W. R. 39; 55 L. J. (CH.) 46; 53 L. T. 522 120
De Burgho's Estate, *Re*, [1896] 1 I. R. 274 346
De Bussche *v.* Alt (1878), 8 Ch. D. 286; 47 L. J. (CH.) 381; 38 L. T. 370, C. A. 166, 167, 396
Deeks *v.* Strutt (1794), 5 Term Rep. 690 31, 71
Deeley *v.* Lloyds Bank, [1910] 1 Ch. 648; 102 L. T. 556, C. A. 84, 386, 389
——— *v.* Perkes, [1896] A. C. 496; 65 L. J. (CH.) 912; 75 L. T. 233 . 347
Deeley's Patent, *Re*, [1895] 1 Ch. 687; 64 L. J. (CH.) 480; 72 L. T. 702; 43 W. R. 517; 12 R. 272, C. A. 347, 349
Deep Sea Fishery Co.'s Claim, *Re* Fenwick, Stobart & Co., Ltd. *See* Fenwick, Stobart & Co., Ltd., *Re*, Deep Sea Fishery Co,'s Claim.
Deerhurst, *Re*, *Ex parte* Seaton (1891), 60 L. J. (Q. B.) 413, n.; 64 L. T. 273; 8 Morr. 97, C. A. 348
Deffell *v.* White (1866), L. R. 2 C. P. 144; 36 L. J. (C. P.) 25; 15 L. T. 211; 12 Jur. (N. S.) 902; 15 W. R. 68 511
Defries, *Re*, Norton *v.* Levy (1883), 48 L. T. 703 347, 350
De Gruyther *v.* De Gruyther (1900), *Times*, November 2nd 535
De Hoghton, *Re*, De Hoghton *v.* De Hoghton, [1896] 1 Ch. 855; 65 L. J. (CH.) 528; 74 L. T. 297; 44 W. R. 550, C. A. 264
——— *v.* Money (1866), 2 Ch. App. 164; 15 L. T. 403; 15 W. R. 214 90, 100
De Lancey, *Re* (1870), L. R. 5 Exch. 102; 39 L. J. (EX.) 76; 22 L. T. 239; 18 W. R. 468 239
——— *Re* (1869), L. R. 4 Exch. 327, n. 304
——— *v.* R. (1872), L. R. 7 Exch. 140; 41 L. J. (EX.) 64; 26 L. T. 400; 20 W. R. 441 239, 248
De Lancey's Succession, *Re* (1869), L. R. 4 Exch. 345; 38 L. J. (EX.) 193; 21 L. T. 58 270
Delaney *v.* Fox (1857), 2 C. B. (N. S.) 768; 26 L. J. (C. P.) 248 . . 373, 402, 404
Delany *v.* Tenison (1758), 3 Bro. Parl. Cas. 659 518
Delaroque *v.* Oxenholme & Co., [1883] W. N. 227 583, 612
De Lassalle *v.* Guildford, [1901] 2 K. B. 215; 70 L. J. (K. B.) 533; 84 L. T. 549; 49 W. R. 467; 17 T. L. R. 384, C. A. 567
Delauney *v.* Mitchell (1816), 1 Stark. 437 517
DeLeon *v.* Hubbard, [1883] W. N. 197 628
"Delta," The (1876), 1 P. D. 393; 45 L. J. (P.) 111; 35 L. T. 376; 25 W. R. 46 361
Delves *v.* Delves (1875), L. R. 20 Eq. 77; 23 W. R. 499 157
De Mattos *v.* Gibson (1859), 4 De G. & J. 276, C. A. 101
De Mestre *v.* West, [1891] A. C. 264; 60 L. J. (P. C.) 66; 64 L. T. 375; 55 J. P. 613 191
De Mora *v.* Concha, Concha *v.* Murietta. *See* Concha *v.* Murietta, De Mora *v.* Concha
——— *v.* ——— (1885), 29 Ch. D. 268; 54 L. J. (CH.) 532; 52 L. T. 282; 49 J. P. 548; 33 W. R. 846, C. A. 323
——— *v.* ——— (1886), 32 Ch. D. 133; 55 L. J. (CH.) 821; 54 L. T. 554; 34 W. R. 522, C. A. 621
Dendy *v.* Evans, [1910] 1 K. B. 263; 79 L. J. (K. B.) 121; 102 L. T. 4; 54 Sol. Jo. 151, C. A. 153
Denham & Co., *Re* (1883), 25 Ch. D. 752; 50 L. T. 523; 32 W. R. 487 . . 449
Dening *v.* Ware (1856), 22 Beav. 184 97
Denn d. Goodwin *v.* Spray (1786), 1 Term Rep. 466 540
——— d. Lucas *v.* Fulford (1761), 2 Burr. 1177 523
Dens *v.* Ryley (1851), 20 L. J. (C. P.) 264 550
Denton, *Ex parte*, R. *v.* Sharman. *See* R. *v.* Sharman, *Ex parte* Denton.
——— *v.* Stewart (1786), 1 Cox, Eq. Cas. 258 12
De Quetteville *v.* De Quetteville, [1905] W. N. 130, C. A. 219
Derbishire *v.* Home (1853), 3 De G. M. & G. 80, C. A. 170
Derby (Earl) *v.* Foster (1835), 1 Ad. & El. 791, n 546

PAGE
Derby's (Earl) Case (1614), 12 Co. Rep. 114 5
Derby Corporation *v.* Derbyshire County Council, [1897] A. C. 550; 66 L. J. (Q. B.) 701; 77 L. T. 107; 62 J. P. 4; 46 W. R. 48 574
De Rechberg *v.* Beeton (1888), 38 Ch. D. 192; 57 L. J. (CH.) 1090; 59 L. T. 56; 36 W. R. 682 277
Dering *v.* Winchelsea (Earl) (1787), 1 Cox, Eq. Cas. 318; 2 Bos. & P. 270; 1 White & Tud. L. C., 7th ed., 538 30, 69, 70, 72
De Rochefort *v.* Dawes (1871), L. R. 12 Eq. 540; 40 L. J. (CH.) 625; 25 L. T. 456...144
Derry *v.* Peek (1889), 14 App. Cas. 337; 58 L. J. (CH.) 864; 61 L. T. 265; 54 J. P. 148; 38 W. R. 33; 1 Meg. 292 14, 15
De Rutzen (Baron) *v.* Farr (1835), 4 Ad. & El. 53; 5 Nev. & M. (K. B.) 617; 1 Har. & W. 735; 5 L. J. (K. B.) 38 561
De Salazar, *In the Goods of* (1873), 21 W. R. 776 496
Desborough *v.* Harris (1855), 5 De G. M. & G. 439; 1 Jur. (N. S.) 986; 3 Eq. Rep. 1058; 4 W. R. 2 57
Deschamps *v.* Miller, [1908] 1 Ch. 856; 77 L. J. (CH.) 416; 98 L. T. 564 . . 65
Desportes, *Re*, *Ex parte* Official Receiver (1893), 68 L. T. 233; 5 R. 221; 10 Morr. 40 576
Dessau *v.* Lewin, *Re* Michael. *See* Michael, *Re*, Dessau *v.* Lewin.
Dettmar *v.* Metropolitan and Provincial Bank (1863), 1 Hem. & M. 641; 10 L. T. 63; 3 New Rep. 364 18
Deutsche Bank *v.* Beriro (1895), 73 L. T. 669, C. A. 386
Devala Provident Gold Mining Co., *Re* (1883), 22 Ch. D. 593; 52 L. J. (CH.) 434; 48 L. T. 259; 31 W. R. 425 461
Devaynes *v.* Noble, Baring *v.* Noble (1831), 2 Russ. & M. 495 39
——— *v.* ———, Baring *v.* Noble, Clayton's Case (1816), 1 Mer. 529...39, 84, 160
Devese *v.* Pontet (1785), Prec. Ch. 240, n. (2nd ed. by Finch); 1 Cox, Eq. Cas. 188 138, 142
De Vitre *v.* Betts (1873), L. R. 6 H. L. 319; 31 W. R. 705 68
Devonald *v.* Rosher, [1906] 2 K. B. 741 445
Devonsher *v.* Newenham (1804), 2 Sch. & Lef. 199 39
Devonshire (Duke) *v.* Neill (1877), 2 L. R. Ir. 132 468, 469
Devonshire's (Earl) Case (1607), 11 Co. Rep. 89 a 27
Dew *v.* Clarke (1822) 1 Sim. & St. 108 45
Dewar *v.* Goodman, [1907] 1 K. B. 612; [1908] 1 K. B. 94; 77 L. J. (K. B.) 169; 97 L. T. 2; 25 T. L. R. 62, C. A.; affirmed, [1909] A. C. 72; 78 L. J. (K. B.) 209; 100 L. T. 2; 25 T. L. R. 137; 53 Sol. Jo. 116 100
—— *v.* Maitland (1866), L. R. 2 Eq. 834; 14 L. T. 853; 12 Jur. (N. S.) 699; 14 W. R. 958 120, 125, 126
Dewhurst *v.* Clarkson (1854), 3 E. & B. 194; 2 C. L. R. 1143; 23 L. J. (Q. B.) 247; 18 J. P. 534; 18 Jur. 693 477
Dexter *v.* Hayes (1860), 11 I. C. L. R. 106; affirmed *sub nom.* Hayes *v.* Dexter (1861), 13 I. C. L. R. 22 443, 444
Deybel's Case (1821), 4 B. & Ald. 243 494
Dicas *v.* Brougham (Lord) (1833), 6 C. & P. 249 599
——— *v.* Lawson (1835), 1 Cr. M. & R. 934; 3 Dowl. 427; 5 Tyr. 235; 4 L. J. (EX.) 80 589
Dicconson *v.* Talbot (1870), 6 Ch. App. 32; 24 L. T. 49; 19 W. R. 138 . . 155
Dickenson *v.* Blisset (1754), 1 Dick. 268 569
Dickins *v.* Randerson, [1901] 1 K. B. 437; 70 L. J. (K. B.) 344; 84 L. T. 204; 65 J. P. 262; 17 T. L. R. 224; 19 Cox, C. C. 643 479
Dickinson (Ann) *v.* Burrell, Stourton *v.* Burrell (1866), L. R. 1 Eq. (CH.) 371; 12 Jur. (N. S.) 199; 14 W. R. 412; 35 Beav. 257; 13 L. T. 660. 90
——— *v.* Shee (1801), 4 Esp. 67 598
Dickson *v.* Evans (1794), 6 Term Rep. 57 435
——— *v.* Reuter's Telegram Co. (1877), 3 C. P. D. 1; 47 L. J. (Q. B.) 1; 37 L. T. 370; 26 W. R. 23, C. A. 322, 378
Dilkes *v.* Broadmead (1860), 2 De G. F. & J. 566; 30 L. J. (CH.) 268; 3 L. T. 605; 7 Jur. (N. S.) 56; 9 W. R. 238 160
Dillon *v.* Coppin (1839), 4 My. & Cr. 647; 9 L. J. (CH.) 87; 4 Jur. 427 . . 98
——— *v.* O'Brien and Davis (1887), 16 Cox, C. C. 245; 20 L. R. Ir. 300 . . 510
——— *v.* Parker (1818), 1 Swan. 359; 1 Wils. (CH.) 253 . . 116, 122, 125, 126
Dimond *v.* Vallance (1839), 7 Dowl. 590; 2 Will. Woll. & H. 67; 3 Jur. 385 . 612
Dingle, *Re*, *Ex parte* Butterfill, *Ex parte* Rashleigh (1811), 1 Rose, 192 . . 348
Dinwiddie *v.* Bailey (1801), 6 Ves. 136 28
Dionissis *v.* R. (1865), 3 Moo. P. C. C. (N. S.) 181 375
Disher *v.* Disher (1712), 1 P. Wms. 204; 2 Eq. Cas. Abr. 720 107

PAGE
Di Sora *v.* Phillips (1863), 10 H. L. Cas. 624; 2 New Rep. 553; 33 L. J. (CH.) 129 430, 490
D'Israeli *v.* Jowett (1795), 1 Esp. 427 541
Ditcher *v.* Kenrick (1824), 1 C. & P. 161 581, 582
Dixon, *Re*, Heynes *v.* Dixon, [1900] 2 Ch. 561; 69 L. J. (CH.) 689; 83 L. T. 129; 48 W. R. 665, C. A. 151
——— *Re*, Penfold *v.* Dixon, [1902] 1 Ch. 248; 71 L. J. (CH.) 96; 85 L. T. 622; 50 W. R. 203; 18 T. L. R. 154 215, 217, 219, 220
——— *v.* Gayfere (No. 2), Fluker *v.* Gordon (1853), 17 Beav. 433; 23 L. J. (CH.) 60 115
——— *v.* Kennaway, [1900] 1 Ch. 833; 69 L. J. (CH.) 501; 82 L. T. 527; 16 T. L. R. 329 361, 381, 384, 410
——— *v.* Lee (1834), 1 Cr. M. & R. 645; 5 Tyr. 180; 3 Dowl. 259 . . 583, 590
——— *v.* Samson (1837), 2 Y. & C. (EX.) 566; 1 Jur. 495 122
——— *v.* Steel, [1901] 2 Ch. 602; 70 L. J. (CH.) 794; 85 L. T. 404; 50 W. R. 132 143
——— *v.* Winch, [1900] 1 Ch. 736; 69 L. J. (CH.) 465; 82 L. T. 437; 48 W. R. 612; 16 T. L. R. 276, C. A. 85
——— *v.* Yates (1833), 5 B. & Ad. 313; 2 Nev. & M. (K. B.) 177; 2 L. J. (K. B.) 198 407
Dobson *v.* Bell (1676), 2 Lev. 176; 3 Keb. 693; T. Jo. 87 468
——— *v.* Pattinson (1857), 3 Jur. (N. S.) 1202; 5 W. R. 771 503
Docker *v.* Somes (1834), 2 My. & K. 655; 3 L. J. (CH.) 200 158
Dodd *v.* Acklom (1843), 6 Man. & G. 672; 7 Scott (N. R.), 415; 13 L. J. (C. P.) 11; 7 Jur. 1017 375
——— *v.* Norris (1814), 3 Camp. 519 455
Doddington's Case (1594), 2 Co. Rep. 32 b; Poph. 60 366
Dodsley *v.* Kinnersley (1761), Amb. 403 12
Dodson (P.), *Re*, *Re* Dodson (A. L. P.), Gibson *v.* Dodson, [1907] 1 Ch. 284; 76 L. J. (CH.) 182; 96 L. T. 254 220
———, *Re*, Yates *v.* Morton, [1908] 2 Ch. 638; 77 L. J. (CH.) 830; 98 L. T. 395 112
——— *v.* Hay (1791), 3 Bro. C. C. 405 107
Dodsworth, *Re*, Spence *v.* Dodsworth, [1891] 1 Ch. 658; 60 L. J. (CH.) 768; 64 L. T. 282; 39 W. R. 362 625
Doe d. Arundel (Lord) *v.* Fowler (1850), 14 Q. B. 700; 19 L. J. (Q. B.) 151; 14 Jur. 179 513, 514, 524, 537
——— Ashburnham (Earl) *v.* Michael (1851), 17 Q. B. 276; 20 L. J. (Q. B) 480; 15 Jur. 677 512, 561
——— Askew *v.* Askew (1809), 10 East, 520 540
——— Bacon *v.* Brydges (Lady) (1843), 6 Man. & G. 282; 7 Scott (N. R.), 333; 13 L. J. (C. P.) 209 344
——— Bailey *v.* Foster (1846), 3 C. B. 215; 15 L. J. (C. P.) 263 402
——— Bamford *v.* Barton (1837), 2 Mood & R. 28 470
——— Bank of England *v.* Chambers (1836), 4 Ad. & El. 410; 6 Nev. & M. (K. B.) 539; 1 Har. & W. 749; 5 L. J. (K. B.) 123 . . 496, 511, 607
——— Banning *v.* Griffin (1812), 15 East, 293 470, 504
——— Barrett *v.* Kemp (1831), 5 Moo. & P. 173; 7 Bing. 332 429
——— *v.* ——— (1835), 2 Scott, 9; 1 Hodg. 231; 4 L. J. (EX.) 331; 2 Bing. (N. C.) 102 452
——— Bassett *v.* Mew (1837), 7 Ad. & El. 240 553
——— Batten *v.* Murless (1817), 6 M. & S. 110 544
——— Biddle *v.* Abrahams (1816), 1 Stark. 305 403
——— Biddulph *v.* Poole (1848), 11 Q. B. 713; 17 L. J. (Q. B.) 143; 12 Jur. 450...375
——— Bland *v.* Smith (1817), 2 Stark, 199; Holt (N. P.), 589 544
——— Blayney *v.* Savage (1844), 1 Car. & Kir. 487 538
——— Bodenham *v.* Colcombe (1841), Car. & M. 155 561
——— Bowerman *v.* Sybourn (1796), 7 Term Rep. 2 543
——— Bowley *v.* Barnes (1846), 8 Q. B. 1037; 15 L. J. (Q. B.) 293; 10 Jur. 520...443
——— Bridger *v.* Whitehead (1832), 8 Ad. & El. 571; 3 Nev. & P. (K. B.) 557; 1 Will. Woll. & H. 521; 7 L. J. (Q. B.) 250; 2 Jur. 493 436
——— Bristow *v.* Pegge (1785), 1 Term Rep. 758, n. 407
——— Bullen *v.* Mills (1834), 2 Ad. & El. 17; 4 Nev. & M. (K. B.) 25; 1 Mood. & R. 385; 4 L. J. (K. B.) 10 403
——— Burrows *v.* Freeman (1844), 12 M. & W. 844; 1 Car. & K. 386; 14 L. J. (EX.) 142 541
——— Butcher *v.* Musgrave (1840), 1 Man. & G. 625; 1 Scott (N. R.), 451; 9 L. J. (C. P.) 318 366

PAGE

Doe d. Carter *v.* James (1837), 2 Mood. & R. 47 581
——— Chandler *v.* Ford (1835), 3 Ad. & El. 649 ; 5 Nev. & M. (K. B.) 209 ; 1 Har. & W. 378 370
——— Chawner *v.* Boulter (1837), 6 Ad. & El. 675 ; 1 Nev. & P. (K. B.) 650 ; Will. Woll. & Dav. 333 ; 6 L. J. (K. B.) 179 545
——— Chetham, Strode *v.* Seaton (1834), 2 Ad. & El. 171 ; 4 Nev. & M. (K. B.) 81 ; 4 L. J. (K. B.) 13 475, 529
——— Christmas *v.* Oliver (1829), 5 Man. & Ry. (K. B.) 202 ; 10 B. & C. 181 ; 2 Smith, L. C., 11th ed., 724. 374
——— Church *v.* Perkins (1790), 3 Term Rep. 749 596
——— Clarke *v.* Thomson (1841), 9 Dowl. 948 578
——— Clun (Bailiff etc.) *v.* Clarke (1809), Peake, Add. Cas. 239 . . . 404, 405
——— Colemere *v.* Whitroe (1822), Dow. & Ry. (N. P.) 1 405
——— Croydon (Churchwardens) *v.* Cook (1805), 5 Esp. 221 541
——— Curzon *v.* Edmonds (1840), 6 M. & W. 295 432
——— Daniel *v.* Coulthred (1837), 7 Ad. & El. 232 ; 2 Nev. & P. (K. B.) 165 ; Will. Woll. & Dav. 477 ; 7 L. J. (Q. B.) 52 442
——— Davies *v.* Gatacre (1838), 8 C. & P. 578 538, 539
——— Davy *v.* Haddon (1783), 3 Doug. (K. B.) 310 364
——— Devine *v.* Wilson (1855), 10 Moo. P. C. C. 502. 506, 508
——— Digby *v.* Steel (1811), 3 Camp. 115 543
——— Downe (Lord) *v.* Thompson (1847), 9 Q. B. 1037 ; 11 Jur. 1007 . 346, 403
——— Duncan *v.* Edwards (1839), 9 Ad. & El. 555 ; 1 Per. & Dav. 408 ; 2 Will. Woll. & H. 12 ; 8 L. J. (Q. B.) 98 ; 3 Jur. 41 427, 496
——— Egremont *v.* Courtenay (1848), 11 Q. B. 702 375
——— ——— (Earl) *v.* Date (1842), 3 Q. B. 609 ; 6 Jur. 990 . . . 570, 576
——— ——— *v.* Grazebrook (1843), 4 Q. B. 406 ; 3 Gal. & Dav. 334 ; 12 L. J. (Q. B.) 221 ; 7 Jur. 530 538
——— ——— (Lord) *v.* Langdon (1848), 12 Q. B. 711 ; 18 L. J. (Q. B.) 17 ; 13 Jur. 96 581, 582
——— ——— *v.* Pulman (1842) 3 Q. B. 622 ; 6 Jur. 1122 . . . 442
——— Fleming *v.* Fleming (1827), 4 Bing. 266 ; 12 Moore (C. P.), 500 ; 5 L. J. (O. S.) (C. P.) 169 444, 446, 504
——— ——— *v.* Somerton (1845), 7 Q. B. 58 ; 14 L. J. (Q. B.) 210 ; 9 Jur. 775 521
——— Foster *v.* Derby (Earl) (1834), 1 Ad. & El. 783 ; 3 Nev. & M. (K. B.) 782 ; 3 L. J. (K. B.) 191 346, 546
——— France *v.* Andrews (1850), 15 Q. B. 756 473, 502, 538
——— Frankis *v.* Frankis (1840), 11 Ad. & El. 792 ; 3 Per. & Dav. 565 ; 9 L. J. (Q. B.) 177 458
——— Freeland *v.* Burt (1787), 1 Term Rep. 701 366
——— Freeman *v.* Lloyd (1839), 5 Bing. (N. C.) 741 ; 8 Scott, 93 ; 10 L. J. (C. P.) 128 ; 3 Jur. 751 606
——— Fryer *v.* Coombs (1842), 3 Q. B. 687 ; 12 L. J. (Q. B.) 36 ; 3 Gal. & Dav. 193 ; 6 Jur. 930 517
——— Gainsford *v.* Stone (1846), 3 C. B. 176 ; 15 L. J. (C. P.) 234 ; 10 Jur. 480 . . . 344, 368
——— George *v.* Jesson (1805), 6 East, 80 ; 2 Smith, K. B. 236 500
——— Graham *v.* Hawkins (1841), 2 Q. B. 212 ; 1 Gal. & Dav. 551 ; 10 L. J. (Q. B.) 285 ; 6 Jur. 215 465, 561
——— ——— *v.* Penfold (1838), 8 C. & P. 536 442
——— Hammond *v.* Cooke (1829), 6 Bing. 174 ; 3 Moo. & P. 411 506
——— Hanley *v.* Wood (1819), 2 B. & Ald. 724 315
——— Harvey *v.* Francis (1837), 2 Mood. & R. 57 405
——— Higginbotham *v.* Barton (1840), 11 Ad. & El. 307 ; 3 Per. & Dav. 194 ; 4 Jur. 432 373, 403, 404, 405
——— Hornby *v.* Glen (1834), 1 Ad. & El. 49 ; 3 Nev. & M. (K. B.) 837 ; 3 L. J. (K. B.) 161 368
——— Huddleston *v.* Johnston (1825), M'Cle. & Yo. 141 375
——— Hughes *v.* Lakin (1836), 7 C. & P. 481 564
——— Hulin *v.* Powell (1852), 3 Car. & Kir. 323 546
——— Jackson *v.* Ramsbottom (1815), 3 M. & S. 516 403
——— ——— *v.* Wilkinson (1824), 3 B. & C. 413 ; 5 Dow. & Ry. (K. B.) 273 . 402
——— Jacobs *v.* Phillips (1845), 8 Q. B. 158 ; 15 L. J. (Q. B.) 47 ; 10 Jur. 34 . 428, 505, 513, 514
——— James *v.* Brawn (1821), 5 B. & Ald. 243 443, 444
——— Jenkins *v.* Davies (1847), 10 Q. B. 314 ; 16 L. J. (Q. B.) 218 ; 11 Jur. 607 428, 469, 470, 505, 512, 538, 608

PAGE

Doe d. Johnson *v.* Baytup (1835), 3 Ad. & El. 188; 4 Nev. & M. (K. B.) 837; 1 Har. & W. 270; 4 L. J. (K. B.) 263 402, 404
——— ——— *v.* Johnson (1818), 2 Chit. 196 518
——— Jupp *v.* Andrews (1778), 2 Cowp. 845 578
——— Kingslake *v.* Beviss (1849), 7 C. B. 456; 18 L. J. (C. P.) 128 . . . 464
——— ——— *v.* Smythe (Lady) (1815), 4 M. & S. 347 . . . 402, 403, 404
——— Leeming *v.* Skirrow (1837), 7 Ad. & El. 157; 2 Nev. & P. (K. B.) 123; Will. Woll. & Dav. 517 344
——— Levy *v.* Horne (1842), 3 Q. B. 757; 3 Gal. & Dav. 239; 12 L. J. (Q. B.) 72; 7 Jur. 38 370, 371
——— Lichfield (Earl) *v.* Stacey (1833), 6 C. & P. 139 561
——— Lloyd *v.* Deakin (1821), 4 B. & Ald. 433 502
——— ——— *v.* Evans (1827), 3 C. & P. 219 547
——— Loscombe *v.* Clifford (1847), 2 Car. & Kir. 448 520, 574
——— Lowden *v.* Watson (1817), 2 Stark. 230 403
——— Manton *v.* Austin (1832), 2 Moo. & S. 107; 9 Bing 41; 1 L. J. (C. P.) 152 403
——— Manvers (Earl) *v.* Mizem (1837), 2 Mood. & R. 56 402, 403
——— Marchant *v.* Errington (1839), 6 Bing. (N. C.) 79; 8 Scott, 210; 9 L. J. (C. P.) 9; 3 Jur. 1126 345, 368
——— Marlow *v.* Wiggins (1843), 4 Q. B. 367; 3 Gal. & Dav. 504; 12 L. J. (Q. B.) 177; 7 Jur. 529 405
——— Morris *v.* Rosser (1802), 3 East, 15 545
——— Mudd *v.* Suckermore (1836), 5 Ad. & El. 703; 2 Nev. & P. (K. B.) 16; Will. Woll. & Dav. 405; 7 L. J. (Q. B.) 33 482, 607, 608
——— Nanney *v.* Gore (1837) 2 M. & W. 320 552
——— Neale *v.* Samples (1838), 8 Ad. & El. 151; 3 Nev. & P. (Q. B.) 254; 1 Will. Woll. & H. 228; 7 L. J. (Q. B.) 140; 2 Jur. 841 513, 514
——— Nepean *v.* Budden (1822), 5 B. & Ald. 626; 1 Dow. & Ry. (K. B.) 243 375
——— North *v.* Webber (1837), 3 Bing. (N. C.) 922; 5 Scott, 189; 3 Hodg. 203 367
——— Norton *v.* Webster (1840), 12 Ad. & El. 442; 4 Per. & Dav. 270; 9 L. J. (Q. B.) 373 566
——— Oldham *v.* Wolley (1828), 8 B. & C. 22; 2 Man. & Ry. (K. B.) 195; 3 C. & P. 402; 6 L. J. (O. S.) (K. B.) 286 505, 511, 512
——— Orrel *v.* Madox (1794), 1 Esp. 197 538
——— Oxenden *v.* Chichester (1816), 4 Dow, 65 121
——— Padwick *v.* Skinner (1848), 3 Exch. 84; 18 L. J. (Ex.) 107 466
——— ——— *v.* Wittcomb (1851), 6 Exch. 601; 20 L. J. (Ex.) 297; 15 Jur. 778 469
——— Patteshall *v.* Turford (1832), 3 B. & Ad. 890; 1 L. J. (K. B.) 262 . . . 466
——— Phillips *v.* Morris (1835), 3 Ad. & El. 46; 4 Nev. & M (K. B.) 598; 1 Har. & W. 226 521
——— Plevin *v.* Brown (1837), 7 Ad. & El. 447; 2 Nev. & P. (Q. B.) 592; Will. Woll. & Dav. 677; 8 L. J. (Q. B.) 49 405
——— Preece *v.* Howells (1831), 2 B. & Ald. 744; 9 L. J. (O. S.) (K. B.) 332 . 370
——— Priestley *v.* Calloway (1827), 6 B. & C. 484; 9 Dow. & Ry. (K. B.) 518; 5 L. J. (O. S.) (K. B.) 188 540, 541
——— Prior *v.* Ongley (1850), 10 C. B. 25; 20 L. J. (C. P.) 26 403
——— Rawlings *v.* Walker (1826), 5 B. & C. 111; 7 Dow. & Ry. (K. B.) 487; 4 L. J. (O. S.) (K. B.) 93 146
——— Richards *v.* Evans (1847), 10 Q. B. 476; 16 L. J. (Q. B.) 305; 11 Jur. 609. 312
——— ——— *v.* Lewis (1852), 11 C. B. 1035; 20 L. J. (C. P.) 177; 15 Jur. 512 519
——— Roberts *v.* Mostyn (1852), 12 C. B. 268; 21 L. J. (C. P.) 178 552
——— ——— *v.* Roberts (1819), 2 B. & Ald. 367; 2 Chit. 272; Dan. 143 . . 369
——— Rochester (Bishop) *v.* Bridges (1831), 1 B. & Ad. 847 375
——— Rowcliffe *v.* Egremont (Lord) (1841), 2 Mood. & R. 386 570
——— Rowlandson *v.* Wainwright (1836), 5 Ad. & El. 523; 3 Nev. & P. (K. B.) 598; 1 Will. Woll. & H. 508; 7 L. J. (Q. B.) 222 606
——— Shallcross *v.* Palmer (1851), 16 Q. B. 747; 20 L. J. (Q. B.) 367; 15 Jur. 836. 472, 506
——— Shelton *v.* Shelton (1835), 3 Ad. & El. 265; 4 Nev. & M. (K. B.) 857; 1 Har. & W. 287; 4 L. J. (K. B.) 167 367
——— Shrewsbury (Earl) *v.* Keeling (1848), 11 Q. B. 884; 17 L. J. (Q. B.) 199; 12 Jur. 433 428, 505, 513, 514

PAGE
Doe d. Smith *v.* Cartwright (1824), 1 C. & P. 218; Ry. & M. 62 530
——— ——— and Payne *v.* Webber (1834), 1 Ad. & El. 119; 3 Nev. & M. (K. B.) 746; 3 L. J. (K. B.) 148 545
——— Spencer *v.* Beckett (1843), 4 Q. B. 601; 12 L. J. (Q. B.) 236; 7 Jur. 532 . 403
——— Spilsbury *v.* Burdett (Sir Francis) (1835), 4 Ad. & El. 1; 6 Nev. & M. (K. B.) 259; 6 L. J. (K. B.) 73 505, 512
——— Stansbury *v.* Arkwright (1833), 5 C. & P. 575 442, 463
——— ——— *v.* ——— (1833), 2 Ad. & El. 182, n.; 1 Nev. & M. (K. B.) 731; 2 L. J. (K. B.) 102 475
——— Strode *v.* Seaton (1835), 2 Cr. M. & R. 728; 1 Tyr. & Gr. 19; 1 Gale, 303; 5 L. J. (EX.) 73 373
——— Sturt *v.* Mobbs (1841), Car. & M. 1 561
——— Tatum *v.* Catomare (1851), 16 Q. B. 745; 20 L. J. (Q. B.) 364; 15 Jur. 728...506
——— Thorn *v.* Phillips (1831), 1 Dowl. 56 610
——— Tresidder *v.* Tresidder (1841), 1 Q. B. 416; 10 L. J. (Q. B.) 160 . . . 402
——— Tyndale *v.* Hemming (1826), 9 Dow. & Ry. (K. B.) 15; 6 B. & C. 28; 2 C. & P. 462 606
——— Walker *v.* Stephenson (1801), 3 Esp. 284 603
——— Warren *v.* Bray (1828), 8 B. & C. 813; 3 Man. & Ry. (K. B.) 428; 7 L. J. (O. S.) (K. B.) 161 473, 475, 537
——— Wartney *v.* Grey (1816), 1 Stark. 283 522
——— Welsh *v.* Langfield (1847), 16 M. & W. 497 463
——— Wetherell *v.* Bird (1835), 7 C. & P. 6 462
——— Wilkins (Marquis) *v.* Cleveland (1829), 9 B. & C. 864; 4 Man. & Ry. (K. B.) 666; 8 L. J. (O. S.) (K. B.) 74 606
——— William IV. *v.* Roberts (1844), 13 M. & W. 520; 14 L. J. (EX.) 274 . 529
——— Williams *v.* Lloyd (1839), 5 Bing. (N. C.) 741; 8 Scott, 93; 10 L. J. (C. P.) 128; 3 Jur. 751 370
——— Willis *v.* Birchmore (1839), 9 Ad. & El. 662; 1 Per. & Dav. 448; 8 L. J. (Q. B.) 108 403
——— Wollaston *v.* Barnes (1834), 1 Mood. & R. 386 473, 537
——— Wood *v.* Wilkins (1846), 2 Car. & Kir. 328 536
——— Woodmass *v.* Mason (1793), 1 Esp. 53 496
——— Wright (1839), 10 Ad. & El. 763; 2 Per. & Dav. 672 326, 331
——— *v.* Challis (1851), 17 Q. B. 166; 15 Jur. 900; 20 L. J. (Q. B.) 478 . . 403
Doetsch, *Re*, Matheson *v.* Ludwig, [1896] 2 Ch. 836; 65 L. J. (CH.) 855; 75 L. T. 69; 45 W. R. 57 39
Doglioni *v.* Crispin (1866), L. R. 1 H. L. 301; 35 L. J. (P.) 129; 15 L. T. 44 . 338
Doherty *v.* Allman (1878), 3 App. Cas. 709; 39 L. T. 129; 26 W. R. 513 . . 51
Doig *v.* Anthony Birrell Pearce & Co., *Re* Anthony Birrell Pearce & Co. *See* Anthony Birrell Pearce & Co., *Re*, Doig *v.* Anthony Birrell Pearce & Co.
Doker *v.* Hasler (1824), Ry. & M. 198; 2 Bing. 479; 10 Moore (C. P.), 210 . 573
Dolder *v.* Huntingfield (Lord) (1805), 11 Ves. 283 493
Dolman *v.* Pritman (1670), 3 Rep. Ch. 36 588
Doloret *v.* Rothschild (1824), 1 Sim. & St. 590; 2 L. J. (O. S.) (CH.) 125 . . 11
Dolphin *v.* Aylward (1870), L. R. 4 H. L. 486; 23 L. T. 636; 19 W. R. 49 . 143
Donaldson *v.* Donaldson (1854), Kay, 711; 23 L. J. (CH.) 788; 2 W. R. 691 . 98
Donations Commissioners *v.* Wybrants (1845), 2 Jo. & Lat. 182; 7 I. Eq. R. 580...155
Doncaster Corporation *v.* Day (1810), 3 Taunt. 262 547
Donelan's Estate, *Re*, [1902] 1 I. R. 109, C. A. 301
Donisthorpe *v.* Porter (1762), 2 Eden, 162; Amb. 600 147
Dooby *v.* Watson (1888), 39 Ch. D. 178; 57 L. J. (CH.) 865; 58 L. T. 943; 36 W. R. 764. 156
Doré Gallery, *Re* (1890), 38 W. R. 491; 88 L. T. Jo. 397 616
Dormer *v.* Fortescue (1744), 3 Atk. 124 26, 42, 49
Dorrett *v.* Meux (1854), 15 C. B. 142; 23 L. J. (C. P.) 221; 2 C. L. R. 807; 2 W. R. 480 553
Dorset (Duke) *v.* Girdler (1720), Prec. Ch. 531 45
Dost Aly Khan, *In the Goods of* (1880), 6 P. D. 6; 49 L. J. (P.) 78; 29 W. R. 80...488
Doucet *v.* Geoghegan (1878), 9 Ch. D. 441; 26 W. R. 825, C. A. . . . 438, 450
Doughty *v.* Bull (1726), 2 P. Wms. 320 108
Douglas, *Re* (1842), 3 Q. B. D. 825; 12 L. J. (Q. B.) 49; 7 Jur. 39; 3 Gal. & Dav. 509 586
——— *v.* Congreve (1836), 1 Keen, 410; 6 L. J. (CH.) 51. 241
——— *v.* Cooksey (1868), 2 I. R. Eq. 311 143
——— *v.* Cooper (1834), 3 My. & K. 378 328
——— *v.* Douglas, Douglas *v.* Webster (1871), L. R. 12 Eq. 617; 41 L. J. (CH.) 74; 25 L. T. 530; 20 W. R. 55 124, 125

PAGE
Douglas *v.* Willes (1849), 7 Hare, 318 130
——— and Powell's Contract, *Re*, [1902] 2 Ch. 296; 71 L. J. (CH.) 850...113, 114
Douglas-Menzies *v.* Umphelby, [1908] A. C. 224; 77 L. J. (P. C.) 64; 98 L. T. 509; 24 T. L. R. 344 117, 121
Dover *v.* Child (1876), 1 Ex. D. 172; 45 L. J. (EX.) 462; 34 L. T. 737; 24 W. R. 537 353
——— *v.* Maestaer (1803), 5 Esp. 92 517
Dovey *v.* Cory, [1901] A. C. 477; 70 L. J. (CH.) 753; 85 L. T. 257; 50 W. R. 65; 17 T. L. R. 732; 8 Mans. 346 449
Dowdell *v.* Australian Royal Steam Navigation Mail Co. (1854), 3 E. & B. 902; 2 C. L. R. 1656; 23 L. J. (Q. B.) 369; 18 Jur. 579; 2 W. R. 554 584
Dowden and Pook, Ltd. *v.* Pook, [1904] 1 K. B. 45; 73 L. J. (K. B.) 38; 89 L. T. 688; 52 W. R. 97; 20 T. L. R. 39, C. A. 432
Dowler, *Re*, *Re* Fountaine, Fountaine *v.* Amherst (Lord). *See* Fountaine, *Re*, *Re* Dowler, Fountaine *v.* Amherst (Lord).
Dowley *v.* Winfield (1844), 14 Sim. 277; 8 Jur. 972 501
Dowling *v.* Betjemann (1862), 2 John. & H. 544; 6 L. T. 512; 8 Jur. (N. S.) 538; 10 W. R. 574 13
Down *v.* Ellis (1865), 35 Beav. 578 604
——— *v.* Yearley, [1874] W. N. 158 625
Downes *v.* Grazebrook (1817), 3 Mer. 200 157
Downing *v.* Falmouth United Sewerage Board (1887), 37 Ch. D. 234; 57 L. J. (CH.) 234; 58 L. T. 296; 36 W. R. 437, C. A. 619
Downs *v.* Cooper (1841), 2 Q. B. 256; 1 Gal. & Dav. 573; 11 L. J. (Q. B.) 2; 6 Jur. 622 403
Dowse, *Re*, Dowse *v.* Glass (1881), 50 L. J. (CH.) 285; 29 W. R. 563 . . . 138
——— *v.* Gorton, [1891] A. C. 190; 60 L. J. (CH.) 745; 64 L. T. 809; 40 W. R. 17 150
Drake *v.* A.-G. (1843), 10 Cl. & Fin. 257 233, 238
——— *v.* Mitchell (1803), 3 East, 251 336
——— *v.* Smyth (1818), 5 Price, 369 530, 531
Drant *v.* Vause (1842), 1 Y. & C. Ch. Cas. 580; 11 L. J. (CH.) 170; 6 Jur. 313 . 111
Draycott *v.* Talbot (1718), 3 Bro. Parl. Cas. 564 538
Drayton *v.* Dale (1823), 2 B. & C. 293; 3 Dow. & Ry. (K. B.) 534 394
Dresden, *Re*, Lindo *v.* London Hospital (1910), *Times*, July 22nd 241
Dresser *v.* Stansfield (1845), 14 M. & W. 822; 15 L. J. (EX.) 274 552
Drew *v.* Prior (1843), 5 Man. & G. 264; 12 L. J. (C. P.) 144 607
Drewitt *v.* Drewitt (1888), 58 L. T. 684; 52 J. P. 232 544, 623
Drewry *v.* Thacker (1819), 3 Swan. 529 33
Dreyfus *v.* Peruvian Guano Co. (1889), 42 Ch. D. 66; 58 L. J. (CH.) 758; 61 L. T. 180 52
——— *v.* ——— (1889), 43 Ch. D. 316; 62 L. T. 518; 6 Asp. M. L. C. 492, C. A. 51
Drinkwater *v.* Combe (1825), 2 Sim. & St. 340; 3 L. J. (O. S.) (CH.) 178 . . 147
Drover *v.* Beyer (1879), 13 Ch. D. 242; 49 L. J. (CH.) 37; 41 L. T. 393; 28 W. R. 110, C. A. 60
Druce *v.* Denison (1801), 6 Ves. 385 121
Drucker, *Re* (No. 2), *Ex parte* Basden, [1902] 2 K. B. 210; 71 L. J. (K. B.) 668; 86 L. T. 692; 50 W. R. 592; 9 Mans. 241 609
Druiff *v.* Parker (Lord) (1868), L. R. 5 Eq. 131; 37 L. J. (CH.) 241; 18 L. T. 46; 16 W. R. 557 22
Drury *v.* Hooke (1686), 1 Vern. 412; 2 Cas. in Ch. 176; 1 Eq. Cas. Abr. 89 . 20
——— *v.* Orsmond, *Re* Orsmond. *See* Orsmond, *Re*, Drury *v.* Orsmond.
——— Lowe's Marriage Settlement, *Re*, *Ex parte* Sitwell (1888), 21 Q. B. D. 466; 59 L. T. 539; 37 W. R. 238 294
Dryden *v.* Frost (1838), 3 My. & Cr. 670 88
Dublin (Archbishop) *v.* Trimleston (Lord) (1849), 12 I. Eq. R. 251 . . 330, 353
Dublin, Wicklow, and Wexford Rail. Co. *v.* Slattery (1878), 3 App. Cas. 1155; 39 L. T. 365; 27 W. R. 191 429
Dubost, *Ex parte*, *Ex parte* Pye. *See* Pye, *Ex parte*, *Ex parte* Dubost.
Du Bost *v.* Beresford (1810), 2 Camp. 511 480
Du Cane and Nettlefold's Contract, *Re*, [1898] 2 Ch. 96; 67 L. J. (CH.) 393; 78 L. T. 458; 46 W. R. 523 198
Duckenfield *v.* Whichcott (1674), 2 Cas. in Ch. 204 29
Duckett (Bart.) *v.* Williams (1851), 1 Cr. & J. 510 613
Duder *v.* Amsterdamsch Trustees Kantoor, [1902] 2 Ch. 132; 71 L. J. (CH.) 618; 87 L. T. 22; 50 W. R. 551 65
Dudley (Lord) *v.* Dudley (Lady) (1705), Prec. Ch. 241; 1 Eq. Cas. Abr. 219 . 7

PAGE
Dufferin and Claneboye's (Lord) Claim (1848), 2 H. L. Cas. 47 535
Duffield *v.* Elwes (1827), 1 Bli. (N. S.) 497 187
——— *v.* Scott (1789), 3 Term Rep. 374 347
Dufourcet *v.* Bishop (1886), 18 Q. B. D. 373; 56 L. J. (Q. B.) 497; 56 L. T. 633; 6 Asp. M. L. C. 109 149
Dugard, *Ex parte*, *Re* Aughtie. *See* Aughtie, *Re*, *Ex parte* Dugard.
Dugdale *v.* Meadows (1870), 6 Ch. App. 501; 40 L. J. (CH.) 140; 24 L. T. 113 300
Duke *v.* Ashby (1862), 7 H. & N. 600; 31 L. J. (EX.) 168; 8 Jur. (N. S.) 236; 10 W. R. 273 402
"Duke of Buccleuch," The (1889), 15 P. D. 86; 62 L. T. 94; 6 Asp. M. L. C. 471, C. A. 509
Dummer *v.* Pitcher (1833), 2 My. & K. 262; Coop. *temp.* Brough. 257 . 121, 122
Dunbar *v.* Harvie (1820), 2 Bli. 351 541
——— *v.* Tredennick (1813), 2 Ball & B. 304 170
Duncan, *Re*, Terry *v.* Sweeting, [1899] 1 Ch. 387; 68 L. J. (CH.) 253; 80 L. T. 322; 47 W. R. 375; 15 T. L. R. 185 68
——— *v.* Pope (1899), 63 J. P. 217; 80 L. T. 120; 15 T. L. R. 195; 19 Cox, C. C. 241 449
——— *v.* Scott (1807), 1 Camp. 100 551
——— *v.* Worrall (1822), 10 Price, 31 53
———, Fox & Co. *v.* North and South Wales Bank (1880), 6 App. Cas. 1; 50 L. J. (CH.) 355; 43 L. T. 706; 29 W. R. 763 146
Duncan's Trustees *v.* M'Cracken (1888), 25 Sc. L. R. 551; 15 R. (Ct. of Sess.) 638 275
Duncuft *v.* Albrecht (1841), 12 Sim. 189 12
Dundas *v.* Waddell (1880), 5 App. Cas. 249; 7 Rettie (H. L.), 19; 17 Sc. L. R. 433 333, 344
Dungey *v.* Angove (1794), 2 Ves. 304 58
Dunhill *v.* Dunhill (1894), 29 L. J. N. C. 368 598
Dunlop *v.* Higgins (1848), 1 H. L. Cas. 381; 12 Jur. 295 441
Dunn *v.* Aslett (1838), 2 Mood. & R. 122 599, 600
——— *v.* Ferrior (1868), 3 Ch. App. 719; 37 L. J. (CH.) 569; 18 L. T. 65; 16 W. R. 454 55
——— *v.* Snowden (1862), 2 Drew. & Sm. 201; 32 L. J. (CH.) 104; 7 L. T. 558; 11 W. R. 160 500
——— *v.* Wyman (1881), 51 L. J. (Q. B.) 623 389
Dunraven (Lord) *v.* Llewellyn (1850), 15 Q. B. 791; 19 L. J. (Q. B.) 388 . . 468
Dunsford *v.* Curlewis (1859), 1 F. & F. 702 428
Dunston *v.* Paterson (1857), 2 C. B. (N. S.) 495; 26 L. J. (C. P.) 267; 3 Jur. (N. S.) 982 383
Dupuy *v.* Trueman (1843), 2 Y. & C. Ch. Cas. 341 518, 596, 597
Durham (Bishop) *v.* Beaumont (1808), 1 Camp. 207 603
——— (Earl) *v.* Wharton (1836), 3 Cl. & Fin. 146; 10 Bli. (N. S.) 526; 3 My. & K. 698; 6 L. J. (CH.) 15 134
——— Brothers *v.* Robertson, [1898] 1 Q. B. 765; 67 L. J. (Q. B.) 484; 48 L. T. 438, C. A. 103
Durrant *v.* Ecclesiastical Commissioners (1880), 6 Q. B. D. 234; 50 L. J. (Q. B.) 30; 44 L. T. 348; 45 J. P. 270; 29 W. R. 443 22
——— *v.* Friend (1851), 5 De G. & Sm. 343; 21 L. J. (CH.) 353; 16 Jur. 709 440
Dursley (Lord) *v.* Fitzhardinge Berkeley (1801), 6 Ves. 251 45
Dutton *v.* Morrison (1810), 17 Ves. 193; 1 Rose, 213 39
Duvall *v.* Terrey (1694), Show. Parl. Cas. 15; 1 Eq. Cas. Abr. 92 49
Dwyer *v.* Collins (1852), 7 Exch. 639; 21 L. J. (EX.) 225; 16 Jur. 569 . . 520
Dyce Sombre *v.* Troup (1856), Dea. & Sw. 38 440
Dyer *v.* Best (1866), L. R. 1 Exch. 152; 4 H. & C. 189; 35 L. J. (EX.) 105; 13 L. T. 753; 12 Jur. (N. S.) 142; 14 W. R. 336 565, 595
——— *v.* Dyer (1682), 2 Cas. in Ch. 108 168
——— *v.* ——— (1788), 2 Cox, Eq. Cas. 92 155
——— *v.* ——— (1865), 34 Beav. 504; 34 L. J. (CH.) 513; 12 L. T. 442; 13 W. R. 732 112
Dyet, *Re*, Morgan *v.* Dyet (1902), 87 L. T. 744 231
Dysart Peerage Case (1881), 6 App. Cas. 489 460
Dyson, *Re*, Challinor *v.* Sykes, [1910] 1 Ch. 750; 102 L. T. 425 111
——— *v.* Foster (1908), February 7th 578
——— *v.* Wood (1824), 3 B. & C. 449; 5 Dow. & Ry. (K. B.) 295 552

E.

PAGE

EADS *v.* Williams (1854), 4 De G. M. & G. 674 ; 3 Eq. Rep. 244 ; 1 Jur. (N. S.) 193 ; 3 W. R. 98 174, 552
Eagleton and Coventry *v.* Kingston (1803), 8 Ves. 476 607
Eames *v.* Hacon (1881), 18 Ch. D. 347 ; 50 L. J. (CH.) 740 ; 29 W. R. 877, C. A. 554
Earl *v.* Lewis (1801), 4 Esp. 1 531, 564
"Earl of Dumfries," The (1885), L. R. 10 P. D. 31 ; 54 L. J. (P.) 7 ; 51 L. T. 906 ; 33 W. R. 568 ; 5 Asp. M. L. C. 342 462, 541
Earl's Trusts, *Re* (1858), 4 K. & J. 300, C. A. 497, 628
Earle *v.* Kingscote, [1900] 2 Ch. 585 ; 69 L. J. (CH.) 725 ; 83 L. T. 577 ; 49 W. R. 3 ; 16 T. L. R. 511, C. A. 380
Earlom *v.* Saunders (1754), Amb. 241 105, 114
Early *v.* Benbow (1846), 2 Coll. 342 241
East *v.* Chapman (1827), 2 C. & P. 570 ; Mood. & M. 46 575
—— *v.* Cook (1750), 2 Ves. Sen. 30 118
East and West India Dock Co. *v.* Kirk and Randall (1887), 12 App. Cas. 738 ; 57 L. J. (Q. B.) 295 ; 58 L. T. 158 433
East India Co. *v.* Boddam (1804), 9 Ves. 464 26
———— *v.* Kynaston (1821), 3 Bli. 153 509
———— *v.* Vincent (1740), 2 Atk. 83 168
East Lincolnshire Railway Act, *Re*, *Ex parte* Flamank (1851), 1 Sim. (N. S.) 260 111
East London Rail. Co., *Re*, Oliver's Claim (1890), 24 Q. B. D. 507 ; 63 L. T. 147 ; 38 W. R. 312, C. A. 545
———— *v.* River Thames Conservators (1904), 90 L. T. 347 ; 68 J. P. 302 ; 20 T. L. R. 378 563
East London Union Guardians *v.* Metropolitan Rail. Co. (1869), L. R. 4 Exch. 309 ; 38 L. J. (EX.) 225 98
East of England Banking Co., *Re*, *Ex parte* Bugg (1865), 2 Drew. & Sm. 452 ; 35 L. J. (CH.) 43 ; 12 L. T. 696 ; 11 Jur. (N. S.) 616 ; 13 W. R. 911 . . . 97
East of London Rail. Co., *Ex parte*, *Re* King's Leasehold Estates. *See* King's Leasehold Estates, *Re*, *Ex parte* East of London Rail. Co.
Eastbourne Guardians *v.* Croydon Guardians, [1910] 2 K. B. 16 ; 102 L. T. 595 ; 26 T. L. R. 447 ; 8 L. G. R. 503 340
Eastern Union Rail. Co. *v.* Symonds (1850), 5 Exch. 237 ; 19 L. J. (EX.) 287 . 466
Eastmure *v.* Laws (1839), 5 Bing. (N. C.) 444 ; 7 Scott, 461 ; 7 Dowl. 431 ; 2 Arn. 54 ; 8 L. J. (C. P.) 236 ; 3 Jur. 460 332, 334
Easton *v.* Penny (1892), 67 L. T. 290 ; 41 W. R. 72 375, 376
Eastwood *v.* Vinke (1731), 2 P. Wms. 613 136, 138
Ebbetts *v.* Conquest (1900), 82 L. T. 560 ; 16 T. L. R. 320 337
Ecclesiastical Commissioners for England *v.* North Eastern Rail. Co. (1877), 4 Ch. D. 845 ; 47 L. J. (CH.) 20 ; 36 L. T. 174 171, 175
Eccleston *v.* Petty (*alias* Speke) (1689), Carth. 79 ; 3 Mod. Rep. 258 ; 1 Show. 89 ; Comb. 156 ; Holt (K. B.), 222 543
Ecroyd *v.* Coulthard, [1897] 2 Ch. 554 ; 66 L. J. (CH.) 751 ; 77 L. T. 357 ; 61 J. P. 791 ; 46 W. R. 119 ; affirmed, [1898] 2 Ch. 358 ; 67 L. J. (CH.) 458 ; 78 L. T. 702, C. A. 507
Eddowes *v.* Argentine Loan Co. (1890), 59 L. J. (CH.) 392 ; 62 L. T. 514 ; 38 W. R. 629, C. A. 625, 626
Edelsten *v.* Edelsten (1863), 1 De G. & Sm. 185 ; 7 L. T. 768 ; 9 Jur. (N. S.) 479 ; 11 W. R. 328 509
Edevain *v.* Cohen (1889), 43 Ch. D. 187 ; 62 L. T. 17 ; 38 W. R. 177, C. A. . 350
Edgar *v.* Plomley, [1900] A. C. 431 ; 69 L. J. (P. C.) 95 ; 82 L. T. 573 ; 49 W. R. 142 ; 16 T. L. R. 395 104
Edginton *v.* Fitzmaurice (1885), 29 Ch. D. 459 ; 55 L. J. (CH.) 650 ; 53 L. T. 369 ; 50 J. P. 52 ; 33 W. R. 911, C. A. 379, 449
Edison and Swan Electric Light Co. *v.* Holland (1889), 6 R. P. C. 243, C. A. . 543
Edmands *v.* Best (1862), 7 L. T. 279 344, 377, 397
Edmonds *v.* Rowe (1824), Ry. & M. 77 591
———— *v.* Walter (1820), 3 Stark, 8 ; 2 Chit. 291 594
Edmunds *v.* Low (1857), 3 K. & J. 318 ; 26 L. J. (CH.) 432 ; 3 Jur. (N. S.) 508 ; 5 W. R. 444 137, 138
Edmundson *v.* Thompson (1861), 31 L. J. (EX.) 207 ; 5 L. T. 428 ; 8 Jur. (N. S.) 235 ; 10 W. R. 300 383, 391
"Edward Oliver," The (1867), L. R. 1 A. & E. 379 ; 36 L. J. (ADM.) 13 ; 16 L. T. 575 146

PAGE

Edwardes *v.* Noble. *See* Noble *v.* Edwardes.
Edwards *v.* Aberayron Mutual Ship Insurance Society (1876), 1 Q. B. D. 563; 34 L. T. 457 388
——— *v.* Burt (1852), 2 De G. M. & G. 55, C. A. 21
——— *v.* Carter, [1893] A. C. 360; 63 L. J. (CH.) 100; 69 L. T. 153; 58 J. P. 4; 1 R. 218 127
——— *v.* Crock (1801), 4 Esp. 39 439
——— *v.* Edwards (1834), 2 Cr. & M. 612 210
——— *v.* Freeman (1728), 2 P. Wms. 435; 1 Eq. Cas. Abr. 219 160
——— *v.* Jones (1836), 1 My. & Cr. 226; 5 L. J. (CH.) 194 98
——— *v.* Morgan, Morgan *v.* Edwards (1824), 13 Price, 782; M'Cle. 541; affirmed *sub nom.* Morgan *v.* Edwards (1827), 1 Bli. (N. S.) 401 . 125
——— *v.* Rogers (1640), W. Jo. 459; Cro. Car. 524, 543; March, 94 . . 345
——— *v.* Spaight (1862), 2 John. & H. 617 610, 614
——— *v.* Tuck (1856), 23 Beav. 268 105
——— *v.* Walters, [1896] 2 Ch. 157; 65 L. J. (CH.) 557; 74 L. T. 396; 44 W. R. 547, C. A. 164
——— *v.* Warwick (Countess) (1723), 2 P. Wms. 171; 1 Bro. Parl. Cas. 207; 2 Eq. Cas. Abr. 42 28, 29, 107, 115
——— & Co. *v.* Picard, [1909] 2 K. B. 903; 78 L. J. (K. B.) 1108; 101 L. T. 416; 25 T. L. R. 815, C. A. 56
Edwards' Estate, *Re* (1861), 11 I. Ch. R. 367 91
Egbert *v.* Short, [1907] 2 Ch. 205; 76 L. J. (CH.) 520; 97 L. T. 90; 23 T. L. R. 558 59
Egerton *v.* Brownlow (Earl) (1853), 4 H. L. Cas. 1; 23 L. J. (CH.) 348; 18 Jur. 71 94
Egg *v.* Barnett (1800), 3 Esp. 196 562
Eglinton (Earl) *v.* Lamb (1867), 15 L. T. 657 490
Egmont (Earl) *v.* Smith (1877), 6 Ch. D. 469; 46 L. J. (CH.) 356 99
Egremont Burial Board *v.* Egremont Iron Ore Co. (1880), 14 Ch. D. 158; 49 L. J. (CH.) 623; 42 L. T. 179; 28 W. R. 594 574
Ehrmann *v.* Ehrmann, [1896] 2 Ch. 611; 65 L. J. (CH.) 745; 75 L. T. 37; 45 W. R. 149, C. A. 614
Elden *v.* Keddell (1807), 8 East, 187 553
Elder *v.* Carter, *Ex parte* Slide and Spur Gold Mining Co. (1890), 25 Q. B. D. 194; 59 L. J. (Q. B.) 281; 62 L. T. 516; 54 J. P. 692; 38 W. R. 612, C. A. 582
——— *v.* Pearson, *Re* Bellamy. *See* Bellamy, *Re*, Elder *v.* Pearson.
Elderton's Case (1703), 2 Ld. Raym. 978; 6 Mod. Rep. 73; 3 Salk. 91, 284; Holt (K. B.), 590 485
Eldridge *v.* Knott (1744), 1 Cowp. 214 168
Electric Telegraph Co. of Ireland, *Re*, Bunn's Case (1860), 2 De G. F. & J. 275, C. A. 96, 97
Elford *v.* Teed (1813), 1 M. & S. 28 495
Elias *v.* Continental Oxygen Co., *Re* Continental Oxygen Co. *See* Continental Oxygen Co., *Re*, Elias *v.* Continental Oxygen Co.
——— *v.* Griffith (1877), 46 L. J. (CH.) 806 623
Elin *v.* Wilson (1883), 75 L. T. Jo. 47 613
Elkin *v.* Janson (1845), 13 M. & W. 655; 14 L. J. (EX.) 201; 9 Jur. 353 . . 436
Ellen *v.* Great Northern Rail. Co. (1901), 17 T. L. R. 453, C. A. . . . 383, 562
Ellice *v.* Roupell (No. 1) (1863), 32 Beav. 299; 32 L. J. (CH.) 563; 9 Jur. (N. S.) 530; 8 L. T. 191; 11 W. R. 579; 2 New Rep. 3 45, 46
Elliot *v.* Brown (1791), unreported 39
——— *v.* Hancock (1690), 2 Vern. 143; 1 Eq. Cas. Abr. 33 29
——— *v.* South Devon Rail. Co. (1848), 2 Exch. 725; 17 L. J. (EX.) 262 . . 429
——— *v.* Totnes Union (1892), 57 J. P. 151 480
Elliott *v.* Fisher (1842), 12 Sim. 505 106, 107
——— *v.* Kemp (1840), 10 L. J. (EX.) 321; 7 M. & W. 306 442
——— *v.* Smith (1882), 22 Ch. D. 236; 52 L. J. (CH.) 222; 48 L. T. 27; 31 W. R. 336 501
Ellis *v.* Barker (1871), 7 Ch. App. 104; 25 L. T. 688 19
—— *v.* Ellis (1832) 1 Sch. & Lef. 1 132
—— *v.* Kerr, [1910] 1 Ch. 529; 79 L. J. (CH.) 291; 102 L. T. 417; 54 Sol. Jo. 307 69
—— *v.* Lewis (1844), 3 Hare, 310; 13 L. J. (CH.) 210; 8 Jur. 238 . . . 121
—— *v.* Loftus Iron Co. (1874), L. R. 10 C. P. 10; 44 L. J. (C. P.) 24; 31 L. T. 483; 23 W. R. 246 495
—— *v.* Robins (1881), 50 L. J. (CH.) 512 544, 623
—— *v.* Watson (1818), 2 Stark. 453 541

PAGE
Elliston *v.* Reacher, [1908] 2 Ch. 374; 77 L. J. (CH.) 617; 99 L. T. 346; affirmed, [1908] 2 Ch. 665; 78 L. J. (CH.) 87; 99 L. T. 701, C. A. 51, 101, 102
Elmore *v.* Pirrie (1887), 57 L. T. 333 51
——— *v.* Stone (1809), 1 Taunt. 458 426
Else *v.* Barnard (1861), 2 L. T. 203 389
Elton *v.* Larkins (1832), 5 C. & P. 385; 1 Mood. & R. 196 462
Elvy *v.* Norwood (1852), 5 De G. & Sm. 240; 21 L. J. (CH.) 716; 16 Jur. 493 . 71
Elwes, *Re*, (1858), 3 H. & N. 719; 28 L. J. (EX.) 46; 4 Jur. (N. S.) 1153 . 290, 294
Ely (Dean and Chapter) *v.* Caldecott (1831), 7 Bing. 433; 5 Moo. & P. 272; 9 L. J. (O. S.) (C. P.) 171 540
——— *v.* Stewart (1740), 2 Atk. 44; Barn. (CH.) 170 . . 541, 598
Emanuel *v.* Soltykoff (1892), 8 T. L. R. 331, C. A. 614
——— *v.* Symon, [1908] 1 K. B. 302; 77 L. J. (K. B.) 180; 98 L. T. 304; 24 T. L. R. 85, C. A. 364
Emberley *v.* Trevanion (1863), 3 Sw. & Tr. 197; 29 L. J. (P. M. & A.) 142 . 328, 346
Emmott *v.* Star Newspaper Co. (1892), 62 L. J. (Q. B.) 77; 67 L. T. 829; 57 J. P. 201; 5 R. 137 554
Emsworth *v.* Griffiths (1706), 5 Bro. Parl. Cas. 184; 15 Vin. Abr. 468 . . 153
Emuss *v.* Smith (1848), 2 De G. & Sm. 722 111
Engelback *v.* Nixon (1875), L. R. 10 C. P. 645; 44 L. J. (C. P.) 396; 32 L. T. 831 389
England *v.* Curling (1844), 8 Beav. 129 38
——— d. Syburn *v.* Slade (1792), 4 Term Rep. 682 403, 404
——— *v.* Tredegar (Lord) (1866), L. R. 1 Eq. 344; 35 L. J. (CH.) 386; 35 Beav. 256 26
English and Scottish Mercantile Investment Co. *v.* Brunton, [1892] 2 Q. B. 700; 62 L. J. (Q. B.) 136; 67 L. T. 406; 41 W. R. 133; 4 R. 58, C. A. . . 87, 88
Ennis *v.* Carroll (1868), 17 W. R. 344 535
——— *v.* Rochford (1884), 14 L. R. Ir. 285 331, 344
Ennor *v.* Barwell (1860), 1 De G. F. & J. 529; 7 Jur. (N. S.) 788; 8 W. R. 300, C. A. 509
Enoch and Zaretzky, Bock & Co., *Re*, [1910] 1 K. B. 327; 79 L. J. (K. B.) 363; 101 L. T. 801, C. A. 420, 433, 597
Erlanger *v.* New Sombrero Phosphate Co. (1878), 3 App. Cas. 1218; 39 L. T. 269; 26 W. R. 65 14, 156, 158, 169, 171
Errington *v.* Aynesly (1788), 2 Bro. C. C. 341; 2 Dick. 692. 151
Erving *v.* Peters (1793), 3 Term Rep. 685 331
Esdaile *v.* Stephenson (1822), 1 Sim. & St. 122 100
Espin *v.* Pemberton (1859), 3 De G. & J. 547; 28 L. J. (CH.) 311; 5 Jur. (N. S.) 157; 7 W. R. 221 84, 85, 86, 88
Espley *v.* Wilkes (1872), L. R. 7 Exch. 298; 41 L. J. (EX.) 241; 26 L. T. 918 . 370
Etches *v.* Lance (1802), 7 Ves. 417 60
Etheridge *v.* Womersley, *Re* Womersley. *See* Womersley, *Re*, Etheridge *v.* Womersley.
"Eugènie," The (1873), L. R. 4 A. & E. 123; 29 L. T. 314; 21 W. R. 957; 2 Asp. M. L. C. 104 146
European and Australian Royal Mail Co. *v.* Royal Mail Steam Packet Co. (1861), 30 L. J. (C. P.) 247; 8 Jur. (N. S.) 136 407
European Assurance Society *v.* Radcliffe, *Re* Radcliffe. *See* Radcliffe, *Re*, European Assurance Society *v.* Radcliffe.
European Society Arbitration Acts, *Re*, *Ex parte* British Nation Life Assurance Association (Liquidators) (1878), 8 Ch. D. 679; 48 L. J. (CH.) 118; 39 L. T. 136; 27 W. R. 88, C. A. 97
Evans, *Ex parte*, *Re* Watkins. *See* Watkins, *Re*, *Ex parte* Evans.
———, *Re* (1835), 2 Cr. M. & R. 206; 5 Tyr. 660; 4 L. J. (EX.) 201 . . . 264
———, *Re*, Evans *v.* Noton, [1893] 1 Ch. 252; 62 L. J. (CH.) 413; 68 L. T. 271; 41 W. R. 230; 2 R. 216, C. A. 588
——— *v.* Ball (1878), 38 L. T. 141 475, 534
——— *v.* ——— (1882), 47 L. T. 165 105
——— *v.* Bicknell (1801), 6 Ves. 174 14
——— *v.* Evans (1844), 1 Rob. Eccl. 165 344
——— *v.* ———, [1904] P. 378; 73 L. J. (P.) 114; 91 L. T. 600; 20 T. L. R. 612...576
——— *v.* ——— and Robinson (1858), 27 L. J. (P. & M.) 31, 57; 1 Sw. & Tr. 328; 5 Jur. (N. S.) 606; 7 W. R. 181 504
——— *v.* Getting (1834), 6 C. & P. 586 563
——— *v.* Lewis (1860), 2 L. T. 559 619
——— *v.* Llewellin (1787), 2 Bro. C. C. 150; 1 Cox, Eq. Cas. 333 . . 15, 17

PAGE
Evans *v.* Merthyr Tydfil Urban Council, [1899] 1 Ch. 241; 68 L. J. (CH.) 175; 79 L. T. 578, C. A. 46, 458, 466, 469, 530, 546
——— *v.* Prothero (1850), 2 Mac & G. 319; 20 L. J. (CH.) 448; 15 Jur. 113 . 517
——— *v.* ——— (1852), 1 De G. M. & G. 572 517
——— *v.* Rees (1839), 10 Ad. & El. 151; 2 Per. & Dav. 626; 9 L. J. (M. C.) 83 . 346, 505, 514, 530, 539, 545
——— *v.* Richardson (1817), 3 Mer. 469. 487
——— *v.* Smallcombe (1868), L. R. 3 H. L. 249; 19 L. T. 207 . . . 169, 171
——— *v.* Sweet (1824), Ry. & M. 83; 1 C. & P. 277 521
——— *v.* Taylor (1838), 7 Ad. & El. 617; 3 Nev. & P. (K. B.) 174; 7 L. J. (Q. B.) 73 529
Evered, *Re*, Molineux *v.* Evered, [1910] 2 Ch. 147; 54 Sol. Jo. 540, C. A. . . 141
——— *v.* Leigh, *Re* Oliver's Settlement. *See* Oliver's Settlement, *Re*, Evered *v.* Leigh.
Everett *v.* Lowdham (1831), 5 C. & P. 91 593
——— *v.* Remington, [1892] 3 Ch. 148; 61 L. J. (CH.) 574; 67 L. T. 80 . . 101
Everitt *v.* Everitt (1870), L. R. 10 Eq. 405; 39 L. J. (CH.) 777; 23 L. T. 136; 18 W. R. 1020 18
Ewart, *In the Goods of* (1859), 1 Sw. & Tr. 258 503
——— *v.* Jones (1845), 14 M. & W. 774; 3 Dow. & L. 252; 15 L. J. (EX.) 18 . 588
——— *v.* Williams (1857), 7 De G. M. & G. 68; 3 Eq. R. 171; 24 L. J. (CH.) 366; 3 W. R. 46 561
Ewer *v.* Ambrose (1825), 3 B. & C. 746; 5 Dow. & Ry. (K. B.) 629 600
——— *v.* ——— (1825), 4 B. & C. 25; 6 Dow. & Ry. (K. B.) 127; 3 L. J. (O. S.) (K. B.) 128 551
Ewin, *Re* (1830), 1 Cr. & J. 151 1 Tyr. 92; 9 L. J. (O. S.) (EX.) 37 . . 235, 238
Ewing, *In the Goods of* (1881), 6 P. D. 19; 50 L. J. (P.) 11; 44 L. T. 278; 45 J. P. 376; 29 W. R. 474 310
——— *v.* Orr Ewing (1883), 9 App. Cas. 34; 53 L. J. (CH.) 435; 50 L. T. 401; 32 W. R. 573 65, 274
——— (William) & Co. *v.* Dominion Bank, [1904] A. C. 806; 74 L. J. (P. C.) 21 . 396
Ewing's Trustees *v.* Mathieson (1906), 44 Sc. L. R. 12; 14 Scots Law Times, 135 254, 301
Exchange Bank of Yarmouth *v.* Blethen (1885), 10 App. Cas. 293; 54 L. J. (P. C.) 27; 53 L. T. 537; 33 W. R. 801 389
Exeter Corporation *v.* Warren (1844), 5 Q. B. 773; Dav. & Mer. 524; 8 Jur. 441...512, 561
Exhall Coal Co., Ltd., *Re*, *Re* Bleckley (1866), 35 Beav. 449; 14 L. T. 280; 12 Jur. (N. S.) 757; 14 W. R. 599 150
Eyre, *Re*, [1907] 1 K. B. 331; 76 L. J. (K. B.) 227; 96 L. T. 236 . . . 209
——— *v.* Burmister (1862), 10 H. L. Cas. 90; 6 L. T. 838 82
——— *v.* Hughes (1876), 2 Ch. D. 148; 45 L. J. (CH.) 395; 34 L. T. 211; 24 W. R. 597 62
——— *v.* Marsden (1838), 2 Keen, 564; 7 L. J. (CH.) 220; 2 Jur. 583; affirmed 4 My. & Cr. 231; 3 Jur. 450 108, 109
——— *v.* Monro (1857), 3 K. & J. 305; 26 L. J. (CH.) 757; 3 Jur. (N. S.) 584; 5 W. R. 870 234
Eyton, *Re*, Bartlett *v.* Charles (1890), 45 Ch. D. 458; 59 L. J. (CH.) 733; 63 L. T. 336; 39 W. R. 135 103, 351, 365

F.

FABER *v.* Montague, *Re* Montague. *See* Montague, *Re*, Faber *v.* Montague.
Fagg's (Sir John) Case (undated), 1 Eq. Cas. Abr. 354; cited Huntingdon (Earl) *v.* Greenville (1682), 1 Vern. 49 83
Fairer *v.* Park (1876), 3 Ch. D. 309; 45 L. J. (CH.) 760; 35 L. T. 27 . . . 137, 138
Fairlie *v.* Denton (1828), 3 C. & P. 103; 8 B. & C. 395; 2 Man. & Ry. (K. B.) 353 458
Fairtitle d. Mytten *v.* Gilbert (1787), 2 Term Rep. 169 370, 371
Falck *v.* Williams, [1900] A. C. 176; 69 L. J. (P. C.) 17 435, 559
Falcke *v.* Scottish Imperial Insurance Co. (1887), 57 L. T. 39; 35 W. R. 794 . 334
Falconer *v.* Hanson (1808), 1 Camp. 171 547, 618
Falk, *Re* (1832), 2 Deac. & Ch. 415 576
Falkingham *v.* Victorian Railways Commissioner, [1900] A. C. 452; 69 L. J. (P. C.) 89; 82 L. T. 506 545
Falkner *v.* O'Brien (1812), 2 Ball & B. 214 19

PAGE
Falmouth (Earl) *v.* Roberts (1842), 11 L. J. (EX.) 180 1 Dowl. (N. S.) 633; 9 M. & W. 469 605
Farina *v.* Fickus, *Re* Fickus. *See* Fickus, *Re*, Farina *v.* Fickus.
Farmeloe *v.* Bain (1876), 1 C. P. D. 445; 45 L. J. (Q. B.) 264; 34 L. T. 324 . 377, 384, 387
Farmer *v.* Goy & Co., Ltd., *Re* Goy & Co., Ltd. *See* Goy & Co., Ltd., *Re*, Farmer *v.* Goy & Co., Ltd.
——— *v.* Trower (1853), 22 L. J. (EX.) 22 601
Farquharson *v.* Floyer (1876), 3 Ch. D. 109; 45 L. J. (CH.) 750; 35 L. T. 355 . 145
——————— *v.* Seaton (1828), 5 Russ. 45 347
——————— Brothers & Co. *v.* King & Co., [1901] 2 K. B. 697; 70 L. J. (K. B.) 985; 85 L. T. 264; 49 W. R. 673; 17 T. L. R. 689; reversed, [1902] A. C. 325; 71 L. J. (K. B.) 667; 86 L. T. 810; 51 W. R. 94; 18 T. L. R. 665 379, 382, 383, 391, 396, 399
Farrah *v.* Keat (1838), 6 Dowl. 470; 1 Will. Woll. & H. 43; 2 Jur. 136 . 579, 589
Farrand *v.* Yorkshire Banking Co. (1888), 40 Ch. D. 182; 58 L. J. (CH.) 238; 60 L. T. 669; 37 W. R. 318 80
Farrant *v.* Blanchford (1863), 1 De G. J. & Sm. 107; 32 L. J. (CH.) 237; 7 L. T. 770; 9 Jur. (N. S.) 423; 11 W. R. 294 172
Farrar *v.* Farrars, Ltd. (1888), 40 Ch. D. 395; 58 L. J. (CH.) 185; 60 L. T. 121; 37 W. R. 196, C. A. 157
——— *v.* Hutchinson (1839), 9 Ad. & El. 641; 1 Per. & Dav. 437; 2 Will. Woll. & H. 106; 8 L. J. (Q. B.) 107 562
——— *v.* Winterton (1842), 5 Beav. 1; 6 Jur. 204 111
Farrer *v.* St. Catharine's College, Cambridge (1873), L. R. 16 Eq. 19; 42 L. J. (CH.) 809; 28 L. T. 800; 21 W. R. 643 242
——— *v.* Sykes (1874), 43 L. J. (CH.) 392 629
Farrington *v.* Forrester, *Re* Jones. *See* Jones, *Re*, Farrington *v.* Forrester.
——————— *v.* Knightly (1721), 1 P. Wms. 544; Prec. Ch. 566; 10 Mod. Rep. 442; 2 Eq. Cas. Abr. 421 32
Farrow *v.* Blomfield (1859), 1 F. & F. 653 602
Farrow's Estate, *Re* (1857), 22 Beav. 400 604
Farwell *v.* Seale (1849), 3 De G. & Sm. 359; 18 L. J. (CH.) 189; 13 Jur. 483 . 254
Fasset *v.* Brown (1790), Peake, 33 606
Faulder *v.* Silk (1811), 3 Camp. 125 342, 530
Faulkner *v.* Brine (1858), 1 F. & F. 254 601
——————— *v.* Johnson (1843), 11 M. & W. 581 443
Faure Electric Accumulation Co., Ltd. *v.* Phillipart (1887), 58 L. T. 525 . . 389
Faversham (Lord) *v.* Emerson (1855), 11 Exch. 385; 24 L. J. (EX.) 254; 3 C. L. R. 1379 350
Fawcet *v.* Catten (1674), T. Jo. 39. 360
——— *v.* Lowther (1751), 2 Ves. Sen. 300 89, 94, 95
Fearnsides, *Re*, Baines *v.* Chadwick, [1903] 1 Ch. 250; 72 L. J. (CH.) 200; 88 L. T. 57; 51 W. R. 186; 19 T. L. R. 104 218, 220
Federal Supply and Cold Storage Co. *v.* Angehrn (1910), 26 T. L. R. 626, P. C. . 166
Feeny, *Re* (1902), 36 I. L. T. 80 208
Fell *v.* Parkin (1882), 52 L. J. (Q. B.) 99; 47 L. T. 350 391
Fells *v.* Read (1796), 3 Ves. 70 12, 13
Felthouse *v.* Bailey (1866), 14 W. R. 827 618
Fennell *v.* Tait (1834), 1 Cr. M. & R. 584 580
Fenner *v.* Blake, [1900] 1 Q. B. 426; 69 L. J. (Q. B.) 257; 82 L. T. 149; 48 W. R. 392 375, 376
——— *v.* Duplock (1824), 2 Bing. 10; 9 Moore (C. P.), 32; 2 L. J. (O. S.) (C. P.) 102 373, 403, 404, 405
Fenton *v.* Cumberlege, *Re* Mundell. *See* Mundell, *Re*, Fenton *v.* Cumberlege.
Fenwick *v.* Bell (1844), 1 Car & Kir 312 481
——— *v.* Clarke (1862), 4 De G. F. & J. 240; 6 L. T. 393; 10 W. R. 636, C. A. 161
——— *v.* Reed (1821), Madd. & G. 7 608
———, Stobart & Co., Ltd., *Re*, Deep Sea Fishery Co.'s Claim, [1902] 1 Ch. 507; 71 L. J. (CH.) 321; 86 L. T. 193; 9 Mans. 205 85
——— *v.* Thornton (1827), Mood. & M. 51 460
Feret *v.* Hill (1854), 15 C. B. 207; 2 C. L. R. 1366; 23 L. J. (C. P.) 185; 18 Jur. 1014; 2 W. R. 493 487
Ferguson *v.* Benyon (1867), 16 W. R. 71 476
——— *v.* Fyffe (1841), 8 Cl. & Fin. 121 490
——— *v.* Mahon (1839), 11 Ad. & El. 179; 3 Per. & Dav. 143; 9 L. J. (Q. B.) 146 354
——— *v.* Ogilby (1862), 12 I. Ch. R. 411 230

PAGE
Fermoy (Lord), *Re* (1890), MacCarthy's Leading Cases in Land Purchase Law, 55 258
Fernandes' Executors' Case (1870), 5 Ch. App. 314; 22 L. T. 219; 18 W. R. 411 310
Fernandez, *Ex parte* (1861), 10 C. B. (N. S.) 3; 30 L. J. (C. P.) 321; 4 L. T. 324; 7 Jur. (N. S.) 571; 9 W. R. 832 575, 595, 616
Fernley *v.* Worthington (1840), 1 Man. & G. 491; 10 L. J. (M. C.) 81 519
Ferns *v.* Carr (1885), 28 Ch. D. 409; 54 L. J. (CH.) 478; 52 L. T. 348; 49 J. P. 503; 33 W. R. 363 28
Fernyhough *v.* Naylor (1875), 23 W. R. 228 627
Ferrand *v.* Milligan (1845), 7 Q. B. 730 442
Ferrer *v.* Oven (1827), 7 B. & C. 427; 1 Man. & Ry. (K. B.) 222; 6 L. J. (O. S.) (K. B.) 28 552
Ferrers (Lord) *v.* Shirley (1731), Fitz-G. 195 543
Few *v.* Backhouse (1838), 8 Ad. & El. 789; 8 L. J. (Q. B.) 30; 1 Per. & Dav. 34; 1 Will. Woll. & H. 658 337
Ffinch *v.* Combe, [1894] P. 191; 63 L. J. (P.) 113; 70 L. T. 695; 6 R. 545 . 480
Fickus, *Re*, Farina *v.* Fickus, [1900] 1 Ch. 331; 69 L. J. (CH.) 161; 81 L. T. 749; 48 W. R. 250 377
Fiddey, *Re*, Jones *v.* Frost (1872), 7 Ch. App. 773; 42 L. J. (CH.) 47; 27 L. T. 465; 20 W. R. 1025 371
Field *v.* Brown, Smith *v.* Brown (1859), 27 Beav. 90 112
—— *v.* Hopkins (1890), 44 Ch. D. 524; 62 L. T. 774, C. A. 92
—— *v.* Mostin (1778), 1 Dick. 543 137
Filmer *v.* Gott (1774), 4 Bro. Parl. Cas. 230 16
Finch, *Re*, Abbiss *v.* Burney (1881), 17 Ch. D. 211; 50 L. J. (CH.) 348; 44 L. T. 267; 29 W. R. 449, C. A. 94
——, *Re*, Finch *v.* Finch (1883), 23 Ch. D. 267; 48 L. T. 129; 31 W. R. 526, C. A. 604
——— *v.* Finch (1752), 2 Ves. Sen. 493 574
——— *v.* Shaw (1854), 5 H. L. Cas. 905; 9 Beav. 500; 18 Jur. 935; 26 L. J. (CH.) 65; 3 Jur. (N. S.) 25 77
Finch's (Sir Moyle) Case (1600), 4 Co. Inst. 85; 2 And. 162 89
Finden, *Ex parte* (1805), 11 Ves. 404, n. 92
Fine Art Society *v.* Union Bank of London (1886), 17 Q. B. D. 705; 56 L. J. (Q. B.) 70; 55 L. T. 536; 51 J. P. 69; 35 W. R. 114, C. A. 393
Finney *v.* Beesley (1851), 17 Q. B. 86 613
——— *v.* Finney (1868), L. R. 1 P. & D. 483; 37 L. J. (P. & M.) 43; 18 L. T. 489...331
Firth, *Re*, *Ex parte* Schofield (1877), 6 Ch. D. 230; 46 L. J. (BCY.) 112; 37 L. T. 281; 26 W. R. 9, C. A. 576
——— *v.* McPhail, [1905] 2 K. B. 300; 3 L. G. R. 478; 74 L. J. (K. B.) 458; 92 L. T. 567; 69 J. P. 203; 20 Cox, C. C. 821 449
——— *v.* Slingsby (1888), 58 L. T. 481 175
Fischer *v.* Hahn (1863), 13 C. B. (N. S.) 659; 32 L. J. (C. P.) 209; 11 W. R. 342...613, 615
——— *v.* Ingataray (1858), E. B. & E. 321; 27 L. J. (Q. B.) 239; 4 Jur. (N. S.) 632; 6 W. R. 549 614
——— *v.* Seafield (Earl) (1825), 4 Sh. (Ct. of Sess.) 192 257
Fish, *Re*, Bennett *v.* Bennett, [1893] 2 Ch. 413; 62 L. J. (CH.) 977; 69 L. T. 233; 2 R. 467, C. A. 158, 159
——, *Re*, Lea *v.* Fish (1897), 103 L. T. Jo. 267 219, 223
——— *v.* Kempton (1849), 7 C. B. 687; 18 L. J. (C. P.) 206; 13 Jur. 750 . . . 395
Fisher, *Re*, [1894] 1 Ch. 450; 63 L. J. (CH.) 235; 70 L. T. 62; 42 W. R. 241; 7 R. 97, C. A. 487
——— *v.* Brierley (No. 2) (1861), 30 Beav. 267 241
——— *v.* Coffey (1855), 1 Jur. (N. S.) 956 625
——— *v.* Kitchingham (1742), Willes, 367 545
——— *v.* Lane (1771), 2 Wm. Bl. 834; 3 Wils. 297 552
——— *v.* Magnay (1844), 5 Man. & G. 778; 6 Scott (N. R.), 588; 1 Dow. & L. 40...390
——— *v.* Ogle (1808), 1 Camp. 418 341
——— *v.* Owen (1878), 8 Ch. D. 645; 47 L. J. (CH.) 681; 38 L. T. 577; 26 W. R. 581 575
——— *v.* Ronalds (1852), 12 C. B. 762; 17 Jur. 393; 22 L. J. (C. P.) 62 . . . 574
Fishmongers' Co. *v.* Dimsdale (1852), 12 C. B. 557 606
——————— *v.* Robertson (1843), 5 Man. & G. 131; 6 Scott (N. R.), 56; 12 L. J. (C. P.) 185 357
Fitch *v.* Smallbrook (1661), T. Raym. 32; 1 Keb. 134; 1 Sid. 51 545
—— *v.* Weber (1848), 6 Hare, 145; 17 L. J. (CH.) 361; 12 Jur. 645 109
Fitz *v.* Rabbits (1837), 2 Mood. & R. 60 518, 519
Fitzgerald, *Re*, Surman *v.* Fitzgerald, [1904] 1 Ch. 573; 76 L. J. (CH.) 436; 90 L. T. 266; 52 W. R. 432; 29 T. L. R. 332, C. A.. 488
——————— *v.* Elsee (1811), 2 Camp. 635 605

PAGE
Fitzgerald *v.* Fitzgerald (1863), 3 Sw. & Tr. 397 422
——— *v.* ——— (1863), 33 L. J. (P. M. & A.) 39 547
——— *v.* Jervoise (1820), 5 Madd. 25 108
Fitzhardinge (Lord), *Re*, Fitzhardinge (Lord) *v.* Jenkinson (1899), 80 L. T. 376; 15 T. L. R. 225, C. A. 222
Fitz-James *v.* Moys (1663), 1 Sid. 133; 1 Keb. 486 570
Fitzroy *v.* Cave, [1905] 2 K. B. 634; 74 L. J. (K. B.) 829; 93 L. T. 499; 54 W. R. 17; 21 T. L. R. 612, C. A. 449
——— *v.* Gwillim (1786), 1 Term Rep. 153 72
Fitzroy Bessemer Steel etc. Co., *Re* (1884), 50 L. T. 144; 32 W. R. 475 . . 175
Fitzsimons *v.* Fitzsimons (1860), 28 Beav. 417; 3 L. T. 141; 6 Jur. (N. S.) 641...122
Fitzwalter Peerage Case (1843), 10 Cl. & Fin. 193 . . . 482, 505, 561, 608
Flack *v.* Holm (1820), 1 Jac. & W. 405 60
Flamank, *Ex parte*, *Re* East Lincolnshire Railway Act. *See* East Lincolnshire Railway Act, *Re*, *Ex parte* Flamank.
Flavell, *Re*, Murray *v.* Flavell (1883), 25 Ch. D. 89; 53 L. J. (CH.) 185; 32 W. R. 102, C. A. 97
Fleet *v.* Merton (1871), L. R. 7 Q. B. 126; 41 L. J. (Q. B.) 49; 26 L. T. 181; 20 W. R. 97 445
——— *v.* Perrins (1868), L. R. 3 Q. B. 536; 9 B. & S. 575; 37 L. J. (Q. B.) 233; 19 L. T. 147 458, 543
Fleming *v.* Buchanan (1853), 3 De G. M. & G. 976; 22 L. J. (CH.) 886, C. A. 34, 37
——— *v.* Gooding (1834), 10 Bing. 549; 4 Moo. & S. 455; 3 L. J. (C. P.) 214 . 402
Fletcher, *Re*, Gillings *v.* Fletcher (1888), 38 Ch. D. 373; 57 L. J. (CH.) 1032; 59 L. T. 313; 36 W. R. 841 129, 137
——— *v.* Ashburner (1779), 1 Bro. C. C. 497 104
——— *v.* Bealey (1885), 28 Ch. D. 688; 54 L. J. (CH.) 424; 52 L. T. 541; 33 W. R. 745 52
——— *v.* Collis, [1905] 2 Ch. 24; 74 L. J. (CH.) 502; 92 L. T. 749; 53 W. R. 516, C. A. 172
——— *v.* Fletcher (1844), 4 Hare, 67; 14 L. J. (CH.) 66; 8 Jur. 1040 . . 97
——— *v.* Froggatt (1827), 2 C. & P. 569 457
——— *v.* London and North Western Rail. Co., [1892] 1 Q. B. 122; 61 L. J. (Q. B.) 24; 65 L. T. 605; 40 W. R. 182, C. A. 436
Flight *v.* Cook (1755), 2 Ves. Sen. 619 52
Flint *v.* Howard, [1893] 2 Ch. 54; 62 L. J. (CH.) 804; 68 L. T. 390; 2 R. 386, C. A. 144
Flitcroft's Case (1882), 21 Ch. D. 519; 52 L. J. (CH.) 217; 48 L. T. 86; 31 W. R. 174, C. A. 156
Flitters *v.* Allfrey (1874), L. R. 10 C. P. 29; 44 L. J. (C. P.) 73; 31 L. T. 878; 23 W. R. 442 329, 331, 334, 357
Flockton *v.* Peake (1864), 12 W. R. 562 28
Florence, *Re*, *Ex parte* Wingfield (1879), 10 Ch. D. 591; 40 L. T. 15; 27 W. R. 346, C. A. 444
——— *v.* Jenings (1857), 2 C. B. (N. S.) 454; 26 L. J. (C. P.) 274; 3 Jur. (N. S.) 772 332, 335, 337
Flower *v.* Lloyd (1879), 10 Ch. D. 297; 37 L. T. 419, C. A. 352
Floyer *v.* Bankes (1863), 3 De G. J. & Sm. 306; 3 New Rep. 16; 33 L. J. (CH.) 1; 9 L. T. 353; 9 Jur. (N. S.) 1255; 12 W. R. 28 . . 263, 277, 278, 281, 298
Fludyer, *Re*, Wingfield *v.* Erskine, [1898] 2 Ch. 562; 67 L. J. (CH.) 620; 79 L. T. 298; 47 W. R. 5 37
——— *v.* Cocker (1805), 12 Ves. 25 98
Fluker *v.* Gordon (1853), 17 Beav. 423; 23 L. J. (CH.) 60 115
Foley (Lady), *Re* (1898), *Times*, May 18th 200
——— *v.* Burnell (1783), 1 Bro. C. C. 792 96
——— *v.* Hill (1848), 2 H. L. Cas. 28 28, 156
Foligno *v.* Martin (1852), 22 L. J. (CH.) 502. 366
Foljambe *v.* Smith's Tadcaster Brewery Co. (1904), 73 L. J. (CH.) 722; 91 L. T. 312 540
Folkes *v.* Chadd (1782), 3 Doug. (K. B.) 157 480
Follett *v.* Tyrer (1844), 14 Sim. 125; 13 L. J. (N. S.) (CH.) 441; 8 Jur. 528 . 107
Foly's Case (1680), Freem. (CH.) 49; 2 Eq. Cas. Abr. 459 34
Fonsick *v.* Agar (1806), 6 Esp. 92 547
Footner *v.* Sturgis (1852), 5 De G. & Sm. 736; 21 L. J. (CH.) 741 . . . 93
Forbes, *Re* (1852), 1 W. R. 32; 9 Hare Appendix, xx., n. 534
——— *v.* Moffatt (1811), 18 Ves. 384 146, 147
——— *v.* Steven (1870), L. R. 10 Eq. 178; 39 L. J. (CH.) 485; 22 L. T. 703; 18 W. R. 686 235, 238, 308

PAGE
Ford *v.* Ager (1863), 2 H. & C. 279 ; 32 L. J. (EX.) 269 ; 8 L. T. 46 ; 9 Jur. (N. S.) 804 ; 11 W. R. 1073 404
—— *v.* Blest (1890), 6 T. L. R. 295 578
—— *v.* Chesterfield (Earl) (1854), 19 Beav. 428 152
—— *v.* Ruxton (1844), 1 Coll. 403 240
—— *v.* Tynte (1864), 10 L. T. 93 326
—— and Ferguson's Contract, *Re*, [1906] 1 I. R. 607 95
Forder *v.* Wade (1794), 4 Bro. C. C. 521 96
Fordham *v.* Wallis (1853), 10 Hare, 217 ; 22 L. J. (CH.) 548 ; 17 Jur. 228 ; 1 W. R. 118 460, 160
Forest of Dean Coal Mining Co., *Re* (1878), 10 Ch. D. 450 ; 40 L. T. 287 ; 27 W. R. 594 156
Forman *v.* Homfray (1813), 2 Ves. & B. 329 38
——— & Co. Proprietary *v.* Ship "Liddesdale," [1900] A. C. 190 ; 69 L. J. (P.) 44 ; 82 L. T. 331 ; 9 Asp. M. L. C. 45 397
Formby *v.* Barker, [1903] 2 Ch. 539 ; 72 L. J. (CH.) 716 ; 89 L. T. 249 ; 51 W. R. 646, C. A. 101
Forrest *v.* Forrest (1865), 5 New Rep. 299 604
Forrester *v.* Cotton (1760), 1 Eden, 531 118, 121
——— *v.* Leigh (Lord) (1753), Amb. 171. 145
Forsight *v.* Grant (1791), 1 Ves. 298 ; 3 Bro. C. C. 242 138
Forster *v.* Baker (1910), 101 L. T. 522, C. A. 103
——— *v.* Davis, Norden *v.* McRae, *Re* McRae. *See* McRae, *Re*, Forster *v.* Davis, Norden *v.* McRae.
——— *v.* Forster (1864), 33 L. J. (P. M. & A.) 113 ; 10 Jur. (N. S.) 594 . . 605
Forsyth, *Re* (1865), 11 L. T. 616 ; 11 Jur. (N. S.) 213 ; 13 W. R. 307 ; affirmed, 12 L. T. 687 ; 13 W. R. 932 371, 372
Fort *v.* Clarke (1826), 1 Russ. 601 443, 560
Fortescue *v.* Barnett (1834), 3 My. & K. 36 ; 2 L. J. (CH.) 98 98
Fortune *v.* Hanson, [1896] 1 Q. B. 202 ; 65 L. J. (M. C.) 71 ; 74 L. T. 145 ; 60 J. P. 88 ; 44 W. R. 431 ; 18 Cox, C. C. 258 478
Forward *v.* Duffield (1747), 3 Atk. 555 151
Foster, *Re*, *Ex parte* Basan (1885), 2 Morr. 29, C. A. 543
———, *Re*, Thomas *v.* Foster, [1897] 1 Ch. 484 ; 66 L. J. (CH.) 220 ; 76 L. T. 228 ; 45 W. R. 333 220
——— *v.* Blagden (1771), Amb. 704 146
——— *v.* Compton (1818), 2 Stark. 364 545
——— *v.* Cook (1791), 3 Bro. C. C. 347 145
——— *v.* Deacon (1818), 3 Madd. 394 99
——— *v.* Foster (1875), 1 Ch. D. 588 ; 45 L. J. (CH.) 301 ; 24 W. R. 185 . . 112
——— *v.* Globe Venture Syndicate, Ltd., [1900] 1 Ch. 811 ; 69 L. J. (CH.) 375 ; 82 L. T. 253 493
——— *v.* Harvey (No. 1) (1863), 4 De G. J. & Sm. 59 ; 2 New Rep. 443 ; 9 L. T. 404 ; 11 W. R. 899 628
——— *v.* Ley (1835), 2 Bing. (N. C.) 269 ; 2 Scott, 438 ; 1 Hodg. 326 ; 5 L. J. (C. P.) 17 234, 253, 254
——— *v.* Mackinnon (1869), L. R. 4 C. P. 704 ; 38 L. J. (C. P.) 310 ; 20 L. T. 887 ; 17 W. R. 1105 392, 402, 567
——— *v.* McMahon (1847), 11 I. Eq. R. 587 463
——— *v.* Mentor Life Assurance Co. (1854), 3 E. & B. 48 ; 2 C. L. R. 1404 ; 23 L. J. (Q. B.) 145 ; 18 Jur. 827 389
——— *v.* Plumbers' Co. (1900), 44 Sol. Jo. 211 505, 513
——— *v.* Tyne Pontoon and Dry Docks Co. (1893), 63 L. J. (Q. B.) 50 . . 410, 411
——— *v.* Vassall (1747), 3 Atk. 587 66
Foulkes *v.* Sellway (1800), 3 Esp. 236 455
Fountaine, *Re*, *Re* Dowler, Fountaine *v.* Amherst (Lord), [1909] 2 Ch. 382 ; 78 L. J. (CH.) 648 ; 101 L. T. 83 ; 25 T. L. R. 689 463, 465
——— *v.* Carmarthen Railway (1868), L. R. 5 Eq. 316 ; 37 L. J. (CH.) 429 ; 16 W. R. 476 381
Fourdrin *v.* Gowdey (1834), 3 My. & K. 383 ; 3 L. J. (CH.) 171 138
Fowkes *v.* Pascoe (1875), 10 Ch. App. 343 ; 44 L. J. (CH.) 367 ; 32 L. T. 545 ; 23 W. R. 538 131
Fowler *v.* Fowler (1735), 3 P. Wms. 353 ; 2 Eq. Cas. Abr. 156, 355 . 136, 137, 139
——— *v.* ——— (1859), 4 De G. & J. 250 25
——— *v.* ——— (1881), 50 L. J. (CH.) 686 ; 44 L. T. 799 ; 29 W. R. 800 . . 581
Fowler's Trust, *Re* (1859), 27 Beav. 362 123
Fox *v.* Bearblock (1881), 17 Ch. D. 429 ; 50 L. J. (CH.) 489 ; 44 L. T. 508 ; 29 W. R. 661 444, 465, 504

PAGE
Fox *v.* Mackreth (1788), 2 Bro. C. C. 400 ; 2 White & Tud. L. C., 7th ed., p. 702...14, 157
—— *v.* Martin, [1895] W. N. 36 412
—— *v.* Waters (1840), 4 Per. & Dav. 1 ; 12 Ad. & El. 43 ; 9 L. J. (Q. B.) 329 . 461
—— *v.* Wright (1821), Madd. & G. 111 21
Fox's Case, *Re* Moseley Green Coal and Coke Co. *See* Moseley Green Coal and Coke Co., *Re*, Fox's Case.
Foxton *v.* Manchester and Liverpool District Banking Co. (1881), 44 L. T. 406 . 156
Foxwell *v.* Lewis, *Re* Lewis. *See* Lewis, *Re*, Foxwell *v.* Lewis.
———— *v.* Van Grutten, [1897] 1 Ch. 64 ; 66 L. J. (CH.) 53 ; 75 L. T. 368, C. A. 55
Fracis Times & Co. *v.* Carr (1900), 82 L. T. 698 ; 16 T. L. R. 405 ; 8 Asp. M. L. C. 418, C. A. 327
Frail *v.* Ellis (1852), 16 Beav. 350 ; 22 L. J. (CH.) 467 ; 1 W. R. 72 79
Frame *v.* Dawson (1807), 14 Ves. 386 76
France *v.* Clark (1884), 26 Ch. D. 257 ; 53 L. J. (CH.) 585 ; 50 L. T. 1 ; 32 W. R. 466, C. A. 392, 393, 412
——— *v.* Lucy (1825) Ry. & M. 341 522
Francis *v.* Dodsworth (1847), 4 C. B. 202 ; 17 L. J. (C. P.) 185 163
Francklin's Charity *Re* (1829), 3 Sim. 147 ; 3 Y. & J. 544 239
Franco *v.* Alvares (1746), 3 Atk. 342 153
——— *v.* Bolton (1797), 3 Ves. 368 53, 73
Frank *v.* Standish (1772), 1 Bro. C. C. 588, n. 119, 120
Franklin *Re*, Franklin *v.* Franklin (1907), 52 Sol. Jo. 12 132, 134
Franklyn *v.* Colquhoun (1816), 1 Madd. 580 586
Franks, *Re*, *Ex parte* Gittins, [1892] 1 Q. B. 646 ; 66 L. T. 30 ; 40 W. R. 384 ; 9 Morr. 90 577
Fraser *v.* Croft (1898), 25 R. (Ct. of Sess.) 496 222
——— *v.* Nevins, Welsh & Co. (1888), 4 T. L. R. 448, C. A. 614
——— *v.* Pendlebury (1861), 31 L. J. (C. P.) 1 ; 10 W. R. 104 372
——— *v.* Renton, *Re* Rhodes. *See* Rhodes, *Re*, Fraser *v.* Renton.
Frayne *v.* Taylor (1863), 33 L. J. (CH.) 228 ; 10 Jur. (N. S.) 119 ; 12 W. R. 287 . 110
Frederick *v.* A.-G. (1874), L. R. 3 P. & D. 270 ; 44 L. J. (P. & M.) 1 ; 32 L. T. 39...469
———— *v.* Frederick (1721), 1 P. Wms. 710 74
Freeman *v.* Arkell (1824), 1 C. & P. 137 ; 2 Dow. & Ry. (K. B.) 669 ; 2 B. & C. 494 519, 571
——— *v.* Cooke (1848), 2 Exch. 654 ; 6 Dow. & L. 187 ; 18 L. J. (EX.) 114 ; 12 Jur. 777 323, 324, 325, 350, 369, 377, 379, 382, 383, 384, 391, 396, 398, 399
——— *v.* Cox (1878), 8 Ch. D. 148 ; 47 L. J. (CH.) 560 ; 26 W. R. 689 . . 458
——— *v.* Lomas (1851), 9 Hare, 109 ; 20 L. J. (CH.) 564 ; 15 Jur. 648 . 162, 163
——— *v.* Phillipps (1816), 4 M. & S. 486 468, 469, 547
——— *v.* Read (1863), 4 B. & S. 174 ; 32 L. J. (M. C.) 226 ; 10 Jur. (N. S.) 149 530
——— *v.* Steggall (1849), 14 Q. B. 202 ; 19 L. J. (Q. B.) 18 ; 13 Jur. 1030 . 606
Freke *v.* Calmady, *Re* Hotchkys. *See* Hotchkys, *Re*, Freke *v.* Calmady.
Fremoult *v.* Dedire (1718), 1 P. Wms. 429 93, 488
French *v.* French, [1902] 1 I. R. 172 75
———— *v.* Howie, [1906] 2 K. B. 674 ; 75 L. J. (K. B.) 980 ; 95 L. T. 274, C. A. 336
———— *v.* Macale (1842), 2 Dr. & War. 269 ; 1 Con. & Law. 459. . . . 151
Frere *v.* Winslow, *Re* Winslow. *See* Winslow, *Re*, Frere *v.* Winslow.
Freston, *Re* (1883), 11 Q. B. D. 545 ; 52 L. J. (Q. B.) 545 ; 49 L. T. 290 ; 31 W. R. 804, C. A. 585, 586
Frewen *v.* Law Life Assurance Society, [1896] 2 Ch. 511 ; 65 L. J. (CH.) 787 ; 75 L. T. 17 ; 44 W. R. 682 117
Friary Holroyd and Healey's Breweries, Ltd. *v.* Singleton, [1899] 1 Ch. 86 ; 68 L. J. (CH.) 13 ; 47 W. R. 93 ; 15 T. L. R. 23 97
Fricker *v.* Moore (1730), Bunb. 289 610
Friend *v.* Eastabrook (1777), 2 Wm. Bl. 1152 402
——— *v.* Young, [1897] 2 Ch. 421 ; 66 L. J. (CH.) 737 ; 77 L. T. 50 ; 46 W. R. 139 156
Fripp *v.* Chard Rail. Co. (1853), 11 Hare, 241 55
Frith, *Re*, Newton *v.* Rolfe, [1902] 1 Ch. 342 ; 71 L. J. (CH.) 199 ; 86 L. T. 212 . 150
——— *v.* Frith, [1896] P. 74 ; 65 L. J. (P.) 53 482, 565
——— *v.* ———, [1906] A. C. 254 ; 75 L. J. (P. C.) 50 ; 94 L. T. 383 ; 54 W. R. 618 ; 22 T. L. R. 388 567
Frost *v.* Richardson, [1910] 103 L. T. 22 452, 532
Froude *v.* Hobbs (1859), 1 F. & F. 612 428, 429
Fry *v.* Lane, *Re* Fry, Whittet *v.* Bush (1888), 40 Ch. D. 312 ; 58 L. J. (CH.) 113 ; 60 L. T. 12 ; 37 W. R. 135 17, 21, 22

PAGE

Fry *v.* Porter (1670), 1 Mod. Rep. 300; 1 Cas. in Ch. 131; 2 Rep. Ch. 26; 1 Eq. Cas. Abr. 114 8
—— *v.* Wood (1737), 1 Atk. 445 547
Fry's (Lady Anne) Case (1672), 1 Vent. 199; 1 Eq. Cas. Abr. 58 153
Fryer *v.* Bernard (1724), 2 P. Wms. 261; T. Raym. 236; 2 Lev. 21; 1 Mod. Rep. 86 67
—— *v.* Morland (1876), 3 Ch. D. 675; 45 L. J. (CH.) 817; 35 L. T. 458; 25 W. R. 21 263, 264, 265, 269, 273, 277, 278
—— *v.* Wiseman (1876), 45 L. J. (CH.) 199; 33 L. T. 779; 24 W. R. 205 . 620
Fulham *v.* McCarthy (1848), 1 H. L. Cas. 703; 12 Jur. 757 19, 103
Fullagar *v.* Clark (1812), 18 Ves. 481 14
Fuller *v.* Benett (1843), 2 Hare, 394; 12 L. J. (CH.) 355; 7 Jur. 1056 . . 85
—— *v.* Patrick (1849), 13 Jur. 561 606
—— *v.* Prentice (1788), 1 Hy. Bl. 49 583
—— *v.* Redman (No. 1) (1859), 26 Beav. 600; 29 L. J. (CH.) 324; 5 Jur. (N. S.) 1045; 7 W. R. 430 35
Fullwood *v.* Fullwood (1878), 9 Ch. D. 176; 47 L. J. (CH.) 459; 38 L. T. 380; 26 W. R. 435 169
Fulmerston *v.* Steward (1554), Plowd. 102; 2 Dyer, 102 b; Poph. 173 . . 375
Furlong *v.* Howard (1804), 2 Sch. & Lef. 115 581
Furness, *Re*, Furness *v.* Stalkartt, [1901] 2 Ch. 346; 70 L. J. (CH.) 580; 84 L. T. 680 129, 134
—— *v.* Meek (1857), 2 L. J. (EX.) 34 430, 567
—— Withy & Co. *v.* Hall (1909), 25 T. L. R. 233 334
Fyson *v.* Kemp (1833), 6 C. & P. 71 549
Fytche *v.* Fytche (1868), L. R. 7 Eq. 494; 19 L. T. 343 125

G.

GABELL *v.* South Eastern Rail. Co. *See* Parker *v.* South Eastern Rail Co.
Gaden *v.* Newfoundland Bank, [1899] A. C. 281; 68 L. J. (P. C.) 57; 80 L. T. 329; 15 T. L. R. 228 458
Gainsborough (Countess) *v.* Gifford (1727), 2 P. Wms. 424; 2 Eq. Cas. Abr. 162 . 48
—— (Earl) *v.* Watcombe Terra Cotta Clay Co. (1885), 54 L. J. (CH.) 991; 53 L. T. 116 87
Gale *v.* Lindo (1687), 1 Vern. 475; 1 Eq. Cas. Abr. 88 20, 376, 382
Gallaher *v.* Murton (1888), 4 T. L. R. 304 607
Gallard, *Re*, *Ex parte* Gallard, [1897] 2 Q. B. 8; 66 L. J. (Q. B.) 484; 76 L. T. 327; 45 W. R. 556; 4 Mans. 52 169
Galloway *v.* Hope, *Re* Jump. *See* Jump, *Re*, Galloway *v.* Hope.
Galvin *v.* Devereux, [1903] 1 I. R. 185 122
Gandy *v.* Gandy (1885), 30 Ch. D. 57; 54 L. J. (CH.) 1154; 53 L. T. 306; 33 W. R. 803, C. A. 97, 364
—— *v.* Macaulay, *Re* Garnett. *See* Garnett, *Re*, Gandy *v.* Macaulay.
Ganer *v.* Lanesborough (1790), 1 Peake, 18 488
"Gannett," The (Owners) *v.* The "Algoa" (Owners), [1900] A. C. 234; 69 L. J. (P.) 49; 82 L. T. 329; 9 Asp. M. L. C. 43 433
Garbutt *v.* Durham Joint Committee, [1904] 2 K. B. 514; 73 L. J. (K. B.) 789; 91 L. T. 247; 52 W. R. 678; 58 J. P. 487; 2 L. G. R. 1161; 20 T. L. R. 616, C. A. 477
—— *v.* Fawcus (1875), 1 Ch. D. 155; 45 L. J. (CH.) 133; 33 L. T. 617; 24 W. R. 89, C. A. 63
Garden *v.* Creswell (1837), 2 M. & W. 319; 5 Dowl. 461; Murp. & H. 44; 6 L. J. (EX.) 84 578, 589
Garden Gully United Quartz Mining Co. *v.* McLister (1875), 1 App. Cas. 39; 33 L. T. 408; 24 W. R. 744 173
Gardiner *v.* Fell (1819), 1 Jac. & W. 22; 2 Wils. (CH.) 32 120
—— *v.* Hardy, [1876] W. N. 153 620
Gardner *v.* Gardner (1877), 2 App. Cas. 723; 4 Rettie (H. L.), 56 504
—— *v.* Moult (1839), 10 Ad. & El. 464; 2 Per. & Dav. 403; 8 L. J. (Q. B.) 270; 3 Jur. 1190 458, 544
Gardner Peerage, The (1727), Le Marchant's Report, 169 439
Garland, *Ex parte* (1804), 10 Ves. 110; 1 Smith, K. B. 220 150
—— *v.* Jacomb (1873), L. R. 8 Exch. 216; 28 L. T. 877; 21 W. R. 868 . 394
—— *v.* Scoones (1798), 2 Esp. 648 545
—— *v.* Shaw, *Re* Vernon. *See* Vernon, *Re*, Garland *v.* Shaw.
Garnett, *Re*, Gandy *v.* Macaulay (1885), 31 Ch. D. 1, C. A. 604
Garrard *v.* Frankel (1862), 30 Beav. 445; 31 L. J. (CH.) 604; 8 Jur. (N. S.) 985 . 78
Garth *v.* Baldwin (1755), 2 Ves. Sen. 646 95

PAGE
Garth *v.* Cotton (1750), 1 Ves. Sen. 524; 3 Atk. 751 49
Garthshore *v.* Chalie (1804), 10 Ves. 1 140, 141, 142
Gartside *v.* Isherwood (1783), 1 Bro. C. C. 558 16
——— *v.* Ratcliff (1676), 1 Cas. in Ch. 292; 1 Eq. Cas. Abr. 169 . . . 72
Gaskell *v.* Gaskell (1836), 6 Sim. 643 40
Gaskill *v.* Skene (1850), 14 Q. B. 664; 19 L. J. (Q. B.) 275; 14 Jur. 597 . . 459
Gates *v.* Buckland (1864), 5 New Rep. 32; 13 W. R. 67 625
Gathercole *v.* Miall (1846), 15 M. & W. 319; 15 L. J. (EX.) 179; 10 Jur. 337 . 519
——— *v.* Smith (1881), 17 Ch. D. 1; 15 L. J. (CH.) 671; 44 L. T. 439; 29 W. R. 434, C. A. 163
Gaunt *v.* Johnson (1848), 6 Hare, 551 584
——— *v.* Wainman (1836), 3 Bing. (N. C.) 69; 3 Scott, 413; 2 Hodg. 186; 5 L. J. (C. P.) 344 346, 349, 368
Gawler *v.* Wade (1707), 1 P. Wms. 99; 2 Eq. Cas. Abr. 165 35, 94
Gaynon *v.* Wood (1759), 1 P. Wms. (6th ed.) 410, n. 137
Gedge *v.* Royal Exchange Assurance Corporation, [1900] 2 Q. B. 214; 5 Com. Cas. 229; 9 Asp. M. L. C. 57; 69 L. J. (Q. B.) 506; 82 L. T. 463; 16 T. L. R. 344...487
Gedye *v.* Pelling, [1892] W. N. 44 617
Gee *v.* Pritchard (1818), 2 Swan. 402 9, 49
—— *v.* Ward (1857), 7 E. & B. 509; 3 Jur. (N. S.) 692; 5 W. R. 579 547
General Accident, Fire and Life Assurance Corporation *v.* Robertson, [1909] A. C. 404; 101 L. T. 135; 25 T. L. R. 685; 53 Sol. Jo. 649 436
General Credit and Discount Co. *v.* Glegg (1883), 22 Ch. D. 549; 52 L. J. (CH.) 297; 48 L. T. 182; 31 W. R. 421 152
General Finance, Mortgage and Discount Co. *v.* Liberator Permanent Benefit Building Society (1878), 10 Ch. D. 15; 39 L. T. 600; 27 W. R. 210 . 367, 374
General Financial Bank, *Re*, [1888] W. N. 47 615
Genese, *Re*, *Ex parte* Gilbert (1886), 3 Morr. 223, C. A. 575
Gent, *Re*, Gent-Davis *v.* Harris (1888), 40 Ch. D. 190; 58 L. J. (CH.) 162; 60 L. T. 355; 37 W. R. 151 156
Gentle *v.* Faulkner, [1900] 2 Q. B. 267; 69 L. J. (Q. B.) 777; 82 L. T. 708; 16 T. L. R. 397, C. A. 64
George *v.* Clagett (1797), 7 T. R. 359; 2 Smith, L. C., 11th ed. 138 . . . 395
——— *v.* Thyer, *Re* Shephard. *See* Shephard, *Re*, George *v.* Thyer.
Geralopulo *v.* Wieler (1851), 10 C. B. 690; 20 L. J. (C. P.) 105; 15 Jur. 316...477, 509
German *v.* Colston (1678), 2 Rep. Ch. 137 161
Gervis *v.* Grand Western Canal Co. (Proprietors) (1816), 5 M. & S. 76 . . 544
Gery *v.* Redman (1875), 1 Q. B. D. 161; 45 L. J. (Q. B.) 267; 24 W. R. 270 . 463
Gething *v.* Keighley (1878), 9 Ch. D. 547; 48 L. J. (CH.) 45; 27 W. R. 283 . 561
Getty *v.* Getty, [1907] P. 334; 76 L. J. (P.) 158 572
Geyer *v.* Aguilar (1798), 7 Term Rep. 681 328, 341, 542
Ghose *v.* Manichund (1859), 7 Moo. Ind. App. 282 445
Ghost's Trusts, *Re* (1883), 49 L. T. 588 365, 372
Gibbs, *Re*, Thorne *v.* Gibbs, [1898] 1 Ch. 625; 67 L. J. (CH.) 282; 78 L. T. 289; 46 W. R. 477; 14 T. L. R. 317 183, 231
——— *v.* Cruikshank (1873), L. R. 8 C. P. 454; 42 L. J. (C. P.) 273; 28 L. T. 735; 21 W. R. 734 337
——— *v.* Guild (1882) 9 Q. B. D. 59; 51 L. J. (Q. B.) 313; 46 L. T. 248; 30 W. R. 591, C. A. 64, 170, 175
——— *v.* Phillipson (1829), 1 Russ. & M. 19 586, 587
Gibbins *v.* Buckland (1863), 1 H. & C. 736; 32 L. J. (EX.) 156; 8 L. T. 87; 9 Jur. (N. S.) 207; 11 W. R. 380 403, 404
Gibbons *v.* Caunt (1799), 4 Ves. 840 24
Gibson *v.* Dodson, *Re* Dodson (P.), *Re* Dodson (A. L. P.). *See* Dodson (P.), *Re*, *Re* Dodson (A. L. P.), Gibson *v.* Dodson.
——— *v.* Doeg (1857), 2 H. & N. 615; 27 L. J. (EX.) 37; 6 W. R. 107 . . 102
——— *v.* Goldsmid (1854), 5 De G. M. & G. 757, C. A. 71
——— *v.* Hall, *Re* Aldersey. *See* Aldersey, *Re* Gibson *v.* Hall.
——— *v.* Jeyes (1801), 6 Ves. 266 19
——— *v.* Kinven (1682), 1 Vern. 66 70
——— *v.* Seagrim (1855), 20 Beav. 614; 24 L. J. (CH.) 782 143, 144
Giffard *v.* Williams (1869), L. R. 8 Eq. 494; 38 L. J. (CH.) 597; 21 L. T. 575; 18 W. R. 56 529, 531
Gilbert, *Ex parte*, *Re* Genese. *See* Genese, *Re*, *Ex parte* Gilbert.
——— *v.* Comedy Opera Co. (1880), 16 Ch. D. 594; 43 L. T. 665; 29 W. R. 169...621
——— *v.* Endean (1878), 9 Ch. D. 259; 39 L. T. 404, C. A. 626
Gilbey *v.* Great Western Rail. Co. (1910), 102 L. T. 202, C. A. . . . 438, 439
Gilchrist *v.* Herbert (1872), 26 L. T. 381; 20 W. R. 348 518

PAGE
Giles *v.* Warren (1872), L. R. 2 P. & D. 401 ; 41 L. J. (P. & M.) 59 ; 26 L. T. 780; 20 W. R. 827 472
Gill *v.* Gilbard (1852), 2 Hare, Appendix, xvi. 627
—— *v.* Gill, [1907] S. C. 532 604
Gillespie *v.* Cumming (1841), Long. & T. 181 545
Gillett *v.* Abbott (1838), 7 Ad. & El. 783 ; 3 Nev. & P. (Q. B.) 24 ; 1 Will. Woll. & H. 89 ; 7 L. J. (Q. B.) 61 ; 2 Jur. 300 367
——— *v.* Hill (1834), 2 Cr. & M. 530 ; 4 Tyr. 290 ; 3 L. J. (EX.) 145 408
Gillette Safety Razor Co. *v.* Gamage (A. W.), Ltd. (1909), 25 T. L. R. 808 . . 413
Gillies *v.* Longlands (1851), 4 De G. & Sm. 372 ; 20 L. J. (CH.) 441 ; 15 Jur. 570 107, 115
——— *v.* Smither (1819), 2 Stark. 528 605
Gillings *v.* Fletcher, *Re* Fletcher. *See* Fletcher, *Re*, Gillings *v.* Fletcher.
Gillman, Spencer & Co. *v.* Carbutt (1889), 61 L. T. 281, C. A. . . . 384, 392, 408
Gilpin *v.* Southampton (Lady) (1812), 18 Ves. 469 33
Gingell, Son and Foskett, Ltd. *v.* Stepney Borough Council, [1906] 2 K. B. 468 ; 75 L. J. (K. B.) 777 ; 95 L. T. 146 ; 70 J. P. 503 ; 22 T. L. R. 688 ; 4 L. G. R. 1092 442
Girdlestone *v.* Brighton Aquarium (1879), 3 Ex. D. 137 ; 26 W. R. 575 ; 38 L. T. 358 352
Gisborne *v.* Hart (1839), 5 M. & W. 50 ; 7 Dowl. 402 ; 8 L. J. (EX.) 197 ; 3 Jur. 536 552
Gittins, *Ex parte*; *Re* Franks. *See* Franks, *Re*, *Ex parte* Gittins.
——— *v.* Steele (1818), 1 Swan. 199 161
Gleen *v.* Gleen (1900), 17 T. L. R. 62 535
"Glendarroch," The, [1894] P. 226 ; 7 Asp. M. L. C. 420 ; 63 L. J. (ADM.) 89 ; 70 L. T. 344 ; 6 R. 686, C. A. 434
Glendinning *v.* Thomas (1862), 6 L. T. 251 589
Glenie *v.* Bruce Smith, [1907] 2 K. B. 507 ; 76 L. J. (K. B.) 874 ; 97 L. T. 434 ; 23 T. L. R. 596 ; affirmed, [1908] 1 K. B. 263 ; 77 L. J. (K. B.) 193 ; 98 L. T. 515 ; 24 T. L. R. 177, C. A. 383
Glenister *v.* Harding, *Re* Turner. *See* Turner, *Re*, Glenister *v.* Harding.
Glossop *v.* Heston and Isleworth Local Board (1878), 47 L. J. (CH.) 536 ; 26 W. R. 433 620
——— *v.* Pole (1814), 3 M. & S. 175 531
Gloucester, Aberystwith and South Wales Rail Co., *Re*, Maitlands' Case (1853), 4 De G. M. & G. 769, C. A. 172
Glover *v.* Hartcup (1864), 34 Beav. 74 137
——— *v.* Portington (1664), Freem. (CH.) 182 ; Nels. 96 ; 2 Eq. Cas. Abr. 174 ; 1 Cas. in Ch. 51 153
——— *v.* Strothoff (1786), 2 Bro. C. C. 33 488
Glubb, *Re*, Bamfield *v.* Rogers, [1900] 1 Ch. 354 ; 69 L. J. (CH.) 278 ; 82 L. T. 412, C. A. 15
Glyn *v.* Duesbury (1840), 11 Sim. 139 ; 9 L. J. (CH.) 365 ; 4 Jur. 1080 . . . 57
——, Mills & Co. *v.* East and West India Dock Co. (1882), 7 App. Cas. 591 ; 52 L. J. (Q. B.) 146 ; 47 L. T. 309 ; 31 W. R. 201 486
Glynn *v.* Bank of England (1750), 2 Ves. Sen. 38 26
Goate *v.* Fryer (1789), 3 Bro. C. C. 23 33
Gobby *v.* Dewes (1833), 3 Moo. & S. 556 ; 2 Dowl. 747 ; 10 Bing. 112 ; 2 L. J. (C. P.) 226 360
Goddard *v.* Brodie, *Re* Chisholm. *See* Chisholm, *Re*, Goddard *v.* Brodie.
——— *v.* Jeffreys (1881), 51 L. J. (CH.) 57 ; 45 L. T. 675 ; 30 W. R. 269 . 23
——— *v.* Parr (1855), 24 L. J. (CH.) 783 ; 6 W. R. 633 601, 626
Godefroy *v.* Jay (1827), 3 C. & P. 192 548
Godfrey, *Ex parte*, Warren *v.* Rudall. *See* Warren *v.* Rudall, *Ex parte* Godfrey.
——— *v.* Littel (1831), 2 Russ. & M. 630 39
Godwin *v.* Francis (1870), L. R. 5 C. P. 295 ; 39 L. J. (C. P.) 121 ; 22 L. T. 338 . 559
——— *v.* Winsmore (1742), 2 Atk. 525 96
Goff *v.* Mills (1844), 2 Dow. & L. 23 ; 13 L. J. (Q. B.) 227 ; 8 Jur. 758 . 579, 583, 589, 590
Goldschmidt *v.* Marryat (1809), 1 Camp. 559 48
Goldsmid *v.* Goldsmid (1818), 1 Swan. 211 141, 142
Goldstein *v.* Foss (1827), 6 B. & C. 154 ; 2 C. & P. 252 ; 1 Moo. & P. 402 ; 2 Y. & J. 146 ; 9 Dow. & Ry. (K. B.) 197 ; 4 Bing. 489 431
Goodall, *Re*, Goodall *v.* Goodall, [1895] W. N. 136 308
Goodenough *v.* Alway (1826), 2 Sim. & St. 481 546
Goodered *v.* Armour (1842), 3 Q. B. 956 ; 12 L. J. (Q. B.) 56 ; 3 Gal. & Dav. 206 520

PAGE
Goodfellow *v.* Gray, [1899] 2 Q. B. 498; 68 L. J. (Q. B.) 1032; 81 L. T. 314, C. A. 163
Goodier *v.* Lake (1737), 1 Atk. 446 518
Goodrich, *Re*, Payne *v.* Bennett, [1904] P. 138; 73 L. J. (P.) 33; 90 L. T. 170; 20 T. L. R. 203 471, 533, 560
Goodrick *v.* Brown (1664), Freem. (CH.) 180; 1 Cas. in Ch. 49; 1 Eq. Cas. Abr. 255; 2 Vern. 56 94
Goodright d. Walters *v.* Davids (1778), 2 Cowp. 803 389
——— Stevens *v.* Moss (1777), 2 Cowp. 591 565
Goodtitle d. Parker *v.* Baldwin (1809), 11 East, 488 506
——— Baker *v.* Milburn (1837), 2 M. & W. 853; Murp. & H. 207; 6 L. J. (EX.) 209 557
——— Faulkner *v.* Morse (1789), 3 Term Rep. 366 345, 375
——— *v.* Otway (1797), 7 Term Rep. 399 5
Goodwin *v.* Fielding (1853), 4 De G. M. & G. 90 100
——— *v.* Robarts (1876), L. R. 1 H. L. 476; 45 L. J. (EX.) 748; 35 L. T. 179; 24 W. R. 987 393, 394, 398
Gordon, *Re*, Roberts *v.* Gordon (1877), 6 Ch. D. 531; 46 L. J. (CH.) 794 . . . 115
——— *v.* Cann (1899), 68 L. J. (Q. B.) 434; 80 L. T. 20; 63 J. P. 324; 47 W. R. 269; 15 T. L. R. 165 492
——— *v.* Gordon (1821), 3 Swan. 400 24, 95
——— *v.* ———, [1903] P. 141; 72 L. J. (P.) 33; 89 L. T. 73 504
——— *v.* Metropolitan Police (Chief Commissioner) (1910), 26 T. L. R. 645, C. A. 73, 487, 510
——— *v.* Secretan (1807), 8 East, 548 606
——— *v.* Street, [1899] 2 Q. B. 641; 69 L. J. (Q. B.) 45; 81 L. T. 237; 48 W. R. 158; 15 T. L. R. 445, C. A. 382
Gore *v.* Wright (1838), 7 Ad. & El. 118; 3 Nev. & P. (K. B.) 243; 1 Will. Woll. & H. 266; 7 L. J. (Q. B.) 147; 2 Jur. 840. 375
Gorham *v.* Brice (1902), 18 T. L. R. 424 604
Gornall *v.* Mason (1887), 12 P. D. 142; 56 L. J. (P.) 86; 57 L. T. 601; 51 J. P. 663; 35 W. R. 672 544, 623
Gorringe *v.* Irwell India Rubber and Gutta Percha Works (1886), 34 Ch. D. 128; 56 L. J. (CH.) 85; 55 L. T. 572; 35 W. R. 86, C. A. 103
Gorton *v.* Dyson (1819), 1 Brod. & Bing. 219 553
Gosden *v.* Dotterill (1832), 1 My. & K. 56; 2 L. J. (CH.) 15 240
Gosling *v.* Birnie (1831), 7 Bing. 339; 5 Moo. & P. 160; 9 L. J. (O. S.) (C. P.) 105 324, 408
Gosman, *Re* (1881), 17 Ch. D. 771; 50 L. J. (CH.) 624; 45 L. T. 267; 29 W. R. 793, C. A. 228
Gosselin, *Re*, Gosselin *v.* Gosselin, [1906] 1 Ch. 120; 75 L. J. (CH.) 88; 54 W. R. 193 107
Gotlieb *v.* Danvers (1796), 1 Esp. 455 521, 522
Goucher *v.* Clayton (1865), 34 L. J. (CH.) 239; 11 Jur. (N. S.) 107; 13 W. R. 336 357, 413
Gould *v.* Bacup Local Board (1881), 50 L. J. (M. C.) 44; 44 L. T. 103; 45 J. P. 325; 29 W. R. 471 380
——— *v.* Lakes (1880), 6 P. D. 1; 49 L. J. (P.) 59; 43 L. T. 382; 44 J. P. 698; 29 W. R. 155 472
Gouldsworth *v.* Knights (1843), 11 M. & W. 337; 12 L. J. (EX.) 282 405
Gouldwell, *Re*, *Ex parte* Squire (1868), 4 Ch. App. 47; 38 L. J. (BCY.) 13; 19 L. T. 272; 17 W. R. 40 517
Gover *v.* Davis (1860), 29 Beav. 222 106
Gower (Lord R.), *Ex parte*, R. *v.* Barnard. *See* R. *v.* Barnard, *Ex parte* Gower (Lord R.).
——— *v.* Gower (1783), 1 Cox, Eq. Cas. 53 148
Gowland *v.* De Faria (1811), 17 Ves. 20 20, 21, 170
Goy & Co., Ltd., *Re*, Farmer *v.* Goy & Co., Ltd., [1900] 2 Ch. 149; 69 L. J. (CH.) 481; 83 L. T. 309; 48 W. R. 425; 16 T. L. R. 310 104, 164
Grace *v.* Baynton (1877), 21 Sol. Jo. 631 557, 558
Graham *v.* Drummond, [1896] 1 Ch. 968; 65 L. J. (CH.) 472; 74 L. T. 417; 44 W. R. 596 160
——— *v.* Glover (1855), 25 L. J. (Q. B.) 10; 5 E. & B. 591; 2 Jur. (N. S.) 160; 4 W. R. 25 580
——— *v.* Graham (1749), 1 Ves. Sen. 262 137
——— *v.* Londonderry (1746), 3 Atk. 393 9
——— *v.* Massey, *Re* Hawthorne. *See* Hawthorne, *Re*, Graham *v.* Massey.
——— *v.* Wickham (1863), 1 De G. J. & Sm. 474; 2 New Rep. 410; 8 L. T. 679; 9 Jur. (N. S.) 702; 11 W. R. 1009, C. A. 234

PAGE

Grange, *Re*, Chadwick *v.* Grange, [1907] 2 Ch. 20; 76 L. J. (CH.) 456; 96 L. T. 867, C. A. 112
Grant *v.* Gould (1792), 2 Hy. Bl. 100 363
——— *v.* Grant (1827), 3 Russ. 598; (1830), 3 Sim. 340 49
——— *v.* ——— (1865), 34 Beav. 623 604
——— *v.* Jackson (Bart.) (1794), Peake, 203 543
——— *v.* Littledale, *Re* Thursby's Settlement. *See* Thursby's Settlement, *Re*, Grant *v.* Littledale.
——— *v.* Maddox (1846), 15 M. & W. 737; 16 L. J. (EX.) 227 568
——— *v.* Norway (1851), 10 C. B. 665; 20 L. J. (C. P.) 93; 15 Jur. 296 . . 385
Grave *v.* Salisbury (Earl) (1785), 1 Bro. C. C. 425 132
Gravenor *v.* Woodhouse (1822), 1 Bing. 38; 7 Moore (C. P.), 289 405
Graves (Lord) *v.* Fisher (1834), 3 Cl. & Fin. 1; 8 Bli. (N. S.) 937 530
——— *v.* Key (1832), 3 B. & Ad. 313 371, 383, 562
———, Minors, *Re*, Graves *v.* Graves (1864), 15 I. Ch. R. 357 111
Gray *Re*, Gray *v.* Gray, [1896] 1 Ch. 620; 65 L. J. (CH.) 462; 74 L. T. 275; 60 J. P. 314; 44 W. R. 406 198, 219
——— *v.* Bateman (1872), 21 W. R. 137 156
——— *v.* Haig (1852), 21 L. J. (CH.) 542 546
——— *v.* Lewis (1873), 8 Ch. App. 1035; 29 L. T. 199; 21 W. R. 928 . . 343, 347
——— *v.* Mathias (1800), 5 Ves. 286 53, 73
——— *v.* Owen, [1910] 1 K. B. 622; 102 L. T. 187; 26 T. L. R. 297 . . . 376
Graydon, *Re*, *Ex parte* Official Receiver, [1896] 1 Q. B. 417; 65 L. J. (Q. B.) 328; 44 W. R. 495 331, 332
Grayson *v.* Atkinson (1752), 2 Ves. Sen. 454 605
Great Northern Salt and Chemical Works, *Re*, *Ex parte* Kennedy (1890), 44 Ch. D. 472; 59 L. J. (CH.) 288; 62 L. T. 231; 2 Meg. 46 555
Great North-West Central Rail. Co. *v.* Charlebois, [1899] A. C. 114; 68 L. J. (P. C.) 25; 79 L. T. 35 327
Great Western Rail. Co. *v.* Oxford, Worcester, and Wolverhampton Rail. Co. (1853), 3 De G. M. & G. 341. C. A. 169
——— *v.* Smith (1876), 2 Ch. D. 235; 45 L. J. (CH.) 235; 34 L. T. 267; 24 W. R. 443, C. A. 389
——— ——— *v.* Willis (1865), 18 C. B. (N. S.) 748; 34 L. J. (C. P.) 195; 12 L. T. 349 424, 461
Greaves, *Re*, *Ex parte* Whitton (1880), 43 L. T. 480 333, 359
——— *Re*, Bray *v.* Tofield (1881), 18 Ch. D. 551; 50 L. J. (CH.) 817; 45 L. T. 464; 30 W. R. 55 31, 175
——— *v.* Greenwood (1877), 2 Ex. D. 289; 46 L. J. (EX.) 252; 36 L. T. 1; 25 W. R. 639, C. A. 446
——— *v.* Hunter (1826), 2 C. & P. 477 607
Greaves' Settlement Trusts, *Re* (1883), 23 Ch. D. 313; 52 L. J. (CH.) 753; 48 L. T. 414; 31 W. R. 807 107
Green *v.* Bailey (1847), 15 Sim. 542; 11 Jur. 258 519
——— *v.* Croft (1792), 2 Hy. Bl. 30 232
——— *v.* Farmer (1768), 4 Burr. 2214; 1 Wm. Bl. 651. 162
——— *v.* Gatewick (1672), Buller, Nisi Prius, 7th ed., p. 239 547
——— *v.* Green (1816), 2 Mer. 86 123
——— *v.* Hewett (1793), Peake, 243 530
——— *v.* James (1840), 6 M. & W. 656; 10 L. J. (EX.) 73 403
——— *v.* Knight, [1895] 2 Ch. 148; 64 L. J. (CH.) 546; 72 L. T. 574; 43 W. R. 465; 12 R. 252, C. A. 155
——— *v.* New River Co. (1792), 4 Term Rep. 590 343, 542
——— *v.* Pigot (1781), 1 Bro. C. C. 103; 2 Dick. 585 52
——— *v.* Sevin (1879), 13 Ch. D. 589; 41 L. T. 724 154, 164
——— *v.* Stephens (1810), 12 Ves. 419; 17 Ves. 64 107
——— *v.* Waller (1703), 2 Ld. Raym. 891 496
Green's Settlement, *Re* (1865), L. R. 1 Eq. 288; 35 L. J. (CH.) 252; 12 Jur. (N. S.) 70; 13 L. T. 541 501
Greenaway *v.* Adams (1806), 12 Ves. 395 12
Greenhill *v.* Greenhill (1711), 2 Vern. 679; Prec. Ch. 320; 1 Eq. Cas. Abr. 174; Gilb. (CH.) 77 106
——— *v.* North British and Mercantile Insurance Co., [1893] 3 Ch. 474; 62 L. J. (CH.) 918; 69 L. T. 526; 42 W. R. 91 127
Greenlaw *v.* King (1841), 5 Jur. 18; 10 L. J. (CH.) 129; 3 Beav. 49 67
Greenough *v.* Eccles (1859), 5 C. B. (N. S.) 786; 28 L. J. (C. P.) 160; 5 Jur. (N. S.) 776 600
Greenshield *v.* Pritchard (1841), 8 M. & W. 148; 5 Jur. 439 587

PAGE
Greenslade *v.* Dare (1855), 20 Beav. 284; 5 Jur. 439 449, 608
Greenway, *Ex parte* (1802), 6 Ves. 812 5, 26
——— *v.* Greenway (1860), 2 De G. F. & J. 128; 29 L. J. (CH.) 601 . . 106
Greenwood *v.* Greenwood (1863), 2 De G. J. & Sm. 28, C. A. 24
——— *v.* Penny (1850), 12 Beav. 403 123
——— *v.* Percy (1859), 26 Beav. 572 41
Greenwood's Estates and Effects, *Re* (1869), L. R. 4 Exch. 327; 39 L. J. (EX.) 30; 21 L. T. 25; 17 W. R. 861 246, 304
Greer, *Re*, Greer *v.* Greer, [1907] 1 I. R. 57 88
Greerside *v.* Benson (1745), 3 Atk. 248 31
Gregg, *Re*, *Re* Prance (1869), L. R. 9 Eq. 137; 39 L. J. (CH.) 107; 23 L. T. 234; 18 W. R. 589 628
——— *v.* Holland, *Re* Holland. *See* Holland, *Re*, Gregg *v.* Holland.
——— *v.* Wells (1839), 10 Ad. & El. 90; 2 Per. & Dav. 296 396
Gregory *v.* Doidge (1826), 11 Moore (C. P.), 394; 3 Bing. 474; 4 L. J. (O. S.) (C. P.) 159 405
——— *v.* Fraser (1813), 3 Camp. 454 517
——— *v.* Gregory (1815), Coop. G. 201 170, 173
——— *v.* Lockyer (1821), Madd. & G. 90 210
——— *v.* Maychurch (1850), 19 L. J. (CH.) 289 594
——— *v.* Molesworth (1747), 3 Atk. 626 356
——— *v.* Tavernor (1833), 6 C. & P. 280 597
——— *v.* Wilson (1852), 9 Hare, 683 153
Gregory's Settlement, *Re* (1865), 34 Beav. 600 480
Gregson and Armstrong, *Re* (1894), 70 L. T. 106; 10 R. 408 509
Grepe (J. S.) *v.* Loam, Bulteel *v.* Grepe (J. S.) (1887), 37 Ch. D. 168; 57 L. J. (CH.) 435; 58 L. T. 100, C. A. 59
Gresley *v.* Mousley (1858), 1 Giff. 450 173
——— *v.* ——— (1859), 4 De G. & J. 78; 28 L. J. (CH.) 620; 5 Jur. (N. S.) 583; 7 W. R. 427 90
Gretton *v.* Diggles (1813), 4 Taunt. 766 97
——— *v.* Haward (1819), 1 Swan. 409 117, 123, 127, 128
Greville *v.* Greville (No. 2) (1859), 27 Beav. 596 257
——— *v.* Stulz (1847), 11 Q. B. 997; 17 L. J. (Q. B.) 14; 12 Jur. 49 . . 618
Grey *v.* Smith (1808), 1 Camp. 387 516
——— (Earl) *v.* A.-G., [1900] A. C. 124; 69 L. J. (Q. B.) 308; 82 L. T. 62; 48 W. R. 383; 16 T. L. R. 202 189, 191
Grey's Trusts, *Re*, Grey *v.* Stamford, [1892] 3 Ch. 88; 61 L. J. (CH.) 622; 41 W. R. 60 283
Greys Brewery Co., *Re* (1883), 25 Ch. D. 400; 53 L. J. (CH.) 262; 50 L. T. 14; 32 W. R. 381 598
Gribble *v.* Webber, *Re* Webber. *See* Webber, *Re*, Gribble *v.* Webber.
Gribbon *v.* Gribbon (1908), 24 T. L. R. 160 613
Grice *v.* Shaw (1852), 10 Hare, 76 147, 148
Griesbach *v.* Freemantle (1853), 17 Beav. 314 115
Grieveson *v.* Kirsopp (1838), 2 Keen, 653; 6 L. J. (CH.) 261 106
Griffin, *Re*, Griffin *v.* Griffin, [1899] 1 Ch. 408; 68 L. J. (CH.) 220; 79 L. T. 442; 15 T. L. R. 78 98
——— *v* De Veiulle (1781). *See* Huguenin *v.* Baseley.
——— *v.* Griffin (1804), 1 Sch. & Lef. 352 155
Griffin's Divorce Bill, [1896] A. C. 133 475
——— *v.* Ricketts, Griffith *v.* Lunell (1849), 7 Hare, 299; 19 L. J. (CH.) 100; 14 Jur. 166 106, 107, 110, 581, 597
——— *v.* Spratley (1787), 1 Cox, Eq. Cas. 383 16
Griffith-Boscawen *v.* Scott (1884), 26 Ch. D. 358; 53 L. J. (CH.) 571; 50 L. T. 386; 32 W. R. 580 118
Griffiths, *Re* (1845), 14 M. & W. 510; 15 L. J. (EX.) 130 239
——— *v.* Fleming, [1909] 1 K. B. 805; 78 L. J. (K. B.) 567; 100 L. T. 765; 25 T. L. R. 377; 53 Sol. Jo. 340, C. A. 487
——— *v.* Payne (1839), 11 Ad. & El. 131; 3 Per. & Dav. 107; 9 L. J. (Q. B.) 34 451
Grill *v.* General Iron Screw Collier Co. (1866), L. R. 1 C. P. 600; 35 L. J. (C. P.) 321; 12 Jur. (N. S.) 727; 14 L. T. 711; 14 W. R. 893 618
Grimes *v.* French (1740), 2 Atk. 141 49
Grimman *v.* Legge (1828), 8 B. & C. 324; 2 Man. & Ry. (K. B.) 438; 6 L. J. (O. S.) (K. B.) 321 375
Grimthorpe (Baron), *In the Goods of*, Beal *v.* Grimthorpe (Baron) (1905), *Times*, June 6th and August 1st and 8th 215

PAGE
Grimthorpe (Lord), *Re*, Beckett *v.* Grimthorpe (Lord), [1908] 1 Ch. 666; 77 L. J. (CH.) 321; 98 L. T. 634; 24 T. L. R. 356 220
Grissell *v.* Swinhoe (1869), L. R. 7 Eq. 291; 17 W. R. 438 124
Grissell's Case (1866), 1 Ch. App. 528; 35 L. J. (CH.) 752; 14 L. T. 843; 14 W. R. 1015 164
Groos *v.* Anthony Birrell Pearce & Co., *Re*, Anthony Birrell Pearce & Co. *See* Anthony Birrell Pearce & Co., *Re*, Groos *v.* Anthony Birrell Pearce & Co.
Grosvenor *v.* Durston (1858), 25 Beav. 97 122
Grosvenor and West End Terminus Hotel Co., Ltd, *Re* (1897), 13 T. L. R. 309, C. A. 546
Grove, *Re*, Vaucher *v.* Treasury Solicitor (1888), 40 Ch. D. 216; 58 L. J. (CH.) 57; 59 L. T. 587; 37 W. R. 1, C. A. 438, 450
——— *v.* Buluwayo Co. (1898), *Times*, March 30th, C. A. 437, 481
——— *v.* Ware (1817), 2 Stark, 174 521
Grover and Baker Sewing Machine Co. *v.* Millard (1862), 8 Jur. (N. S.) 713 . 413
Grundy *v.* Townsend (1888), 36 W. R. 531, C. A. 333, 356
Guardhouse *v.* Blackburn (1866), L. R. 1 P. & D. 109; 35 L. J. (P. & M.) 116; 12 Jur. (N. S.) 278; 14 L. T. 69; 14 W. R. 463 566
Guardian Assurance Co. *v.* Avonmore (Viscount) (1872), 6 I. R. Eq. 391 . . 366
Gude *v.* Mumford, (1837), 2 Y. & C. (EX.) 445 240
Gueret *v.* Audouy (1893), 62 L. J. (Q. B.) 633, C. A. 362, 364, 545
Guest *v.* Neames, [1884] W. N. 227 114
——— *v.* Warren (1854), 9 Exch. 379; 2 C. L. R. 979; 23 L. J. (EX.) 121; 18 Jur. 133; 2 W. R. 159 338
Guidici *v.* Kinton (1843), 6 Beav. 517 337
Guidot *v.* Guidot (1745), 3 Atk. 254 104, 107
Gully *v.* Exeter (Bishop) (1827), 4 Bing. 290; 12 Moore (C. P.), 591; 5 L. J. (O. S.) (C. P.) 178 519
Gunn, *In the Goods of* (1884), 9 P. D. 242; 53 L. J. (P.) 107; 49 J. P. 72; 33 W. R. 169 106, 305, 306
Gunnis *v.* Erhart (1789), 1 Hy. Bl. 289 566
Gunter *v.* Gunter (1857), 23 Beav. 571; 3 Jur. (N. S.) 1013; 5 W. R. 485 . . 148
——— *v.* M'Tear (1836), 1 M. & W. 201; 1 Gale, 440; 4 Dowl. 722; 1 Tyr. & Gr. 245; 5 L. J. (EX.) 115 612
Gurney *v.* Evans (1858), 3 H. & N. 122; 27 L. J. (EX.) 166 391, 395
——— *v.* Rawlins (1836), 2 M. & W. 87; 6 L. J. (EX.) 7 390
Guy *v.* Waterlow Brothers and Layton (1909), 25 T. L. R. 515 409
Gwillim *v.* Stone (1807), 14 Ves. 128 67
Gwynne *v.* Heaton (1778), 1 Bro. C. C. 1 20, 21
Gyles *v.* Hill (1809), 1 Camp. 471, n. 524, 549

H.

HABERSHON *v.* Blurton (1847), 1 De G. & Sm. 121 39
Hack *v.* Leonard (1724), 9 Mod. Rep. 90 153
Hacket, *Re*, Hacket *v.* Gardiner, [1907] 1 Ch. 385; 76 L. J. (CH.) 249; 96 L. T. 420 221
Hacking *v.* Lee (1860), 9 W. R. 70 346
Haddon *v.* Morton, [1894] 1 Q. B. 565; 63 L. J. (Q. B.) 431; 70 L. T. 470; 9 R. 275, C. A. 358, 365
Hadley, *Re*, Johnson *v.* Hadley, [1909] 1 Ch. 20; 78 L. J. (CH.) 254; 100 L. T. 54; 25 T. L. R. 44; 53 Sol. Jo. 46, C. A. 34, 219, 220
——— *v.* Green (1832), 2 Cr. & J. 374; 2 Tyr. 390; 1 L. J. (EX.) 137 . 332, 356
——— *v.* London Bank of Scotland (1865), 3 De G. J. & Sm. 63; 11 Jur. (N. S.) 554; 12 L. T. 747; 13 W. R. 978, C. A. 99
Haes, *Ex parte*, *Re* X. Y. *See* X. Y., *Re*, *Ex parte* Haes.
Hagedorn *v.* Reid (1813), 3 Camp. 377; 1 M. & S. 567. 465
Haggenmacher's Patents, *Re*, [1898] 2 Ch. 280; 67 L. J. (CH.) 675; 15 R. P. C. 431 601
Hagger *v.* Baker (1845), 14 M. & W. 9; 2 Dow. & L. 856; 14 L. J. (EX.) 227 . 433
Haggitt *v.* Iniff (1854), 5 De G. M. & G. 910; 3 Eq. Rep. 144; 24 L. J. (CH.) 120; 1 Jur. (N. S.) 49; 3 W. R. 141, C. A. 628
Haig *v.* Homan (1830), 4 Bli. (N. S.) 380 97
—— *v.* Newton (1817), 6 South Carolina Reports, 423 596
Haigh, *Ex parte* (1805), 11 Ves. 403 92
——— *v.* Belcher (1836), 7 C. & P. 389 598

PAGE
Haigh *v.* Kaye (1872), 7 Ch. App. 469 ; 41 L. J. (CH.) 567 ; 26 L. T. 675 ; 20 W. R. 597 75
——— *v.* West, [1893] 2 Q. B. 19 ; 62 L. J. (Q. B.) 532 ; 69 L. T. 165 ; 57 J. P. 358 ; 4 R. 396, C. A. 442
Haigh's Estate, Haigh *v.* Haigh, *Re* (1862), 31 L. J. (CH.) 420 ; 8 Jur. (N. S.) 983 593
Haines *v.* East India Co. (1856), 11 Moo. P. C. C. 39 ; 5 W. R. 159 390
——— *v.* Guthrie (1884), 13 Q. B. D. 818 ; 53 L. J. (Q. B.) 521 ; 51 L. T. 645 ; 48 J. P. 756 ; 33 W. R. 99, C. A. 470
Hale *v.* Bates (1858), E. B. & E. 575 ; 28 L. J. (Q. B.) 14 ; 4 Jur. (N. S.) 1106....579, 584
—— *v.* Webb (1786), 2 Bro. C. C. 78 28
Hales, *Ex parte*, *Re* A Solicitor. *See* Solicitor, A, *Re*, *Ex parte* Hales.
——— *v.* Cox (1863), 32 Beav. 118 ; 8 L. T. 134 ; 11 W. R. 331 ; 1 New Rep. 344. 143
——— *v.* Darell (1840), 3 Beav. 324 ; 10 L. J. (CH.) 10 138
——— *v.* Freeman (1819), 1 Brod. & Bing. 391 ; 4 Moore (C. P.), 21 . . 252, 254
——— *v.* Kerr, [1908] 2 K. B. 601 ; 77 L. J. (K. B.) 870 ; 99 L. T. 364 ; 24 T. L. R. 779 451
Halhead *v.* Young (1856), 25 L. J. (Q. B.) 290 ; 6 E. & B. 312 ; 25 L. J. (Q. B.) 290 ; 2 Jur. (N. S.) 970 ; 4 W. R. 530 566, 567
Halifax Commercial Banking Co. and Wood, *Re* (1898), 79 L. T. 183 ; affirmed, 79 L. T. 536 ; 47 W. R. 194, C. A. 423
Halifax Union *v.* Wheelwright (1875), L. R. 10 Exch. 183 ; 44 L. J. (EX.) 121 ; 32 L. T. 802 ; 23 W. R. 704 400
Hall, *Ex parte*, *Re* Cooper. *See* Cooper, *Re*, *Ex parte* Hall.
—— (A. W.) & Co., *Re* (1887), 37 Ch. D. 712 ; 57 L. J. (CH.) 288 ; 58 L. T. 156 410, 411
—— *v.* Bainbridge (1848), 12 Q. B. 699 ; 12 Jur. 795 ; 17 L. J. (Q. B.) 317 . 505
—— *v.* Ball (1841), 3 Man. & G. 242 ; 3 Scott (N. R.), 577 ; 10 L. J. (C. P.) 285...513
—— *v.* Brand (1883), 12 Q. B. D. 39 ; 53 L. J. (Q. B.) 19 ; 49 L. T. 492 ; 32 W. R. 133, C. A. 579
—— *v.* Butler (1839), 10 Ad. & El. 204 ; 2 Per. & Dav. 374 ; 8 L. J. (Q. B.) 239. 405
—— *v.* Dawson (1862), 7 L. T. 519 518
—— *v.* Hall (1873), 8 Ch. App. 430 ; 21 W. R. 373 17
—— *v.* Hill (1841), 1 Dr. & War. 94 135, 136, 137, 139
—— *v.* Levy (1875), L. R. 10 C. P. 154 ; 44 L. J. (C. P.) 89 ; 31 L. T. 727 ; 23 W. R. 393 333, 350, 355, 358
—— *v.* Noyes (*circa* 1796), cited 3 Ves. 748 157, 173
—— *v.* Potter (1695), Show. Parl. Cas. 76 ; 1 Eq. Cas. Abr. 89 ; 3 Lev. 411 ; 2 Vern. 445 ; Prec. Ch. 165 20
—— *v.* Turner (1880), 14 Ch. D. 829 ; 42 L. T. 495 ; 28 W. R. 859 ; 47 J. P. 734 . 566
—— *v.* West End Advance Co. (1883), Cab. & El. 165 398, 399, 401
Hall's Estate, *Re* (1852), 22 L. J. (CH.) 177, C. A. 536
Hallas *v.* Robinson (1885), 15 Q. B. D. 288 ; 54 L. J. (Q. B.) 364 ; 33 W. R. 246, C. A. 64
Hallett *v.* Hastings, *Re* Hastings (Lady). *See* Hastings (Lady), *Re*, Hallett *v.* Hastings.
——— *v.* Mears (1811), 13 East, 15 584
Hallett's Estate, *Re*, Knatchbull *v.* Hallett (1880), 13 Ch. D. 696 ; 49 L. J. (CH.) 415 ; 42 L. T. 421 ; 28 W. R. 732, C. A. 9, 159, 160
Halliday *v.* Holgate (1867), 17 L. T. 18. 596
Hallmark's Case (1878), 9 Ch. D. 329 ; 47 L. J. (CH.) 868 ; 38 L. T. 660 ; 26 W. R. 824, C. A. 449
Hallows *v.* Fernie (1867), 3 Ch. App. 467 ; 11 L. T. 340 ; 16 W. R. 173 . . 617
Halsey *v.* Grant (1806), 13 Ves. 73 12
Hambrook *v.* Smith (1852), 17 Sim. 209 ; 20 L. J. (CH.) 320 ; 16 Jur. 144 . . 574
Hamill *v.* Murphy (1883), 12 L. R. Ir. 403 374
Hamilton *v.* Barr (1886), 18 L. R. Ir. 297, C. A. 556
——— *v.* Hamilton, [1892] 1 Ch. 396 ; 61 L. J. (CH.) 220 ; 66 L. T. 112 ; 40 W. R. 312 127
——— (Duke) *v.* Mohun (Lord) (1710), 1 P. Wms. 118 ; 2 Bro. C. C. 239 ; 1 Salk. 158 ; 2 Vern. 652 ; Gilb. (CH.) 297 ; 1 Eq. Cas. Abr. 90 ; 10 Mod. Rep. 447 19
——— *v.* Royse (1804), 2 Sch. & Lef. 315 78
——— *v.* Wright (1842), 9 Cl. & Fin. 111 157
Hamilton's Estate, *Re* (1905), 39 I. L. T. 272 290
Hamlyn & Co. *v.* Talisker Distillery, [1894] A. C. 202 ; 71 L. T. 1 ; 58 J. P. 540 ; 6 R. 188 420

PAGE
Hammond *v.* Bradstreet (1854), 10 Exch. 390; 2 C. L. R. 1195; 23 L. J. (EX.) 332; 2 W. R. 625 469, 532, 564
——— *v.* Schofield, [1891] 1 Q. B. 453; 60 L. J. (Q. B.) 539 . . . 335
——— *v.* Smith (1864), 33 Beav. 452; 9 L. T. 746; 10 Jur. (N. S.) 117; 12 W. R. 328 137
——— *v.* Stewart (1722), 1 Stra. 510 578
——— *v.* Thompson (1895), 11 T. L. R. 572 613
Hampden *v.* Wallis (1884), 27 Ch. D. 251; 54 L. J. (CH.) 1175; 51 L. T. 357; 32 W. R. 977 458
Hampshire Co-operative Milk Co., *Re*, Purcell's Case (1880), 29 W. R. 170...337, 359
Hampshire Land Co., *Re*, [1896] 2 Ch. 743; 65 L. J. (CH.) 860; 75 L. T. 181; 45 W. R. 136; 3 Mans. 269 85, 86
Hanbury, *Re*, Hanbury *v.* Fisher, [1904] 1 Ch. 415; 73 L. J. (CH.) 222; 90 L. T. 66; 52 W. R. 662; 20 T. L. R. 209, C. A.; reversed *sub nom.* Comiskey *v.* Bowring-Hanbury, [1905] A. C. 84; 74 L. J. (CH.) 263; 92 L. T. 241; 53 W. R. 402; 21 T. L. R. 252 . . . 155
——— *v.* Hanbury (1788), 2 Bro. C. C. 352 133
Hanby *v.* Roberts (1751), Amb. 127; Dick. 104; 2 Coll. 512 145
Hance *v.* Truwhitt (1862), 2 John. & H. 216; 31 L. J. (CH.) 289; 6 L. T. 19; 8 Jur. (N. S.) 430; 10 W. R. 191 120
Hancock, *Re*, Hancock *v.* Berrey (1888), 57 L. J. (CH.) 793; 59 L. T. 197; 36 W. R. 710 165
——— *v.* Pawson, [1905] 1 Ch. 16; 74 L. J. (CH.) 69; 91 L. T. 737; 53 W. R. 89 123, 124
——— *v.* Podmore (1830), 1 B. & Ad. 260; 8 L. J. (O. S.) (K. B.) 403 . . 210
——— *v.* Smith (1889), 41 Ch. D. 456; 58 L. J. (CH.) 725; 61 L. T. 341, C. A. 160
——— *v.* Welsh and Cooper (1816), 1 Stark. 347 331, 345
Handcock's Trusts, *Re* (1889), 23 L. R. Ir. 34, C. A. 119
Handford *v.* Storie (1825), 2 Sim. & St. 196; 3 L. J. (O. S.) (CH.) 110 . 31, 32
Handley *v.* Ward (1818) 598
Handman and Wilcox's Contract, *Re*, [1902] 1 Ch. 599; 71 L. J. (CH.) 263; 86 L. T. 246, C. A. 82
Hanington *v.* Du Chastel (1781), cited 2 Swan. 159, n. 13
Hankey, *Re*, Cunliffe Smith *v.* Hankey, [1899] 1 Ch. 541; 68 L. J. (CH.) 242; 80 L. T. 47; 47 W. R. 444; 15 T. L. R. 162 36
Hankin *v.* Turner, *Re* Ivory. *See* Ivory, *Re*, Hankin *v.* Turner.
Hannaford *v.* Hunn (1825), 2 C. & P. 148 363
Hansard *v.* Robinson (1827), 7 B. & C. 90; 5 L. J. (O. S.) (K. B.) 242; 9 Dow. & Ry. (K. B.) 860; Ry. & M. 404, n. 26
Hanson, *Ex parte* (1811), 18 Ves. 232 163
——— *v.* Keating (1844), 4 Hare, 1; 14 L. J. (CH.) 13 70, 71, 72
——— *v.* Shackleton (1835), 4 Dowl. 48; 1 Har. & W. 542 492
——— *v.* Stubbs, *Re* Stubbs' Estate. *See* Stubbs' Estate, *Re*, Hanson *v.* Stubbs.
Harbert's Case (1584), 3 Co. Rep. 11 b.; Moore (K. B.), 169 30
Harcourt *v.* Seymour (1851), 2 Sim. (N. S.) 12; 20 L. J. (CH.) 606; 15 Jur. 740 113, 115, 116
——— *v.* White (1860), 28 Beav. 303; 30 L. J. (CH.) 681 . . . 172, 173
——— and Knowel's Case. *See* Hitchcock *v.* Sedgwick.
Harding *v.* Ambler (1838), 3 M. & W. 279; 1 Horn & H. 48; 7 L. J. (EX.) 132; 2 Jur. 305 366, 370, 372
——— *v.* Crethorn (1793), 1 Esp. 57 448
——— *v.* Harding (1861), 2 Giff. 597; 7 Jur. (N. S.) 906 272
——— *v.* ——— (1886), 17 Q. B. D. 442; 55 L. J. (Q. B.) 462; 34 W. R. 775 32, 98
——— *v.* Hardrett (1673), Cas. *temp.* Finch, 9 76
——— *v.* Metropolitan Rail. Co. (1872), 7 Ch. App. 154; 41 L. J. (CH.) 371; 26 L. T. 109; 20 W. R. 321 110
Hardinge *v.* Cobden, *Re* Lucan (Earl), *See* Lucan (Earl), *Re*, Hardinge *v.* Cobden.
Hardingham *v.* Nicholls (1745), 3 Atk. 304 76
——— *v.* Thomas (1854), 2 Drew. 353; 23 L. J. (CH.) 910; 2 W. R. 547 128, 139
Hardman *v.* Willcock (1832), 9 Bing. 382, n. 406
Hardoon *v.* Belilios, [1901] A. C. 118; 70 L. J. (P. C.) 9; 83 L. T. 573; 49 W. R. 209; 17 T. L. R. 126 89, 97, 155
Hardwick, *Re*, Roswell *v.* Hardwick (1907), 123 L. T. Jo. 322 625
——— *v.* Coleman (1859), 1 F. & F. 531 608

PAGE

"Hardwick," The (1883), 9 P. D. 32; 5 Asp. M. L. C. 199; 53 L. J. (P.) 23; 50 L. T. 128; 32 W. R. 598 436
Hardwicke (Lord) *v.* Vernon (1799), 4 Ves. 411 157
Hardy *v.* Martin (1783), 1 Bro. C. C. 419, n. 151
Hare *v.* Elms (1893), 1 Q. B. 604; 62 L. J. (Q. B.) 187; 68 L. T. 223; 57 J. P. 309; 41 W. R. 297; 5 R. 189 153
—— *v.* London and North-Western Rail. Co. (1860), John. 722 411
Hargrave *v.* Hargrave (1846), 9 Beav. 552 504
Hargreave *v.* Spink, [1892] 1 Q. B. 25; 61 L. J. (Q. B.) 318; 65 L. T. 650; 40 W. R. 254 486
Hargreaves *v.* Rothwell (1836), 1 Keen, 154; 5 L. J. (CH.) 118 85
———— (Joseph), Ltd., *Re*, [1900] 1 Ch. 347; 69 L. J. (CH.) 183; 82 L. T. 132; 48 W. R. 241; 16 T. L. R. 155; 7 Mans. 354, C. A. 573
Harle *v.* Jarman, [1895] 2 Ch. 419; 64 L. J. (CH.) 779; 73 L. T. 20; 43 W. R. 618; 13 R. 610 127
Harlock *v.* Ashberry (1883), 28 Sol. Jo. 26 625
Harnett *v.* Yielding (1805), 2 Sch. & Lef. 549 11, 72
Harper, *Ex parte*, *Re* Bremner. *See* Bremner, *Re*, *Ex parte* Harper.
——— *v.* Morley (1838), 2 Jur. 653 241
——— *v.* Ravenhill (1829), Taml. 144 305
Harpham *v.* Shacklock (1881), 19 Ch. D. 207; 45 L. T. 572; 30 W. R. 50, C. A. 83
Harriman *v.* Harriman, [1909] P. 123; 78 L. J. (P.) 62; 100 L. T. 557; 73 J. P. 193; 25 T. L. R. 291; 53 Sol. Jo. 265, C. A. 322, 331
Harrington *v.* Churchward (1860), 29 L. J. (CH.) 521; 6 Jur. (N. S.) 576; 8 W. R. 302 28
———— *v.* Fry (1824), 1 C. & P. 289 607
———— *v.* Taylor (1812), 15 East, 378 359
———— *v.* Wheeler (1789), 4 Ves. 686 174
Harris, *Re* (1852), 7 Exch. 344; 21 L. J. (EX.) 92 237
———, *Re*, *Ex parte* Harris (1875), 10 Ch. App. 264; 44 L. J. (BCY.) 33; 32 L. T. 417; 23 W. R. 531 558
———, *Re*, Leacroft *v.* Harris, [1909] 2 Ch. 206; 78 L. J. (CH.) 448; 100 L. T. 805 120, 121
——— *v.* Beauchamp Brothers, [1894] 1 Q. B. 801; 63 L. J. (Q. B.) 480; 70 L. T. 636; 42 W. R. 451, C. A. 56
——— *v.* Cotterell (1808), 3 Mer. 678 46
——— *v.* Great Western Rail. Co. (1876), 1 Q. B. D. 515; 45 L. J. (Q. B.) 729; 34 L. T. 647; 25 W. R. 63 448
——— *v.* Harris (No. 2) (1861), 29 Beav. 110 173
——— *v.* Howe (Earl) (1861), 29 Beav. 261; 30 L. J. (CH.) 612; 7 Jur. (N. S.) 383; 9 W. R. 404 239
——— *v.* Hill (1822), 3 Stark. 140 574, 581
——— *v.* Lee (1718), 1 P. Wms. 482; Prec. Ch. 502; 2 Eq. Cas. Abr. 135 . . 149
——— *v.* Mulkern (1875), 1 Ex. D. 31; 45 L. J. (Q. B.) 244; 34 L. T. 99; 24 W. R. 208 331, 355
——— *v.* Rickett (1856), 4 H. & N. 1 567
——— *v.* Tippett (1811), 2 Camp. 637 601
——— *v.* Truman (1881), 7 Q. B. D. 340; 50 L. J. (Q. B.) 633; 45 L. T. 255; 30 W. R. 135 154
——— *v.* ———— (1882), 9 Q. B. D. 264; 51 L. J. (Q. B.) 338; 46 L. T. 844; 30 W. R. 533, C. A. 344, 386
——— *v.* Willis (1855), 15 C. B. 710; 3 C. L. R. 609; 24 L. J. (C. P.) 93; 3 W. R. 238 326, 354, 364
Harris's Trustees *v.* Harris (1904), 41 Sc. L. R. 357; 6 F. (Ct. of Sess.) 470; 11 Scots Law Times, 726 223
Harrison, *Ex parte*, *Re* Bentley (Henry) & Co. and the Yorkshire Breweries, Ltd. *See* Bentley (Henry) & Co. and the Yorkshire Breweries, Ltd., *Re*, *Ex parte* Harrison.
———, *Re*, Turner *v.* Hellard (1885), 30 Ch. D. 390; 55 L. J. (CH.) 799; 53 L. T. 799; 34 W. R. 420, C. A. 518, 559
——— *v.* Armitage (1819), 4 Madd. 143 38
——— *v.* Blades (1813), 3 Camp. 457 547, 605
——— *v.* Bolwell (1839), 10 Sim. 380 255, 541
——— *v.* Fane (1840), 1 Man. & G. 550 432
——— *v.* Guest (1860), 8 H. L. Cas. 481 17, 22
——— *v.* Harrison (1873), 8 Ch. App. 342; 42 L. J. (CH.) 495; 28 L. T. 545; 21 W. R. 164 120
——— *v.* Nettleship (1833), 2 My. & K. 423; 3 L. J. (CH.) 86 48

PAGE
Harrison *v.* Round (1852), 2 De G. M. & G. 190; 22 L. J. (CH.) 322; 17 Jur. 563; 1 W. R. 26 198
——— *v.* Rutland (Duke), [1893] 1 Q. B. 142; 62 L. J. (Q. B.) 117; 68 L. T. 35; 41 W. R. 322, C. A. 64
——— *v.* Southampton Corporation (1853), 4 De G. M. & G. 137; 22 L. J. (CH.) 722; 18 Jur. 1; 1 W. R. 422, C. A. . . . 351, 362, 364, 506
——— *v.* Vallance (1822), 1 Bing. 45; 7 Moore (C. P.), 304 460
Harrold *v.* Plenty, [1901] 2 Ch. 314; 70 L. J. (CH.) 562; 85 L. T. 45; 49 W. R. 646; 17 T. L. R. 545; 8 Mans. 304 93—96
Harrop's Estate, *Re* (1857), 3 Drew. 726; 26 L. J. (CH.) 516; 3 Jur. (N. S.) 380; 5 W. R. 449 107, 114
Harston *v.* Tenison, *Re* Cross. *See* Cross, *Re*, Harston *v.* Tenison.
Hart *v.* Frontino and Bolivia South American Gold Mining Co. (1870), L. R. 5 Exch. 111; 39 L. J. (EX.) 93; 22 L. T. 30 408, 410
——— *v.* Hart (1841), 1 Hare, 1; 11 L. J. (CH.) 9; 5 Jur. 1007 . . . 516, 519
——— *v.* Macnamara (1817), 4 Price, 154, n. 328, 329
——— *v.* Newman (1811), 3 Camp. 13 458
Hartcup *v.* Bell (1883), Cab. & El. 19 325
Hartley *v.* Cook (1832), 5 C. & P. 441; 3 Moo. & S. 230; 2 L. J. (C. P.) 141; 9 Bing. 728 538
——— *v.* Hindmarsh (1866), L. R. 1 C. P. 553; 35 L. J. (M. C.) 255; 1 Har. & Ruth. 607; 12 Jur. (N. S.) 502; 14 W. R. 862 550
——— *v.* Pendarves, [1901] 2 Ch. 498; 70 L. J. (CH.) 745; 85 L. T. 64; 50 W. R. 56 112
Hartmont *v.* Daly (1896), 12 T. L. R. 170, C. A. 614
Hartopp *v.* Hartopp (1810), 17 Ves. 184 133
——— *v.* ——— (1856), 21 Beav. 259; 25 L. J. (CH.) 471; 2 Jur. (N. S.) 794 . 18
Harvey *v.* Cooke (1827), 4 Russ. 34; 6 L. J. (O. S.) (CH.) 84 24
——— *v.* Farnie (1882), 8 App. Cas. 43; 52 L. J. (P.) 33; 48 L. T. 273; 47 J. P. 308; 31 W. R. 433 328, 338
——— *v.* Mitchell (1841), 2 Mood. & R. 366 429
——— *v.* Mount (1845), 8 Beav. 439; 14 L. J. (CH.) 233; 9 Jur. 741 . . 17
——— *v.* R., [1901] A. C. 601; 70 L. J. (P. C.) 107; 84 L. T. 849; 17 T. L. R. 601 530, 552
——— *v.* Wilde (1872), L. R. 14 Eq. 438; 41 L. J. (CH.) 689; 27 L. T. 471 . 543
Harvy *v.* Broad (1704), 2 Salk. 626; 6 Mod. Rep. 148, 159; Holt (K. B.), 761 . 492
Haslam *v.* Cron, Olivant's Claim (1871), 19 W. R. 968 565
——— and Hier-Evans, *Re*, [1902] 1 Ch. 765; 71 L. J. (CH.) 374; 86 L. T. 663; 50 W. R. 444; 18 T. L. R. 461, C. A. 19
Hassell *v.* Hawkins (1859), 4 Drew. 468. 137
Hastie, *Ex parte*, *Re* Batson. *See* Batson, *Re*, *Ex parte* Hastie.
Hastings (Lady), *Re*, Hallett *v.* Hastings (1887), 35 Ch. D. 94; 56 L. J. (CH.) 631; 57 L. T. 126; 52 J. P. 100; 35 W. R. 584, C. A. 175
Hatch *v.* Hatch (1804), 9 Ves. 292; 1 Smith, K. B. 226 . . . 18, 19, 174
——— *v.* Skelton (1855), 20 Beav. 453 148
Hatfield *v.* Minet (1878), 8 Ch. D. 136; 47 L. J. (CH.) 612; 38 L. T. 629; 26 W. R. 701, C. A. 130
Hawes *v.* Bamford (1839), 9 Sim. 653 625
——— *v.* Draeger (1883), 23 Ch. D. 173; 52 L. J. (CH.) 449; 48 L. T. 518; 31 W. R. 576 504
——— *v.* Watson (1824), 2 B. & C. 540; 4 Dow. & Ry. (K. B.) 22; Ry. & M. 6 . 408
——— *v.* Wyatt (1790), 3 Bro. C. C. 156 19
Hawkes, *Re*, Ackerman *v.* Lockhart, [1898] 2 Ch. 1; 67 L. J. (CH.) 284; 78 L. T. 336; 46 W. R. 445, C. A. 582
Hawkins, *Ex parte* (1843), 13 Sim. 569 110
———, *Ex parte*, *Re* Bradbrook. *See* Bradbrook, *Re*, *Ex parte* Hawkins.
——— *v.* Day (1753), Amb. 160; Dick. 151 36
——— *v.* Warre (1825), 5 Dow. & Ry. (K. B.) 512 517
Hawksbee *v.* Hawksbee (1853), 11 Hare, 230 374
Hawthorne, *Re*, Graham *v.* Massey (1883), 23 Ch. D. 743; 52 L. J. (CH.) 750; 48 L. T. 701; 32 W. R. 147 66
Hay *v.* Fairlie (1826), 1 Russ. 117 238
——— *v.* Northcote, [1900] 2 Ch. 262; 69 L. J. (CH.) 586; 82 L. T. 656; 48 W. R. 615; 16 T. L. R. 418 339, 343
——— *v.* Palmer (1728), 2 P. Wms. 501; 2 Eq. Cas. Abr. 83 29
Hay's Case (1875), 10 Ch. App. 593; 44 L. J. (CH.) 721; 33 L. T. 466; 24 W. R. 191 68
Haycock *v.* Haycock (1682), 2 Cas. in Ch. 124; 1 Eq. Cas. Abr. 72 . . . 32

PAGE
Hayes, *Re* (1861), 9 W. R. 769 114
——— *v.* Hayes (1673), 1 Cas. in Ch. 223; Cas. *temp.* Finch, 231; 1 Eq. Cas. Abr. 78 52
——— *v.* Oatley (1872), L. R. 14 Eq. 1; 41 L. J. (CH.) 510; 26 L. T. 26 . . 252
——— *v.* Willis (1906), 75 L. J. (P.) 86 623
Haygarth's Trusts, *Re* (1883), 22 Ch. D. 545; 52 L. J. (CH.) 416; 48 L. T. 24; 31 W. R. 316 279
Hayne *v.* Maltby (1789), 3 Term Rep. 438 374, 413
Haynes, *Re*, Haynes *v.* Carter (1906), 94 L. T. 431 480, 504
——— *v.* Doman, [1899] 2 Ch. 13; 68 L. J. (CH.) 419; 80 L. T. 569; 15 T. L. R. 354, C. A. 432
——— *v.* Foster, [1901] 1 Ch. 361; 70 L. J. (CH.) 302; 84 L. T. 139; 49 W. R. 327 127
——— *v.* Haynes (1853), 3 De G. M. & G. 590; 1 W. R. 204, C. A. . . . 240
——— *v.* ——— (1861), 1 Drew. & Sm. 426; 30 L. J. (CH.) 578; 4 L. T. 199; 9 W. R. 497 110
——— *v.* Mico (1781), 1 Bro. C. C. 129 136, 138, 141, 142
Hayton *v.* Irwin (1879), 5 C. P. D. 130; 41 L. T. 666; 28 W. R. 665, C. A. . 445
Hayward, *Re*, Tweedie *v.* Hayward, [1901] 1 Ch. 221; 70 L. J. (CH.) 155; 84 L. T. 256; 49 W. R. 296 36
——— *v.* Brunswick Building Society (1881), 8 Q. B. D. 403; 51 L. J. (Q. B.) 73; 45 L. T. 699; 30 W. R. 299, C. A. 100
——— *v.* Dimsdale (1810), 17 Ves. 111 53, 73
——— *v.* Mutual Reserve Association, [1891] 2 Q. B. 236; 65 L. T. 491; 39 W. R. 624 609
——— *v.* Stephens (1866), 36 L. J. (CH.) 135; 15 L. T. 173 628
Head *v.* Egerton (1734), 3 P. Wms. 280 76
——— *v.* Godlee, Reynolds *v.* Godlee (1859), John. 536; 29 L. J. (CH.) 633; 6 Jur. (N. S.) 495; 8 W. R. 141 110
——— *v.* Head (1823), 1 Sim. & St. 150; 1 L. J. (O. S.) (CH.) 105 . . . 504
Heal *v.* Knight (1853), 8 Exch. 839, n. 265
Heald *v.* Kenworthy (1855), 10 Exch. 739; 3 C. L. R. 612; 24 L. J. (EX.) 76; 1 Jur. (N. S.) 70; 3 W. R. 176. 398
Healy *v.* Young (1846), 2 C. B. 702 612
Heard *v.* Pilley (1869), 4 Ch. App. 548; 38 L. J. (CH.) 718; 21 L. T. 68; 17 W. R. 750 75
Hearle *v.* Greenbank (1749), 3 Atk. 695 120
Hearne *v.* James (1788), 2 Bro. C. C. 309 516
——— *v.* Rogers (1829), 9 B. & C. 577; 4 Man. & Ry. (K. B.) 486; 7 L. J. (O. S.) (K. B.) 285 383, 424
——— *v.* Stowell (1840), 12 Ad. & El. 719; 4 Per. & Dav. 696; 6 Jur. 458 . 431
Heartley *v.* Nicholson (1875), L. R. 19 Eq. 233; 44 L. J. (CH.) 277; 31 L. T. 821; 23 W. R. 374 98
Heath, *Re* (1833), 2 Deac. & Ch. 214; Mont. & B. 184; 2 L. J. (BCY.) 27 . 576
——— *v.* Crealock (1873), L. R. 18 Eq. 215 368, 374
——— *v.* ——— (1874), 10 Ch. App. 22; 44 L. J. (CH.) 157; 31 L. T. 650, C. A. 78, 366, 367
——— *v.* Deane, [1905] 2 Ch. 86; 74 L. J. (CH.) 466; 92 L. T. 643; 21 T. L. R. 404 539
——— *v.* Pugh (1881), 6 Q. B. D. 345; 50 L. J. (Q. B.) 473; 44 L. T. 327; 29 W. R. 904, C. A.; affirmed, Pugh *v.* Heath (1882), 7 App. Cas. 235; 51 L. J. (Q. B.) 367; 46 L. T. 321; 30 W. R. 553 78, 91
——— *v.* Weaverham (Township) Overseers, [1894] 2 Q. B. 108; 63 L. J. (M. C.) 187; 70 L. T. 729; 58 J. P. 557; 42 W. R. 478; 10 R. 274...350, 355
——— *v.* Wickham (1880), 5 L. R. Ir. 285 170
Heathcote's Divorce Bill (1851), 1 Macq. 277 495
Heather, *Re*, Pumfrey *v.* Fryer, [1906] 2 Ch. 230; 75 L. J. (CH.) 658; 95 L. T. 352; 54 W. R. 625 133
Heatherley d. Worthing *v.* Weston (1764), 2 Wils. 232 373
Hebblethwaite *v.* Hebblethwaite (1869), L. R. 2 P. & D. 29; 39 L. J. (P. & M.) 15; 21 L. T. 732 576
Hebditch *v.* Macllwaine, [1894] 2 Q. B. 54; 63 L. J. (Q. B.) 587; 70 L. T. 826; 42 W. R. 422; 58 J. P. 620; 9 R. 452, C. A. 431
"Hebe," The (1866), L. R. 1 P. C. 378; 4 Moo. P. C. C. (N. S.) 271 . . . 542
Hecla Foundry Co. *v.* Walker, Hunter & Co. (1889), 14 App. Cas. 550; 16 Rettie (H. L.), 27; 26 Sc. L. R. 796 509

PAGE
Heilbut *v.* Nevill (1869), L. R. 4 C. P. 354 ; 38 L. J. (C. P.) 273 ; 20 L. T. 490 ; 17 W. R. 853 ; affirmed (1870), L. R. 5 C. P. 478 ; 39 L. J. (C. P.) 245 ; 22 L. T. 662 ; 18 W. R. 898, Ex. Ch. 348
Helsham *v.* Blackwood (1851), 11 C. B. 111 ; 20 L. J. (C. P.) 187 ; 15 Jur. 861 344
Heming *v.* Wilton (1832), 5 C. & P. 54 333
Hemphill *v.* McKenna (1845), 8 I. L. R. 43 543
Henchman *v.* A.-G. (1834), 3 My. & K. 485 107
Hender *v.* Rose (1718), 3 P. Wms. 124, n. 124
Henderson *v.* Arthur, [1907] 1 K. B. 10 ; 76 L. J. (K. B.) 22 ; 95 L. T. 772 ; 23 T. L. R. 60, C. A. 566
——— *v.* Henderson (1843), 3 Hare, 100 330, 356
——— *v.* Stevenson (1875), L. R. 2 Sc. & Div. 470 ; 32 L. T. 709 . . 448
——— *v.* Williams, [1895] 1 Q. B. 521 ; 64 L. J. (Q. B.) 308 ; 72 L. T. 98 ; 43 W. R. 274 ; 14 R. 375, C. A. 324, 379, 385, 386, 387, 393, 396, 399, 406, 408
Henderson's Trusts, *Re* (1868), cited, L. R. 7 Eq. 500 501
Henkel *v.* Pape (1870), L. R. 6 Exch. 7 ; 40 L. J. (EX.) 15 ; 23 L. T. 419 ; 19 W. R. 106 559
Henkle *v.* Royal Exchange Assurance Co. (1749), 1 Ves. Sen. 317 . . . 22
Henley, *In the Goods of* (1886), 11 P. D. 126 ; 55 L. J. (P.) 61 ; 56 L. T. 895 ; 50 J. P. 520 ; 35 W. R. 184 309
Hennegal *v.* Evance (1806), 12 Ves. 201 616
Hennell *v.* Strong (1856), 25 L. J. (CH.) 407 311
Hennessy *v.* Wright (1888), 21 Q. B. D. 509 ; 57 L. J. (Q. B.) 530 ; 59 L. T. 323 ; 53 J. P. 52 427, 573
Henniker *v.* A.-G. (1852), 8 Exch. 257 ; 22 L. J. (EX.) 41 ; 16 Jur. 1143 . 234, 238
Henry *v.* Cole (1702), 2 Ld. Raym. 811 ; 7 Mod. Rep. 103 492
——— *v.* Goldney (1846), 15 M. & W. 494 ; 4 Dow. & L. 6 ; 15 L. J. (EX.) 298 ; 10 Jur. 439 361
——— *v.* Henry (1872), 6 I. R. Eq. 286 122
——— *v.* Leigh (1813), 3 Camp. 499 473, 521
"Henry Coxon," The (1878), 3 P. D. 156 ; 47 L. J. (P.) 83 ; 38 L. T. 819 ; 27 W. R. 263 465, 466, 467, 542
Hensman *v.* Fryer (1867), 3 Ch. App. 420 ; 37 L. J. (CH.) 97 ; 17 L. T. 394 ; 16 W. R. 162 145
Hepworth *v.* Pickles, [1900] 1 Ch. 108 ; 69 L. J. (CH.) 55 ; 81 L. T. 818 ; 48 W. R. 184 102, 166
Herbert *v.* Hungerford (1886), 20 L. R. Ir. 100, C. A. 306
——— *v.* Tuckal (1663), T. Raym. 84 ; 1 Sid. 162 ; 1 Eq. Cas. Abr. 172 . . 560
Hercy *v.* Dinwoody (1793), 2 Ves. 87 ; 4 Bro. C. C. 257 171, 172
Herdman *v.* Wheeler, [1902] 1 K. B. 361 ; 71 L. J. (K. B.) 270 ; 86 L. T. 48 ; 50 W. R. 300 ; 18 T. L. R. 190 392
Herman *v.* Royal Exchange Shipping Co. (1884), Cab. & El. 413 389
Hermann *v.* Charlesworth, [1905] 2 K. B. 123 ; 74 L. J. (K. B.) 620 ; 93 L. T. 284 ; 54 W. R. 22 ; 21 T. L. R. 368, C. A. 20
Hermitage *v.* Tomkins (1700), 1 Ld. Raym. 729 367
Hertford (Marquis) *v.* Boore (1801), 5 Ves. 719 174
Hertslet *v.* Oatway, *Re* Oatway. *See* Oatway, *Re*, Hertslet *v.* Oatway.
Heslop *v.* Chapman (1853), 2 C. L. R. 139 421
Hetherington *v.* Hetherington (1887), 12 P. D. 112 ; 56 L. J. (P.) 78 ; 57 L. T. 533 ; 51 J. P. 119 ; 36 W. R. 12 505
——— *v.* Kemp (1815), 4 Camp. 193 556
Hetley, *Re*, Hetley *v.* Hetley, [1902] 2 Ch. 866 ; 71 L. J. (CH.) 769 ; 87 L. T. 265 ; 51 W. R. 202 566
Heugh *v.* Chamberlain (1877), 25 W. R. 742 345, 413
Hewby *v.* Balls, *Re* Balls. *See* Balls, *Re*, Hewby *v.* Balls.
Hewett, *Re*, *Ex parte* Hooper (1815), 1 Mer. 7 92
———, Hewett *v.* Hallett, [1894] 1 Ch. 362 ; 63 L. J. (CH.) 182 ; 70 L. T. 393 ; 42 W. R. 233 ; 8 R. P. 10 70
Hewitt *v.* Loosemore (1851), 9 Hare, 449 ; 21 L. J. (CH.) 69 ; 15 Jur. 1097 . 88
——— *v.* Wright (1780), 1 Bro. C. C. 86 110
Hewlett *v.* London County Council (1908), 72 J. P. 136 ; 24 T. L. R. 331 . . 390
Heymann, *Re*, *Ex parte* Heymann (1872), 7 Ch. App. 488 ; 26 L. T. 339 ; 20 W. R. 457 625
Heynes *v.* Dixon, *Re* Dixon. *See* Dixon, *Re*, Heynes *v.* Dixon.
Hibberd *v.* Knight (1846), 2 Exch. 11 ; 17 L. J. (EX.) 119 ; 12 Jur. 162 . 520, 581
Hibblewhite *v.* M'Morine (1840), 6 M. & W. 200 ; 9 L. J. (EX.) 217 ; 4 Jur. 769 . 412

PAGE
Hibbs *v.* Ross (1866), L. R. 1 Q. B. 534; 9 B. & S. 655; 35 L. J. (Q. B.) 193; 15 L. T. 67; 12 Jur. (N. S.) 812 435
Hickey *v.* Campion (1872), 20 W. R. 752 603
Hickman *v.* Berens, [1895] 2 Ch. 638; 64 L. J. (CH.) 785; 73 L. T. 323; 12 R. 602, C. A. 23
——— *v.* Upsall (1875), L. R. 20 Eq. 136; 23 W. R. 776 501
——— *v.* ——— (1876), 4 Ch. D. 144; 46 L. J. (CH.) 245; 35 L. T. 919; 25 W. R. 175 155
Hicks *v.* Faulkner (1878), 8 Q. B. D. 167; 51 L. J. (Q. B.) 268; 30 W. R. 545; affirmed, 46 L. T. 127; 46 J. P. 420, C. A. 434
——— *v.* Hastings (1857), 3 K. & J. 701 39
——— *v.* Keat (1840), 3 Beav. 141 257, 318
Hiddle *v.* National Fire and Marine Insurance Co. of New Zealand, [1896] A. C. 372; 65 L. J. (P. C.) 24; 74 L. T. 204 429
Hide *v.* Haywood (1740), 2 Atk. 126 159
Hiern *v.* Mill (1801), 13 Ves. 114 88
Higgins, *Ex parte*, *Re* Tyler. *See* Tyler, *Re*, *Ex parte* Higgins.
———, *Re*, Day *v.* Turnell (1885), 31 Ch. D. 142; 55 L. J. (CH.) 235; 54 L. T. 199; 34 W. R. 81, C. A. 296
——— *v.* Senior (1841), 8 M. & W. 834; 11 L. J. (EX.) 199 567
Higginson *v.* Clowes (1808), 15 Ves. 516 23
Higgons *v.* Burton (1857), 26 L. J. (EX.) 342 393
Higgs, *Re*, *Ex parte* Leicester (1892), 66 L. T. 296; 40 W. R. 432 581
——— *v.* Assam Tea Co. (1869), L. R. 4 Exch. 387; 38 L. J. (EX.) 233; 21 L. T. 336; 17 W. R. 1125 371, 381
Higham *v.* Ridgway (1808), 10 East, 109 463
Highfield *v.* Peake (1827), Mood. & M. 109 551
Highway *v.* Banner (1785), 1 Bro. C. C. 584 119
Hill *v.* Atkinson (1816), 2 Mer. 45 232
—— *v.* ——— (1816), 3 Price, 399 250
—— *v.* Barclay (1811), 18 Ves. 56 153
—— *v.* Barry (1842), 7 Jur. 10 595
—— *v.* Clifford, Clifford *v.* Timms, Clifford *v.* Phillips, [1907] 2 Ch. 236; 76 L. J. (CH.) 627; 97 L. T. 266; 23 T. L. R. 601, C. A.; affirmed *sub nom.* Clifford *v.* Timms, [1908] A. C. 12; 77 L. J. (CH.) 91; 98 L. T. 64 323, 328, 329, 339, 342, 364, 476
—— *v.* Cock (1813), 1 Ves. & B. 173 108
—— *v.* Coombe (1818), Starkie on Evidence, 4th ed., 197 598
—— *v.* Dolt (1857), 7 De G. M. & G. 397; 5 W. R. 217 578
—— *v.* Fladgate, *Re* Page. *See* Page, *Re*, Hill *v.* Fladgate.
—— *v.* Fulbrook (1822), Jac. 574 41
—— *v.* Hart-Davis (1884), 26 Ch. D. 470; 53 L. J. (CH.) 1012; 51 L. T. 279, C. A. 626
—— *v.* Hibbit (1871), 19 W. R. 250 469
—— *v.* Hickin, [1897] 2 Ch. 579; 66 L. J. (CH.) 717; 77 L. T. 127; 46 W. R. 137 41
—— *v.* Manchester and Salford Water Works Co. (1831), 2 B. & Ad. 544 . . 370
—— *v.* ——— (1833), 5 B. & Ad. 866; 2 Nev. & M. (K. B.) 573; 3 L. J. (K. B.) 19 449, 478
—— *v.* Penniman (1876), 24 W. R. 245 593
—— *v.* Saunders (1825), 4 B. & C. 529; 7 Dow. & Ry. (K. B.) 17; 9 Moore (C. P.), 238; 2 Bing. 112; 1 C. & P. 80; 4 L. J. (O. S.) (K. B.) 2 403
—— *v.* Wiggett (1706), 2 Vern. 547; 1 Eq. Cas. Abr. 232 540
—— *v.* Wilson (1873), 8 Ch. App. 888; 42 L. J. (CH.) 817; 29 L. T. 238; 21 W. R. 757. 604
Hillas, *Re* (1850), 2 Ir. Jur. 36 249
Hilleary and Taylor, *Re* (1887), 36 Ch. D. 262; 56 L. J. (CH.) 758; 56 L. T. 867; 35 W. R. 705, C. A. 616
Hilliar *v.* Dade (1898), 14 T. L. R. 534, C. A. 431
Hilliard *v.* Fulford (1876), 4 Ch. D. 389; 46 L. J. (CH.) 43; 35 L. T. 750; 25 W. R. 161 161
Hills *v.* Laming (1853), 9 Exch. 256; 23 L. J. (EX.) 60 413
Hillyard *v.* Taylor (1773), Amb. 713 146
Hilton, *Re*, *Ex parte* March (1892), 67 L. T. 594; 9 Morr. 286 . 330, 332, 333, 358
——— *v.* Barrow (1791), 1 Ves. Jun. 284 53
Hinchcliffe, *Re*, [1895] 1 Ch. 117; 64 L. J. (CH.) 76; 71 L. T. 532; 43 W. R. 82; 12 R. 33, C. A. 619
——— *v.* Hinchcliffe (1797), 3 Ves. 516 128, 131, 137

PAGE
Hindley *v.* Haslam (1878), 27 W. R. 61 332, 355
——— *v.* Lacy (1865), 34 L. J. (C. P.) 7 567
Hindmarsh, *Re* (1860), 1 Drew. & Sm. 129 156
Hindson *v.* Ashby, [1896] 2 Ch. 1; 65 L. J. (CH.) 515; 74 L. T. 327; 60 J. P. 484; 45 W. R. 252, C. A. 565, 607
Hine Brothers *v.* Free, Rodwell & Co., Ltd. (1897), 2 Com. Cas. 149 . . . 563
Hinton *v.* Hinton (1755), 2 Ves. Sen. 631 19
Hiram Maxim Lamp Co., *Re*, [1903] 1 Ch. 70; 72 L. J. (CH.) 18; 87 L. T. 729; 10 Mans. 329 164
Hirschfield *v.* London, Brighton and South Coast Rail. Co. (1876), 2 Q. B. D. 1; 46 L. J. (Q. B.) 94; 35 L. T. 473 379
Hirst *v.* Procter, [1882] W. N. 12 626
——— *v.* Tolson (1850), 2 Mac. & G. 134; 19 L. J. (CH.) 441; 14 Jur. 559; 2 H. & Tw. 359 28
Hiscox *v.* Batchelor (1867), 15 L. T. 543 595
H. M. Advocate *v.* Ailsa (Marquis) (1881), 19 Sc. L. R. 28; 9 R. (Ct. of Sess.) 40...288
——— ——— *v.* Alexander's Trustees (1905), 42 Sc. L. R. 307 210
——— ——— *v.* Brown's Trustees (1907), 44 Sc. L. R. 275; [1907] S. C. 333; 14 Scots Law Times, 636 238
——— ——— *v.* Findlay (Kennedy's Factor) (1890), 28 Sc. L. R. 596 . . 313
——— ——— *v.* Gunning's Trustees (1902), 39 Sc. L. R. 534; 9 Scots Law Times, 403 193, 210
——— ——— *v.* Heywood-Lonsdale's Trustees (1906), 43 Sc. L. R. 529; 8 F. (Ct. of Sess.) 724; 13 Scots Law Times, 975 . 188, 189, 195, 229
——— ——— *v.* M'Taggart Stewart (1906), 43 Sc. L. R. 465; 8 F. (Ct. of Sess.) 579; 13 Scots Law Times, 945 . . 186, 187, 189, 199
——— ——— *v.* Routledge's Trustees (1907), 44 Sc. L. R. 305; [1907] S. C. 327; 14 Scots Law Times, 735 237
——— ——— *v.* Warrender's Trustees (1906), 43 Sc. L. R. 278; 8 F. (Ct. of Sess.) 371; 13 Scots Law Times, 724 210
H.M.S. "Bellerophon," *Re* (1874), 44 L. J. (ADM.) 5; 31 L. T. 756; 23 W. R. 248...573
Hitchcock *v.* Beardsley (1738), West, 445 503
——— *v.* Sedgwick (1690), 2 Vern. 156 83
Hitchin *v.* Campbell (1771), 2 Wm. Bl. 779 350, 355, 361
——— *v.* Groom (1848), 5 C. B. 515; 17 L. J. (C. P.) 145 429
Hitchings *v.* Thompson (1850), 5 Exch. 50; 19 L. J. (EX.) 146 405
Hitchins *v.* Eardley (1871), L. R. 2 P. & D. 248; 40 L. J. (P. & M.) 70; 25 L. T. 163 428
——— *v.* Hitchins (1866), L. R. 1 P. & D. 153; 35 L. J. (P. & M.) 62; 14 L. T. 258 618
Hitchman *v.* Stewart (1855), 3 Drew. 271 30
Hixon *v.* Wytham (1675), 1 Cas. in Ch. 248; Cas. *temp.* Finch, 195 . . 33, 70
Hoare *v.* Bremridge (1872), 8 Ch. App. 22; 42 L. J. (CH.) 1; 27 L. T. 593; 21 W. R. 43 11, 13, 14, 53
——— *v.* Niblett, [1891] 1 Q. B. 781; 60 L. J. (Q. B.) 565; 64 L. T. 659; 55 J. P. 664; 39 W. R. 491 335
Hobbs *v.* Henning (1864), 17 C. B. (N. S.) 791; 5 New Rep. 406; 34 L. J. (C. P.) 117; 12 L. T. 205; 11 Jur. (N. S.) 223; 13 W. R. 431...323, 325, 340, 341
——— *v.* Norton (1682), 1 Vern. 136; 2 Cas. in Ch. 128; 1 Eq. Cas. Abr. 356 . 168
——— *v.* Wayet (1887), 36 Ch. D. 256; 57 L. T. 225; 36 W. R. 73 52
——— *v.* Winchester Corporation, [1910] 2 K. B. 46; 79 L. J. (K. B.) 578; 74 J. P. 165; 26 T. L. R. 378; 8 L. G. R. 430; reversed, [1910] W. N. 162; 26 T. L. R. 557, C. A. 449
Hoblyn *v.* Hoblyn (1889), 41 Ch. D. 200; 60 L. T. 499; 38 W. R. 12 18
Hobman *v.* Greenwich District Board of Works (1894), 58 J. P. 703, C. A. . . 518
Hobson *v.* Blackburn (1836), 1 Keen, 273 146
——— *v.* Neale (1853), 17 Beav. 178 265
Hobson's Trusts, *Re* (1878), 7 Ch. D. 708; 47 L. J. (CH.) 310; 38 L. T. 365; 26 W. R. 470, C. A. 112
Hocking, *Re*, Michell *v.* Loe, [1898] 2 Ch. 567; 67 L. J. (CH.) 662; 79 L. T. 164; 47 W. R. 114, C. A. 504
Hodges *v.* Cobb (1867), L. R. 2 Q. B. 652; 8 B. & S. 583; 36 L. J. (Q. B.) 265; 16 L. T. 792; 15 W. R. 1038 618
——— *v.* Smith (1787), 1 Cox, Eq. Cas. 357. 58
——— *v.* Waddington (1679), 2 Cas. in Ch. 9; 2 Vent. 360; 1 Eq. Cas. Abr. 236 161
Hodges' Legacy, *Re* (1873), L. R. 16 Eq. 92; 42 L. J. (CH.) 452; 28 L. T. 624 . 153

PAGE
Hodgson, *Re*, Beckett *v.* Ramsdale (1885), 31 Ch. D. 177 ; 55 L. J. (CH.) 241 ; 54 L. T. 222 ; 34 W. R. 127, C. A. 39, 335, 336, 604
———, *Re*, Hodgson *v.* Fox (1878), 9 Ch. D. 673 ; 48 L. J. (CH.) 52 ; 27 W. R. 38 164
——— *v.* Braisby, *Re* Jacques. *See* Jacques, *Re*, Hodgson *v.* Braisby.
——— *v.* Shaw (1834), 3 My. & K. 183 ; 3 L. J. (CH.) 190 30
Hodgworth *v.* Crawley (1742), 2 Atk. 376 241
Hodson, *Re*, Williams *v.* Knight, [1894] 2 Ch. 421 ; 63 L. J. (CH.) 609 ; 71 L. T. 77 ; 42 W. R. 531 ; 8 R. 346 127
——— *v.* Walker (1872), L. R. 7 Exch. 55 ; 41 L. J. (EX.) 51 ; 25 L. T. 937 ; 20 W. R. 489 346
Hoffe's Estate Act, 1885, *Re* (1900), 82 L. T. 556 374
Hogan, *Re* (1754), 3 Atk. 813 628
———, *Re*, Hogan *v.* Hogan, [1901] 1 I. R. 168 141
Hogg *v.* Kirby (1803), 8 Ves. 215 68
Hoggart *v.* Cutts (1841), Cr. & Ph. 197 ; 10 L. J. (CH.) 314 57
Hoghton *v.* Hoghton (1852), 15 Beav. 278 ; 21 L. J. (CH.) 482 ; 17 Jur. 99...18, 557
Holbrook *v.* Sharpey (1812), 19 Ves. 131 53
Holcombe *v.* Hewson (1810), 2 Camp. 391 451
Holcroft (Lady) *v.* Smith (1702), Freem. (CH.) 259 606
Holden *v.* Bostock & Co., Ltd. (1902), 50 W. R. 323 ; 18 T. L. R. 317, C. A. . 451
——— *v.* Holden (1857), 7 De G. M. & G. 397 ; 5 W. R. 217 578
Holdich *v.* Holdich (1842), 2 Y. & C. Ch. Cas. 18 121
Holding *v.* Elliott (1860), 5 H. & N. 117 ; 29 L. J. (EX.) 134 ; 1 L. T. 381 . . 387
Holdsworth *v.* Dartmouth Corporation (1838), 2 Mood. & R. 153 600
——— *v.* Dimsdale (1871), 24 L. T. 360 ; 19 W. R. 798 559
——— *v.* Lancashire and Yorkshire Insurance Co. (1907), 23 T. L. R. 521 368, 386
——— *v.* McCrea (1867), L. R. 2 H. L. 380 ; 36 L. J. (Q. B.) 297 ; 16 W. R. 226 509
Hole, *Re*, Davies *v.* Davies (1905), 119 L. T. Jo. 222 298
——— *Re*, ——— *v.* Witts, [1906] 1 Ch. 673 ; 75 L. J. (CH.) 362 ; 94 L. T. 451, C. A. 221
——— *v.* Harrison (1675), 1 Cas. in Ch. 246 ; Cas. *temp.* Finch, 15, 203 . . . 30
Holford *v.* Acton Urban Council, [1898] 2 Ch. 240 ; 67 L. J. (CH.) 636 ; 78 L. T. 829 ; 14 T. L. R. 476 50
Holiday *v.* Pitt (1734), 2 Stra. 985 587
Holl *v.* Griffin (1833), 10 Bing. 246 ; 3 Moo. & S. 732 ; 3 L. J. (C. P.) 17 . . . 406
Holland, *Re*, *Ex parte* Alston (1868), 4 Ch. App. 168 ; 19 L. T. 542 ; 17 W. R. 266 146
——— *Re*, Gregg *v.* Holland (1901), 85 L. T. 304 ; [1901] 2 Ch. 145 ; 70 L. J. (CH.) 625 ; 49 W. R. 476 ; 8 Mans. 266...366, 370
——— *Re*, ——— *v.* ———, [1902] 2 Ch. 360 ; 71 L. J. (CH.) 518 ; 86 L. T. 542 ; 50 W. R. 575 ; 18 T. L. R. 563 ; 9 Mans. 259, C. A. . . . 567
——— *v.* Bennett, [1902] 1 K. B. 867 ; 71 L. J. (K. B.) 490 ; 86 L. T. 485 ; 50 W. R. 401 ; 18 T. L. R. 510, C. A. 556
——— *v.* Clark (1842), 1 Y. & C. Ch. Cas. 151 359
——— *v.* Manchester and Liverpool District Banking Co. (1909), 14 Com. Cas. 241 ; 25 T. L. R. 386 388, 485
——— *v.* Reeves (1835), 7 C. & P. 36 597
Holles *v.* Wyse (1693), 2 Vern. 289 151
Holliday *v.* Overton (1852), 15 Beav. 480 ; 21 L. J. (CH.) 769 ; 16 Jur. 346 ; affirmed 16 Jur. 751 94
Hollingshead, *Re*, Hollingshead *v.* Webster (1888), 37 Ch. D. 651 ; 57 L. J. (CH.) 400 ; 58 L. T. 758 ; 36 W. R. 660 175
Hollins *v.* Fowler (1875), L. R. 7 H. L. 757 ; 44 L. J. (Q. B.) 169 ; 33 L. T. 73 . 379
Holloway *v.* Radcliffe (1857), 23 Beav. 163 113
Holman *v.* Burrow (1702), 2 Ld. Raym. 794 ; Salk. 658 492
Holmes (A. D.), *Re* (1885), 29 Ch. D. 786 ; 55 L. J. (CH.) 33, C. A. . . . 103
——— *v.* Holmes (1783), 1 Bro. C. C. 555 133
——— *v.* ———, *Re* Moon. *See* Moon, *Re*, Holmes *v.* Holmes.
——— *v.* Millage, [1893] 1 Q. B. 551 ; 62 L. J. (Q. B.) 380 ; 68 L. T. 205 ; 57 J. P. 551 ; 41 W. R. 354 ; 4 R. 332, C. A. 56
——— *v.* Mitchell (1859), 7 C. B. (N. S.) 361 ; 28 L. J. (C. P.) 301 ; 6 Jur. (N. S.) 73 425
——— *v.* Sixsmith (1852), 7 Exch. 802 ; 21 L. J. (EX.) 312 ; 16 Jur. 619 . . 517
Holroyd *v.* Marshall (1862), 10 H. L. Cas. 191 ; 33 L. J. (CH.) 193 ; 7 L. T. 172 ; 9 Jur. (N. S.) 213 ; 11 W. R. 171 74

PAGE

Holt, *Ex parte*, *Re* Daintrey. *See* Daintrey, *Re*, *Ex parte* Holt.
—— *v.* Miers (1839), 9 C. & P. 191 545
—— *v.* Squire (1825), Ry. & M. 282 462
—— & Co. *v.* Collyer (1881), 16 Ch. D. 718; 50 L. J. (CH.) 311; 44 L. T. 214; 29 W. R. 502 568
Home *v.* Bentinck (1820), 2 Brod. & Bing. 130; 4 Moore (C. P.), 563 . . . 573
Hone *v.* Boyle (1891), 27 L. R. Ir. 137, C. A. 365
Honeyman *v.* Marryat (1855), 21 Beav. 14 154
Honeywood *v.* Forster (1860), 30 Beav. 14 122
Hood *v.* Beauchamp (1836), 8 Sim. 26 560
—— *v.* Phillips (1841), 3 Beav. 513 147, 148
Hood-Barrs *v.* Jackson (1842), 1 Y. & C. Ch. Cas. 585 339
Hooker *v.* Arthur (1671), 2 Rep. Ch. 33 67
Hooper, *Ex parte*, *Re* Hewett. *See* Hewett, *Re*, *Ex parte* Hooper.
——— *v.* Herts, [1906] 1 Ch. 549; 75 L. J. (CH.) 253; 94 L. T. 324; 54 W. R. 350; 13 Mans. 85, C. A. 412
Hope *v.* Beadon (1851), 17 Q. B. 509; 21 L. J. (Q. B.) 25; 2 L. M. & P. 593; 16 Jur. 80 522
—— *v.* Carnegie (1866), 1 Ch. App. 320; 14 L. T. 117; 12 Jur. (N. S.) 284; 14 W. R. 489 48
—— *v.* Hope, [1893] W. N. 20, C. A. 466
—— *v.* I'Anson and Weatherly (1901), 18 T. L. R. 201, C. A. 431
—— *v.* Liddell (1855), 7 De G. M. & G. 331 581
—— *v.* ——— (No. 2) (1855), 21 Beav. 180 546
Hopewell *v.* De Pinna (1809), 2 Camp. 113 500
Hopkin *v.* Hopkin (1853), 10 Hare, Appendix, ii. 628
Hopkins *v.* Hemsworth, [1898] 2 Ch. 347; 67 L. J. (CH.) 526; 78 L. T. 832; 47 W. R. 26 80
——— *v.* Hopkins (1734), Cas. *temp.* Talb. 44 94
——— *v.* ——— (1738), 1 Atk. 591 93, 94
——— *v.* Rolt (1861), 9 H. L. Cas. 514 84
Hopwood *v.* Hopwood (1859), 7 H. L. Cas. 728 128, 134
Hordern *v.* Commercial Union Insurance Co. (1887), 56 L. J. (P. C.) 78; 56 L. T. 240 430
Horlock, *Re*, Calham *v.* Smith, [1895] 1 Ch. 516; 64 L. J. (CH.) 325; 72 L. T. 223; 43 W. R. 410; 13 R. 356. 137, 138
——— *v.* Smith (1853), 17 Beav. 572 140
——— *v.* Wiggins (1888), 39 Ch. D. 142; 58 L. J. (CH.) 46; 59 L. T. 710, C. A. 136
Horn *v.* Coleman (1856), 26 L. J. (CH.) 213; 2 Jur. (N. S.) 1127; 5 W. R. 32 . 254
Horncastle *v.* Charlesworth (1840), 11 Sim. 315; 10 L. J. (CH.) 35; 4 Jur. 1179 40
——— *v.* Equitable Life Assurance Society of U. S. (1906), 22 T. L. R. 735, C. A. 566
Horne *v.* Mackenzie (1839), 6 Cl. & Fin. 628. 596
—— *v.* Smith (1815), 6 Taunt. 9 583, 589
Horniblow, *Re*, *Ex parte* Official Receiver (1885), 53 L. T. 155; 2 Morr. 124 . 546
Horrex, *Re* (1910), *Times*, March 9th 215, 226
Horrocks *v.* Stubbs (1896), 74 L. T. 58, C. A. 326
Horsfall *v.* Halifax and Huddersfield Union Banking Co. (1883), 52 L. J. (CH.) 599 384
Horsnaill, *Re*, Womersley *v.* Horsnaill, [1909] 1 Ch. 631; 78 L. J. (CH.) 331; 100 L. T. 603 113
Horton, *Re*, Horton *v.* Perks, Horton *v.* Clark (1884), 51 L. T. 420 367
——— *v.* Perks, Horton *v.* Clark, *Re* Horton. *See* Horton, *Re*, Horton *v.* Perks, Horton *v.* Clark.
——— *v.* Smith (1858), 4 K. & J. 624; 27 L. J. (CH.) 773; 6 W. R. 783 . . 147
——— *v.* Walsall Assessment Committee, [1898] 2 Q. B. 237; 67 L. J. (Q. B.) 804; 78 L. T. 684; 62 J. P. 437; 46 W. R. 607; 14 T. L. R. 391 . 541
——— *v.* Westminster Improvement Commissioners (1852), 7 Exch. 780; 21 L. J. (EX.) 297 345, 349, 370
Horwood, *Re* (1886), 55 L. T. 373, C. A. 625
Hoskin's Trusts, *Re* (1877), 6 Ch. D. 281; 46 L. J. (CH.) 817, C. A. . . . 252
Hotchkis *v.* Dickson (1820), 2 Bli. 303 24
Hotchkys, *Re*, Freke *v.* Calmady (1886), 32 Ch. D. 408; 55 L. J. (CH.) 546; 55 L. T. 110; 34 W. R. 569, C. A. 105, 117
Hough *v.* Guardian Fire and Life Assurance Co. (1902) 18 T. L. R. 273 . 368, 386
Houghton *v.* Houghton (1841), 11 Sim. 491; 10 L. J. (CH.) 310; 5 Jur. 528 . 39

PAGE
Houghton *v.* Koenig (1856), 18 C. B. 235; 25 L. J. (C. P.) 218 522
Houliston *v.* Smyth (1825), 2 C. & P. 24 439
Household Fire Insurance Co. *v.* Grant (1879), 4 Ex. D. 216; 48 L. J. (EX.) 577; 41 L. T. 298; 27 W. R. 858, C. A. 441
Houston, *Re*, Rodgers *v.* Houston, [1909] 1 I. R. 319 95
Houstoun *v.* Sligo (Marquis) (1885). 29 Ch. D. 448; 52 L. T. 96, C. A....356, 361, 475
Hovenden *v.* Annesley (Lord) (1806), 2 Sch. & Lef. 607 69, 175
How, *In the Goods of* (1858), 1 Sw. & Tr. 53; 27 L. J. (P. & M.) 37; 4 Jur. (N. S.) 366 500
—— *v.* Hall (1811), 14 East, 274 521
Howard *v.* Braithwaite (1812), 1 Ves. & B. 202 604
——— *v.* Canfield (1836), 5 Dowl. 417; Will. Woll. & Dav. 78; 1 Jur. 71 . 596
——— *v.* Clarke (1880), 20 Q. B. D. 558; 58 L. T. 401; 52 J. P. 310 . . 431
——— *v.* Dulau & Co. (1895), 11 T. L. R. 451, C. A. 612
——— *v.* Fanshawe, [1895] 2 Ch. 581; 64 L. J. (CH.) 666; 73 L. T. 77; 43 W. R. 645; 13 R. 663 153
——— *v.* Harris (1683), 1 Vern. 190; 2 Cas. in Ch. 147; 1 Eq. Cas. Abr. 312 . 91
——— *v.* Howard (1904), *Times*, July 14th 452
——— *v.* Hudson (1853), 2 E. & B. 1; 22 L. J. (Q. B.) 341; 17 Jur. 855; 1 W. R. 325 325, 351, 376, 382, 383
——— *v.* Lightfoot, *Re* Lacey. *See* Lacey, *Re*, Howard *v.* Lightfoot.
——— *v.* Prince (1847), 10 Beav. 312 305, 315
——— *v.* Rowatt's Wharf, Ltd., [1896] 2 Ch. 93; 65 L. J. (CH.) 536; 74 L. T. 473; 44 W. R. 536, C. A. 164
——— *v.* Sheward (1866), L. R. 2 C. P. 148; 36 L. J. (C. P.) 42; 15 L. T. 183; 12 Jur. (N. S.) 1015; 15 W. R. 45 445
——— *v* Shrewsbury (Earl) (1867), L. R. 3 Eq. 218; 36 L. J. (CH.) 283; 15 W. R. 301 368
——— *v.* Tremaine (1692), 1 Salk. 278; 4 Mod. Rep. 146; 1 Show. 363; Carth. 65 547
——— *v.* Tucker (1831), 1 B. & Ad. 712 384, 385, 387
Howatson *v.* Webb, [1908] 1 Ch. 1; 77 L. J. (CH.) 32; 97 L. T. 730, C. A. . 369
Howe, *Re*, Wilkinson *v.* Ferniehough, [1910] W. N. 190 241
—— *v.* Aylesbury (Countess) (1802), 1 Ves. 137 108
—— *v.* Dartmouth (Earl) (1802), 7 Ves. 137 108
—— *v.* Malkin (1878), 40 L. T. 196; 27 W. R. 340 460
—— (Earl) *v.* Lichfield (Earl) (1866), L. R. 1 Eq. 641; 14 L. T. 122; 14 W. R. 468; affirmed (1867), 2 Ch. App. 155; 36 L. J. (CH.) 313; 15 W. R. 323 255, 292
Howe's (Earl) Settled Estates, *Re*, Howe (Earl) *v.* Kingscote, [1903] 2 Ch. 69; 72 L. J. (CH.) 461; 88 L. T. 438; 51 W. R. 468; 19 T. L. R. 386, C. A. . 223
Howell *v.* Hanforth (1775), 2 Wm. Bl. 1016 29
——— *v.* Jenkins (1862), 2 John. & H. 706; 1 De G. J. & Sm. 617 . 122, 123, 124
Howes *v.* Barber (1852), 18 Q. B. 588; 21 L. J. (Q. B.) 254; 16 Jur. 614 . . 584
——— *v.* Bishop, [1909] 2 K. B. 390; 78 L. J. (K. B.) 796; 100 L. T. 826; 25 T. L. R. 533, C. A. 19
Howlett *v.* Tarte (1861), 10 C. B. (N. S.) 813; 31 L. J. (C. P.) 146; 9 W. R. 868...351, 358
Hoyle, *Re*, Hoyle *v.* Hoyle, [1893] 1 Ch. 84; 62 L. J. (CH.) 182; 67 L. T. 674; 41 W. R. 81; 2 R. 145, C. A. 458
—— *v.* Cornwallis (Lord) (1720), 1 Stra. 387; Fortes. Rep. 373 492
Hubbard *v.* Alexander (1876), 3 Ch. D. 738; 45 L. J. (CH.) 740; 35 L. T. 52; 24 W. R. 1058 554
——— *v.* Lees and Purden (1866), L. R. 1 Exch. 255; 4 H. & C. 418; 35 L. J. (EX.) 169; 14 L. T. 442; 12 Jur. (N. S.) 435; 14 W. R. 694 . 471, 513, 533, 560
Huckle *v.* London County Council (1910), 26 T. L. R. 580. 383
Huddersfield Banking Co., Ltd. *v.* Lister (Henry) & Son, Ltd., [1895] 2 Ch. 273; 64 L. J. (CH.) 523; 72 L. T. 703; 43 W. R. 567; 12 R. 331, C. A. . 24, 484
Huddleston *v.* Furness Rail. Co. (1899), 15 T. L. R. 238, C. A. 550
Huddlestone *v.* Asbugg (1675), Cas. *temp.* Finch, 204 326
Hudson, *Re*, Cassels *v.* Hudson, [1908] 1 Ch. 655; 77 L. J. (CH.) 305; 98 L. T. 567; 24 T. L. R. 333 94
——— *v.* Harrison (1821), 3 Brod. & Bing. 97; 3 Moore (P. C.), 288. . . 397
——— *v.* Spencer, [1910] 2 Ch. 285; 79 L. J. (CH.) 506; 54 Sol. Jo. 601 . . 130
——— *v.* "Swiftsure," The (Owners), The "Swiftsure" (1900), 82 L. T. 389; 16 T. L. R. 275; 9 Asp. M. L. C. 65 464
Huet *v.* Le Mesurier (1786), 1 Cox, Eq. Cas. 275 535

PAGE
Huffer *v.* Allen (1866), L. R. 2 Exch. 15 ; 4 H. & C. 634 ; 36 L. J. (EX.) 17 ; 15 L. T. 225 ; 12 Jur. (N. S.) 930 ; 15 W. R. 281 326, 327, 356
Huggins *v.* Ward (1873), L. R. 8 Q. B. 521 ; 29 L. T. 33 ; 21 W. R. 914 . . 499
——— *v.* York Buildings Co. (1740), 2 Atk. 44 346
Hughes *v.* Anderson, *Re* Butler's Trustees. *See* Butler's Trustees, *Re*, Hughes *v.* Anderson.
——— *v.* Cornelius (1682), 2 Show. 232 ; T. Raym. 473 ; Skin. 59 . . 328, 363
——— *v.* Vargas (1893), 9 T. L. R. 551 573
——— *v.* Williams (1852), 3 Mac. & G. 683 ; 16 Jur. 415 143
——— *v.* Pump House Hotel Co., [1902] 2 K. B. 190 ; 71 L. J. (K. B.) 630 ; 86 L. T. 794 ; 50 W. R. 660 ; 18 T. L. R. 654, C. A. 103
Hughes-Hallett *v.* Indian Mammoth Gold Mines Co. (1882), 22 Ch. D. 561 ; 52 L. J. (CH.) 418 ; 48 L. T. 107 ; 31 W. R. 285 52, 97
Huguenin *v.* Baseley (1807), 14 Ves. 273 16, 18
Huish, *Re*, Bradshaw *v.* Huish (1889), 43 Ch. D. 260 ; 59 L. J. (CH.) 135 ; 62 L. T. 52 ; 38 W. R. 199 137
Hull and Selby Rail. Co. *v.* North Eastern Rail. Co. (1854), 5 De G. M. & G. 872 ; 24 L. J. (CH.) 109 ; 3 W. R. 129, C. A. 49
Hull Flax Co. *v.* Wellesley (1860), 6 H. & N. 38 ; 30 L. J. (EX.) 5 . 370, 389, 411
Hulme *v.* Chitty (1846), 9 Beav. 437 ; 10 Jur. 323 70
Hulse, *Ex parte*, *Re* Dagenham (Thames) Dock Co. *See* Dagenham (Thames) Dock Co., *Re*, *Ex parte* Hulse.
Hulton (E.) & Co. *v.* Jones, [1910] A. C. 20 ; 79 L. J. (K. B.) 198 ; 101 L. T. 831 ; 26 T. L. R. 128 ; 54 Sol. Jo. 116 ; 47 Sc. L. R. 591 482
Humber *v.* Richards, *Re* Richards. *See* Richards, *Re*, Humber *v.* Richards.
Humble *v.* Hunt (1817), Holt (N. P.), 601 538
——— *v.* Hunter (1848), 12 Q. B. 310 ; 17 L. J. (Q. B.) 350 ; 12 Jur. 121...566, 568
——— *v.* Malbe (1559), Cary, 58 589
Hume *v.* Druyff (1873), L. R. 8 Exch. 214 ; 42 L. J. (EX.) 145 ; 29 L. T. 64 . 60
Humphreys *v.* Budd (1841), 9 Dowl. 1000 ; 5 Jur. 630 494
Humphries *v.* Humphries, [1910] 1 K. B. 796 ; 79 L. J. (K. B.) 544 ; 102 L. T. 492 ; affirmed, [1910] 2 K. B. 531 ; 103 L. T. 14, C. A. . 330, 332, 333, 356, 357
——— *v.* Pensam (1836), 1 My. & Cr. 580 546
Hungate *v.* Gascoyne (1846), 2 Ph. 25 ; 15 L. J. (CH.) 382 ; 10 Jur. 625 . 560, 561
Huning *v.* Ferrers (1710), Gilb. (CH.) 85 ; 1 Eq. Cas. Abr. 356 168
Hunt *v.* Alewyn (1828), 1 Moo. & P. 433 ; 6 L. J. (O. S.) (C. P.) 103 . . . 520
——— *v.* Goodlake (1873), 43 L. J. (C. P.) 54 ; 29 L. T. 472 431
——— *v.* Hunt (1862), 4 De G. F. & J. 221 ; 31 L. J. (CH.) 161 ; 5 L. T. 778 ; 8 Jur. (N. S.) 85 ; 10 W. R. 215 73
——— *v.* Luck, [1902] 1 Ch. 428 ; 71 L. J. (CH.) 239 ; 86 L. T. 68 ; 50 W. R. 291 ; 18 T. L. R. 265, C. A. 87, 88, 442
——— *v.* Roberts (1892), 9 T. L. R. 92 614
——— *v.* Stevens (1810), 3 Taunt. 113 305
Hunter *v.* Atkins (1834), 3 My. & K. 113 18, 19
——— *v.* Leathley (1830), 10 B. & C. 858 ; 8 L. J. (O. S.) (K. B.) 274 ; affirmed, *sub nom.* Leathley *v.* Hunter (1831), 5 Moo. & P. 457 ; 1 Cr. & J. 423 ; 1 Tyr. 355 ; 9 L. J. (O. S.) (EX.) 118 ; 7 Bing. 517 . . 581
——— *v.* Seton (1802), 17 Ves. 265 151, 152, 154
——— *v.* Stewart (1861), 4 De G. F. & J. 168 ; 31 L. J. (CH.) 346 ; 5 L. T. 471 ; 8 Jur. (N. S.) 317 ; 10 W. R. 176 332, 337
——— *v.* Walters (1871), 7 Ch. App. 75 ; 25 L. T. 765 369, 388, 412
Huntington (Earl) *v.* Greenville (1682), 1 Vern. 49 83
Huntley *v.* Donovan (1850), 15 Q. B. 96 473, 532
——— (Marchioness) *v.* Gaskell, [1905] 2 Ch. 656 ; 75 L. J. (CH.) 66 ; 93 L. T. 785 ; 22 T. L. R. 20, C. A. 326
Hurlston, *In the Goods of*, [1898] P. 27 ; 67 L. J. (P.) 69 500
Hurpurshad *v.* Sheo Dyal (1876), L. R. 3 Ind. App. 259 592
Hurrell *v.* Littlejohn, [1904] 1 Ch. 689 ; 73 L. J. (CH.) 287 ; 90 L. T. 260 ; 20 T. L. R. 198 88
Hurst *v.* Beach (1821), 5 Madd. 351 129
Husband, *Re* (1865), 12 L. T. 303 625
Huskisson *v.* Lefevre (1858), 26 Beav. 157 106
Hutcheon *v.* Mannington (1791), 1 Ves. 366 107
Hutcheson *v.* Eaton (1884), 13 Q. B. D. 861 ; 51 L. T. 846, C. A. . . . 545
Hutchins *v.* Lee (1737), 1 Atk. 447 75
Hutchinson *v.* Bernard (1836), 2 Mood. & R. 1 618
——— *v.* Bowker (1839), 5 M. & W. 535 ; 9 L. J. (EX.) 24 430

PAGE
Hutchison *v.* Skelton (1856), 2 Macq. 492 125
Hutt *v.* Morrell (1849), 3 Exch. 240 ; 6 Dow. & L. 447 ; 13 Jur. 215 . . . 357
Hutton *v.* Ras Steam Shipping Co., [1907] 1 K. B. 834 ; 76 L. J. (K. B.) 562 ; 96 L. T. 515 ; 23 T. L. R. 295 ; 12 Com. Cas. 231 ; 10 Asp. M. L. C. 386, C. A. 363
——— *v.* Warren (1836), 1 M. & W. 466 ; 2 Gale, 271 ; 1 Tyr. & Gr. 646 ; 5 L. J. (EX.) 234 444
Hyde *v.* Palmer (1863), 3 B. & S. 657 ; 32 L. J. (Q. B.) 126 ; 7 L. T. 823 ; 11 W. R. 433 420, 438
——— *v.* Whitfield (1815), 19 Ves. 342 60
Hyett *v.* Mekin (1884), 25 Ch. D. 735 ; 53 L. J. (CH.) 241 ; 50 L. T. 54 ; 32 W. R. 513 105, 111
Hylton *v.* Biscoe (1751), 2 Ves. Sen. 304 166
——— *v.* Hylton (1754), 2 Ves. Sen. 547 18, 19
Hyslop, *Re*, Hyslop *v.* Chamberlain, [1894] 3 Ch. 522 ; 64 L. J. (CH.) 168 ; 71 L. T. 373 ; 43 W. R. 6 ; 8 R. 680 560

I.

IBBITSON'S Estate, *Re* (1869), L. R. 7 Eq. 226 ; 21 L. T. 163 105
Ideal Bedding Co., Ltd. *v.* Holland, [1907] 2 Ch. 157 ; 76 L. J. (CH.) 441 ; 96 L. T. 774 ; 23 T. L. R. 467 ; 14 Mans. 113 56
Ilford Park Estates, Ltd. *v.* Jacobs, [1903] 2 Ch. 522 ; 72 L. J. (CH.) 699 ; 89 L. T. 295 ; 19 T. L. R. 574 100
Illidge, *Re*, Davidson *v.* Illidge (1884), 27 Ch. D. 478 ; 53 L. J. (CH.) 991 ; 51 L. T. 523 ; 33 W. R. 18, C. A. 35, 36
Imperial Bank of Canada *v.* Hamilton, [1903] A. C. 49 ; 72 L. J. (P. C.) 1 ; 87 L. T. 457 ; 51 W. R. 289 ; 19 T. L. R. 56 384, 400, 401
Imperial Gas Light and Coke Co. (Directors) *v.* Broadbent (1859), 7 H. L. Cas. 600 ; 29 L. J. (CH.) 377 ; 5 Jur. (N. S.) 1319 50
Imperial Loan Co. *v.* Stone, [1892] 1 Q. B. 599 ; 61 L. J. (Q. B.) 449 ; 66 L. T. 556 ; 56 J. P. 436, C. A. 16
Imray *v.* Oakshette, [1897] 2 Q. B. 218 ; 66 L. J. (Q. B.) 544 ; 76 L. T. 632 ; 45 W. R. 681, C. A. 87
Incandescent Gas Light Co. *v.* Cantelo (1895), 12 R. P. C. 262 390
Incledon *v.* Northcote (1746), 3 Atk. 430 145
Ind, Coope & Co. *v.* Emmerson (1887), 12 App. Cas. 300 ; 56 L. J. (CH.) 989 ; 56 L. T. 778 ; 36 W. R. 243 65, 78
Indian Zoedone Co., *Re* (1884), 26 Ch. D. 70 ; 53 L. J. (CH.) 468 ; 50 L. T. 547 ; 32 W. R. 481, C. A. 555
Ingham, *Re*, Jones *v.* Ingham, [1893] 1 Ch. 352 ; 62 L. J. (CH.) 100 ; 68 L. T. 152 ; 41 W. R. 235 ; 4 R. 126 78
——— *v.* Primrose (1859), 7 C. B. (N. S.) 82 ; 28 L. J. (P. C.) 294 ; 5 Jur. (N. S.) 710 401, 402
Ingle *v.* Richards (No. 1) (1860), 28 Beav. 361 157
——— *v.* Vaughan Jenkins, [1900] 2 Ch. 368 ; 69 L. J. (CH.) 618 ; 83 L. T. 155 ; 48 W. R. 684 146
Ingleby *v.* Slack (1890), 6 T. L. R. 284 566
Inglis *v.* Buttery (1878), 2 App. Cas. 552 568
Ingram *v.* Little (1883), 11 Q. B. D. 251 ; 31 W. R. 858 460
——— *v.* Papillon, *Re* Ashton. *See* Ashton, *Re*, Ingram *v.* Papillon.
Inland Revenue *v.* Dick's Trustees (1907), 44 Sc. L. R. 567 ; [1907] S. C. 880 ; 14 Scots Law Times, 919 233, 234
——— *v.* Gunning's Trustees (1907), 44 Sc. L. R. 514 ; [1907] S. C. 800 ; 14 Scots Law Times, 946 185
——— *v.* Heywood-Lonsdale's Trustees (1906), 43 Sc. L. R. 589 ; 14 Scots Law Times, 416 185, 189, 229
——— *v.* Maclachlan (1899), 36 Sc. L. R. 727 ; 1 F. (Ct. of Sess.) 917 ; 7 Scots Law Times, 45 186, 197, 217
——— *v.* Marr's Trustees (1906), 44 Sc. L. R. 647 ; 14 Scots Law Times, 585 207
Inland Revenue Commissioners *v.* Harrison (1874), L. R. 7 H. L. 1 ; 43 L. J. (EX.) 138 ; 30 L. T. 274 ; 22 W. R. 559 291, 295
——— *v.* Priestley, [1901] A. C. 208 ; 70 L. J. (CH.) 41 ; 84 L. T. 700 ; 49 W. R. 657 ; 17 T. L. R. 507 ; [1901] 2 I. R. 386 . 183, 186, 197, 199

PAGE
Innes, *Re*, Barclay *v.* Innes (1908), 125 L. T. Jo. 60 131, 134
——, *Re*, Innes *v.* Innes, [1910] 1 Ch. 188; 79 L. J. (CH.) 174; 101 L. T. 633. 98
Interleaf Publishing Co. *v.* Phillips (1884), Cab. & El. 315 517
International Life Assurance Society, *Re* (1876), 2 Ch. D. 476; 45 L. J. (CH.) 766; 34 L. T. 782; 24 W. R. 627, C. A. 143
Ireland *v.* Livingston (1872), L. R. 5 H. L. 395; 41 L. J. (Q. B.) 201; 27 L. T. 79 395
Irish Land Commission *v.* Ryan, [1900] 2 I. R. 565, C. A. . . . 356, 357, 358
——————— *v.* White, [1896] 2 I. R. 410 170
Irish Society (Governors and Assistants) *v.* Derry (Bishop) (1846), 12 Cl. & Fin. 641 473, 529, 530, 531
Irnham (Lord) *v.* Child (1781), 1 Bro. C. C. 92; 2 Dick. 554 17, 25
Irvine *v.* Watson (1880), 5 Q. B. D. 102; 49 L. J. (Q. B.) 239; 42 L. T. 51; 28 W. R. 353, C. A. 398
Irwin, *Re*, Irwin *v.* Parkes, [1904] 2 Ch. 752; 73 L. J. (CH.) 832; 53 W. R. 200. 95
Isaacs, *Re*, Isaacs *v.* Reginall, [1894] 3 Ch. 506; 63 L. J. (CH.) 815; 71 L. T. 386; 42 W. R. 685; 8 R. 660. 111
Islington Vestry *v.* Hornsey Urban Council, [1900] 1 Ch. 695; 69 L. J. (CH.) 324; 82 L. T. 580; 48 W. R. 401; 16 T. L. R. 286, C. A. 380
Issard *v.* Lambert, *Re* Davies. *See* Davies, *Re*, Issard *v.* Lambert.
Ives *v.* Medcalfe (1737), 1 Atk. 63. 543
Ivory, *Re*, Hankin *v.* Turner (1878), 10 Ch. D. 372; 39 L. T. 285; 27 W. R. 20, C. A. 553, 554
Ivy (Lady) *v.* Neal (*circa* 1683) 563

J.

JACK d. Boyle *v.* Kiernan (1840), 2 Jebb & S. 231 523
Jackman *v.* Mitchell (1807), 13 Ves. 581 20
Jackson, *Ex parte*, *Re* Warwick. *See* Warwick, *Re*, *Ex parte* Jackson.
———, *Re* (1903), 87 L. T. 747; 19 T. L. R. 74 500
———, *Re*, Jackson *v.* Ward, [1907] 2 Ch. 354; 76 L. J. (CH.) 553 . . . 504
———, *Re*, Smith *v.* Sibthorpe (1887), 34 Ch. D. 732; 56 L. J. (CH.) 593; 56 L. T. 562; 35 W. R. 646 70
——— *v.* Butler (1742), 2 Atk. 306; 9 Mod. Rep. 297 13
——— *v.* Cator (1800), 5 Ves. 688 71, 168
——— *v.* Forbes (1832), 2 Cr. & J. 382; 2 Tyr. 355; 1 L. J. (EX.) 159; affirmed *sub nom.* A.-G. *v.* Jackson (1834), 8 Bli. (N. S.) 15; 3 Tyr. 982; 2 Cl. & Fin. 48 238
——— *v.* Irvin (1809), 2 Camp. 50 441
——— *v.* Jackson (1804), 9 Ves. 591 39
——— *v.* Normanby Brick Co., [1899] 1 Ch. 438; 68 L. J. (CH.) 407; 80 L. T. 482, C. A. 47
——— *v.* Petrie (1804), 10 Ves. 164 60
——— *v.* Seager (1844), 2 Dow. & L. 13; 13 L. J. (Q. B.) 217; 8 Jur. 710 . 578, 589
——— *v.* Thomason (1862), 1 B. & S. 745; 31 L. J. (Q. B.) 11; 6 L. T. 104; 8 Jur. (N. S.) 134; 10 W. R. 42. 600
——— *v.* Williamson (1788), 2 Term Rep. 281 571
Jacob *v.* Hungate (1834), 1 Mood. & R. 445 589
——— *v.* Lindsay (1801), 1 East, 460 515, 595
Jacobs, *Re* (1835), 1 Har. & W. 123 579, 589
——— *v.* Layborn (1843), 11 M. & W. 685; 1 Dow. & L. 352; 12 L. J. (EX.) 427; 7 Jur. 562 570
Jacobson, *Ex parte*, *Re* Pincoffs. *See* Pincoffs, *Re*, *Ex parte* Jacobson.
Jacomb *v.* Turner, [1892] 1 Q. B. 47 553
Jaggers *v.* Binnings (1815), 1 Stark. 64 461
Jago *v.* Jago (1893), 68 L. T. 654 461
James, *Ex parte* (1803), 8 Ves. 337 157
———, *Ex parte*, *Re* Condon. *See* Condon, *Re*, *Ex parte* James.
——— *v.* Biou, Owen *v.* Flack (1826), 2 Sim. & St. 600 446
——— *v.* Dean (1805), 11 Ves. 383 155
——— *v.* James (1889), 23 Q. B. D. 12; 58 L. J. (Q. B.) 424; 61 L. T. 310; 37 W. R. 600, C. A. 433
——— *v.* Kerr (1889), 40 Ch. D. 449; 58 L. J. (CH.) 355; 60 L. T. 212; 53 J. P. 628; 37 W. R. 279 22, 92
——— *v.* Kynnier (1799), 5 Ves. 108 162
——— *v.* Landen (1585), Cro. Eliz. 36; Moore (K. B.), 181 325

PAGE
James *v.* Smith, [1891] 1 Ch. 384; 63 L. T. 524; 39 W. R. 396 . . . 75
"James Westoll," The, [1905] P. 47; 74 L. J. (P.) 9; 92 L. T. 150; 10 Asp. M. L. C. 29, C. A. 62, 64
Jameson *v.* Leitch (1842), Milw. 683 545
——— *v.* Swinton (1810), 2 Taunt. 224; 2 Camp. 373 495
Jaques, *Re*, Hodgson *v.* Braisby, [1903] 1 Ch. 267; 72 L. J. (CH.) 197; 88 L. T. 210; 51 W. R. 229, C. A. 133
Jared *v.* Clements, [1903] 1 Ch. 428; 72 L. J. (CH.) 291; 88 L. T. 97; 51 W. R. 401; 19 T. L. R. 219, C. A. 81
Jayne *v.* Price (1814), 5 Taunt. 326; 1 Marsh. 68 442, 498
Jeacock *v.* Falkener (1783), 1 Bro. C. C. 295 138, 139
Jeannot *v.* Fueerst (1909), 100 L. T. 816; 25 T. L. R. 424; 53 Sol. Jo. 449 . 364
Jeffereys *v.* Small (1683), 1 Vern. 217; 1 Eq. Cas. Abr. 290 69, 70
Jefferies *v.* Michell (1855), 20 Beav. 15 137
Jefferson *v.* Durham (Bishop) (1797), 1 Bos. & P. 105 49
Jeffery *v.* Walton (1816), 1 Stark. 267 567
Jefferys *v.* Jefferys (1841), Cr. & Ph. 138 97
Jeffries *v.* Alexander (1860), 8 H. L. Cas. 594 236
Jeffris *v.* Tomlinson (1886), 3 T. L. R. 193 619
Jeffs *v.* Wood (1723), 2 P. Wms. 128; 2 Eq. Cas. Abr. 15, 353 162
Jegon *v.* Vivian (1871), 6 Ch. App. 742; 40 L. J. (CH.) 389; 19 W. R. 365 . 71
Jenkins *v.* Merthyr Tydvil Urban District Council (1899), 80 L. T. 600 . . 349
——— *v.* Parkinson (1833), 2 My. & K. 5; 3 L. J. (CH.) 36; Coop. *temp.* Brough. 179 60
——— *v.* Robertson (1867), L. R. 1 Sc. & Div. 117 342
——— and Randall (H. E.) & Co.'s Contract, *Re*, [1903] 2 Ch. 362; 72 L. J. (CH.) 693; 88 L. T. 628 113
Jenkinson, *Re* (1857), 24 Beav. 64; 26 L. J. (CH.) 241; 3 Jur. (N. S.) 279; 5 W. R. 301 266, 269, 285
Jenks *v.* Ditton (1897), 76 L. T. 591 580
Jenkyn *v.* Jenkyn (1856), 5 W. R. 43 343
Jenner *v.* A'Beckett (1871), L. R. 7 Q. B. 11; 41 L. J. (Q. B.) 14; 25 L. T. 464; 20 W. R. 181 431
——— *v.* Jenner (1860), 2 De G. F. & J. 359; 30 L. J. (CH.) 201; 3 L. T. 488; 6 Jur. (N. S.) 214; 9 W. R. 109 18
——— *v.* Morgan (1717), 1 P. Wms. 392; 2 Eq. Cas. Abr. 704 29
——— *v.* Morris (1861), 3 De G. F. & J. 45; 30 L. J. (CH.) 361; 3 L. T. 871; 7 Jur. (N. S.) 375; 9 W. R. 391, C. A. 149, 150
Jennes, *Re*, Oetzes *v.* Jennes (1909), 53 Sol. Jo. 376 37
Jenney *v.* Andrews (1822), Madd. & G. 264 34
Jennings, *Re*, [1903] 1 Ch. 906; 72 L. J. (CH.) 454; 88 L. T. 387; 67 J. P. 367; 51 W. R. 425 512
——— *v.* Bond (1845), 8 I. Eq. R. 755 254
——— *v.* Mather, [1901] 1 Q. B. 108; 70 L. J. (Q. B.) 53; 83 L. T. 506; 8 Mans. 14 63
——— *v.* Rigby (1863), 33 Beav. 198; 33 L. J. (CH.) 149; 9 L. T. 308; 12 W. R. 32 35
——— *v.* Ward (1705), 2 Vern. 520; 1 Eq. Cas. Abr. 312 91
Jermy *v.* Preston (1842), 13 Sim. 356 111
Jerrard *v.* Saunders (1794), 2 Ves. 454 44, 76, 77
Jervis *v.* White (1802), 7 Ves. 413 53
——— *v.* Wolferstan (1874), L. R. 18 Eq. 18; 43 L. J. (CH.) 809; 30 L. T. 452 . 161, 234
Jervoise *v.* Jervoise (1853), 17 Beav. 566; 23 L. J. (CH.) 703; 2 W. R. 91 . . 121
Jessop, *Re*, [1910] W. N. 128; 54 Sol. Jo. 543, C. A. 626
Jessopp *v.* Watson (1833), 1 My. & K. 665; 2 L. J. (CH.) 197 108, 109
Jesus College *v.* Bloom (1745), 3 Atk. 262 43
Jeves *v.* Shadwell (1865), 1 Ch. App. 1; 35 L. J. (CH.) 124 . . 273, 274, 275, 276
Jew *v.* Thackwell (1663), 3 Rep. Ch. 7; Cas. in Ch. 31; Freem. (CH.) 174; Nels. 69 29
—— *v.* Wood (1841), Cr. & Ph. 185; 10 L. J. (CH.) 261; 3 Beav. 579; 5 Jur. 954 58, 405
Jewitt, *Re* (1864), 33 Beav. 559; 33 L. J. (CH.) 730; 10 L. T. 556; 10 Jur. (N. S.) 814; 12 W. R. 945 586
Jewon *v.* Grant (1677), 3 Swan. 659 161
Jewsbury *v.* Mummery (1872), L. R. 8 C. P. 56; 42 L. J. (C. P.) 22; 27 L. T. 618; 21 W. R. 270 331
Jewson *v.* Moulson (1742), 2 Atk. 417 94

PAGE
Job *v.* Job (1877), 6 Ch. D. 562 ; 26 W. R. 206 27, 48, 64
John *v.* John, [1898] 2 Ch. 573 ; 67 L. J. (CH.) 616 ; 79 L. T. 362 ; 47 W. R. 52 ; 14 T. L. R. 583, C. A. 55
Johnson, *Ex parte*, *Re* Chapman. *See* Chapman, *Re*, *Ex parte* Johnson.
———, *In the Goods of* (1897), 78 L. T. 85 503
———, *Re*, Shearman *v.* Robinson (1880), 15 Ch. D. 548 ; 49 L. J. (CH.) 745 ; 43 L. T. 372 ; 29 W. R. 168 150
——— *v.* Arnold (1748), 1 Ves. Sen. 169 105
——— *v.* Baker (1825), 2 C. & P. 207 210
——— *v.* Child (1844), 4 Hare, 87 145
——— *v.* Crédit Lyonnais (1877), 3 C. P. D. 32 ; 47 L. J. (Q. B.) 241 ; 37 L. T. 657 ; 26 W. R. 195, C. A. 379, 392, 398
——— *v.* Gallagher (1861), 3 De G. F. & J. 494 ; 30 L. J. (CH.) 298 ; 4 L. T. 72 ; 7 Jur. (N. S.) 273 ; 9 W. R. 506, C. A. 380
——— *v.* Hadley, *Re* Hadley. *See* Hadley, *Re*, Johnson *v.* Hadley.
——— *v.* Kearley, [1908] 2 K. B. 514 ; 77 L. J. (K. B.) 904 ; 99 L. T. 506 ; 24 T. L. R. 729, C. A. 495
——— *v.* Lawson (1824), 9 Moore (C. P.), 183 ; 2 L. J. (O. S.) (C. P.) 136 ; 2 Bing. 86 470
——— *v.* Mason (1794), 1 Esp. 89 405, 605
——— *v.* Medlicott (1734), 3 P. Wms., 6th ed., 130, note [A] 16
——— *v.* Mills (1749), 1 Ves. Sen. 282 52
——— *v.* Pye (1665), 1 Sid. 258 ; 1 Lev. 169 ; 1 Keb. 905 380
——— *v.* Raylton (1881), 7 Q. B. D. 438 ; 50 L. J. (Q. B.) 753 ; 45 L. T. 374 ; 30 W. R. 350, C. A. 444
——— *v.* Thompson (1850), 15 L. T. (O. S.) 437 530
——— *v.* Ward (1806), 6 Esp. 47 530, 544
——— *v.* Wild (1890), 44 Ch. D. 146 ; 59 L. J. (CH.) 322 ; 62 L. T. 537 ; 38 W. R. 500 30
——— *v.* Wyatt (1863), 2 De G. J. & Sm. 18 ; 33 L. J. (CH.) 394 ; 9 Jur. (N. S.) 1333 ; 12 W. R. 234 169
Johnston, *Re*, Cockerell *v.* Essex (Earl) (1884), 26 Ch. D. 538 ; 53 L. J. (CH.) 645 ; 52 L. T. 44 ; 32 W. R. 634 241, 281
Johnston Foreign Patents Co., Ltd., *Re*, *Re* Johnston Die Press Co., Ltd., *Re* Johnstonia Engraving, Ltd., J. P. Trust, Ltd. *v.* Above Cos., [1904] 2 Ch. 234 ; 73 L. J. (CH.) 617 ; 91 L. T. 124, C. A. 74, 75
Johnstone *v.* Harrowby (Earl) (1859), 1 De G. F. & J. 183 ; 29 L. J. (CH.) 145 ; 1 L. T. 390 ; 6 Jur. (N. S.) 153 ; 8 W. R. 105 241
——— *v.* Haviland, [1896] A. C. 95 ; 23 Rettie (H. L.), 6 ; 33 Sc. L. R. 511 ; 3 Scots Law Times, 279 129
——— *v.* Huddlestone (1825), 4 B. & C. 922 ; 7 Dow. & Ry. (K. B.) 411 ; 4 L. J. (O. S.) (K. B.) 71 375
——— *v.* Spencer (Earl) (1885), 30 Ch. D. 581 ; 53 L. T. 502 ; 34 W. R. 10...445, 540
Joicey *v.* Dickinson (1881), 26 Sol. Jo. 109 71
Jolland *v.* Stainbridge (1797), 3 Ves. 478 86
Jolley, *Re*, Neal *v.* Jolley (1901), 17 T. L. R. 244 220, 223
——— *v.* Taylor (1807), 1 Camp. 143 521
Jolliffe, *Ex parte* (1845), 8 Beav. 168 ; 14 L. J. (CH.) 134 ; 10 Jur. 813 . . . 553
Jolly *v.* Arbuthnot (1859), 4 De G. & J. 224 ; 28 L. J. (CH.) 547 ; 5 Jur. (N. S.) 689 ; 7 W. R. 532, C. A. 367
Joly *v.* Swift (1847), 11 I. Eq. R. 410 326
Jones, *Ex parte*, *Re* London and Northern Bank. *See* London and Northern Bank, *Re*, *Ex parte* Jones.
———, *Re*, Calvert *v.* Laxton (1885), 31 Ch. D. 440 ; 55 L. J. (CH.) 350 ; 53 L. T. 855 ; 34 W. R. 249 37
———, *Re*, Farrington *v.* Forrester, [1893] 2 Ch. 461 ; 62 L. J. (CH.) 996 ; 69 L. T. 45 ; 3 R. 498 41
——— *v.* Alephsin (1810), 16 Ves. 470 60
——— *v.* Ashwin (1883), Cab. & El. 159 391
——— *v.* Badley (1868), 3 Ch. App. 362 ; 19 L. T. 106 ; 16 W. R. 713 75
——— *v.* Bailey (1853), 17 Beav. 582 93
——— *v.* Bangor Mutual Society (1890), 61 L. T. 727 388, 389
——— *v.* Bow (1692), Carth. 225 ; Holt (K. B.), 285 363
——— *v.* Brewer (1811), 4 Taunt. 46 547, 605
——— *v.* Clifford (1876), 3 Ch. D. 779 ; 45 L. J. (CH.) 809 ; 32 L. T. 93 . . 24, 25
——— *v.* Edwards (1825), M'Cle. & Yo. 139 522
——— *v.* Fort (1828), Mood. & M. 196 428
——— *v.* Foxall (1852), 15 Beav. 388 ; 21 L. J. (CH.) 725 558

PAGE

Jones *v.* Frost, *Re* Fiddey. *See* Fiddey, *Re*, Jones *v.* Frost.
—— *v.* Gibbons (1804), 9 Ves. 407 80
—— *v.* Goodsall (1843), 2 Hare, 342 305
—— *v.* Harris (1804), 9 Ves. 486 9
—— *v.* Higgins (1866), L. R. 2 Eq. 538; 35 L. J. (CH.) 403; 14 L. T. 126; 14 W. R. 448 173
—— *v.* Howells (1843), 2 Hare, 342; 12 L. J. (CH.) 365 305
—— *v.* Humphreys, [1902] 1 K. B. 10; 71 L. J. (K. B.) 23; 50 W. R. 191 . 103
—— *v.* Jones (1785), 1 Cox, Eq. Cas. 184 547
—— *v.* —— (1838), 8 Sim. 633; 7 L. J. (CH.) 164; 2 Jur. 589 80
—— *v.* ——, [1895] P. 201; 64 L. J. (P.) 84; 72 L. T. 662; 59 J. P. 360; 43 W. R. 656 569
—— *v.* Lenthal (1669), 1 Cas. in Ch. 154; 1 Eq. Cas. Abr. 36 72
—— *v.* Lewis (1751), 2 Ves. Sen. 240 27
—— *v.* Littledale (1837), 6 Ad. & El. 486; 1 Nev. & P. (K. B.) 677; 6 L. J. (K. B.) 169 387
—— *v.* Lloyd (1874), L. R. 18 Eq. 265; 43 L. J. (CH.) 826; 30 L. T. 487; 22 W. R. 785 38, 128
—— *v.* Lock (1865), 1 Ch. App. 25; 35 L. J. (CH.) 117; 13 L. T. 514; 11 Jur. (N. S.) 913; 14 W. R. 149 98
—— *v.* Mitchell (1823), 1 Sim. & St. 290; 1 L. J. (O. S.) (CH.) 163 . . . 108
—— *v.* Morgan (1783), 1 Bro. C. C. 206 95
—— *v.* Morrell (1844), 1 Car. & Kir. 266 459
—— *v.* Mossop (1844), 3 Hare, 568 163
—— *v.* Nixon (1831), You. 359 334
—— *v.* North Vancouver Land and Improvement Co., [1910] A. C. 317; 102 L. T. 377 389, 396
—— *v.* Peppercorne (1858), John. 430; 28 L. J. (CH.) 158; 5 Jur. (N. S.) 140; 7 W. R. 103 485
—— *v.* Powles (1834), 3 My. & K. 581; 3 L. J. (CH.) 210 82
—— *v.* Randall (1774), 1 Cowp. 17 551
—— *v.* Reynolds (1836), 7 C. & P. 335 355
—— *v.* Sampson (1803), 8 Ves. 593 60
—— *v.* Smith (1841), 1 Hare, 43; 12 L. J. (CH.) 381; 6 Jur. 8; (1843), 1 Ph. 244 86, 87
—— *v.* Stroud (1825), 2 C. & P. 196 595, 596
—— *v.* Thomas (1733), 3 P. Wms. 243 76
—— *v.* ——— (1854), 2 Sm. & G. 186 57
—— *v.* White (1717), 1 Stra. 68 531
—— *v.* Williams (1817), 2 Stark. 52 366
—— *v.* ——— (1837), 2 M. & W. 326; Murp. & H. 51 442, 452
—— *v.* ——— (1841), 7 M. & W. 493; 9 Dowl. 252 347
—— *v.* ——— (1857), 24 Beav. 47; 3 Jur. (N. S.) 1066; 5 W. R. 775 . . 86
—— *v.* Yates (1829), 9 B. & C. 532; 4 Man. & Ry. (K. B.) 613 . . . 344, 348
Jones's Trust, *Re* (1852), 21 L. J. (CH.) 566 253
Jope *v.* Morshead (1843), 6 Beav. 213; 12 L. J. (CH.) 190 40
Jorden *v.* Money (1854), 5 H. L. Cas. 185; 23 L. J. (CH.) 865 . 48, 166, 376, 377, 378, 382
Jory *v.* Orchard (1799), 2 Bos. & P. 39 522
Joseph *v.* Lyons (1884), 15 Q. B. D. 280; 54 L. J. (Q. B.) 1; 51 L. T. 740; 33 W. R. 145, C. A. 64
Joy, *Re*, Lalor *v.* Jones (1880), 5 L. R. Ir. 282 312
—— *v.* Birch (1836), 4 Cl. & Fin. 57 153
Joyce *v.* De Moleyns (1844), 2 Jo. & Lat. 374; 8 I. Eq. R. 215 . . . 76, 77
Joynson *v.* Hunt & Son (1905), 93 L. T. 470; 21 T. L. R. 692, C. A. . . 445
Jump, *Re*, Galloway *v.* Hope, [1903] 1 Ch. 129; 72 L. J. (CH.) 16; 87 L. T. 502; 51 W. R. 266 111, 113, 114
Jungheim, Hopkins & Co. *v.* Foukelmann, [1909] 2 K. B. 948; 78 L. J. (K. B.) 1132; 101 L. T. 398; 25 T. L. R. 819; 53 Sol. J. 790 . . 353, 364, 389, 390

K.

KAIN *v.* Farrer (1877), 37 L. T. 469 573
Katama Natchiar *v.* Shivagunga (Rajah) (1863), 9 Moo. Ind. App. 539 . . 329
Kay *v.* Brookman (1828) 3 C. & P. 555 605
Keable *v.* Payne (1838), 8 Ad. & El. 555; 3 Nev. & P. (Q. B.) 531; 1 Will. Woll. & H. 383; 7 L. J. (Q. B.) 218; 3 Jur. 40 517

PAGE
Keane *v.* O'Brien (1871), 5 I. R. C. L. 531 356
Kearney *v.* King (1819), 2 B. & Ald. 301; 1 Chit. 28 494
Keate *v.* Phillips (1881), 18 Ch. D. 577; 50 L. J. (CH.) 664; 44 L. T. 731; 29 W. R. 710 345, 347, 374
Keates *v.* Cadogan (Earl) (1851), 10 C. B. 591; 20 L. J. (C. P.) 76; 15 Jur. 428...14, 15
Keech *v.* Sandford (1726), Cas. *temp.* King, 61 155
Keeley *v.* Wakley (1893), 9 T. L. R. 571 614
Keeling *v.* Ball (1796), Peake, Add. Cas. 88 511, 605
Keene *v.* Biscoe (1878), 8 Ch. D. 201; 47 L. J. (CH.) 644; 38 L. T. 286; 26 W. R. 552 152, 165
Keighley, Maxsted & Co. and Durant & Co., *Re*, [1893] 1 Q. B. 405; 7 Asp. M. L. C. 268; 62 L. J. (Q. B.) 105; 68 L. T. 61; 41 W. R. 437; 4 R. 136, C. A. 433
Keith *v.* Gancia (R.) & Co., Ltd., [1904] 1 Ch. 774; 73 L. J. (CH.) 411; 90 L. T. 395; 52 W. R. 532; 20 T. L. R. 330 386
Kekewich *v.* Kekewich (1909), 101 L. T. 887 222
Kekewick *v.* Manning (1851), 1 De G. M. & G. 176; 21 L. J. (CH.) 577; 16 Jur. 625, C. A. 98
Kelland *v.* Fulford (1877), 6 Ch. D. 491; 25 W. R. 506 111
Kelly *v.* Solari (1841), 9 M. & W. 54; 6 Jur. 107 22
Kelner *v.* Baxter (1866), L. R. 2 C. P. 174; 36 L. J. (C. P.) 94; 15 L. T. 313; 12 Jur. (N. S.) 1016; 15 W. R. 278 387
Kemp *v.* King (1842), 2 Mood. & R. 437; Car. & M. 396 581
——— *v.* Neville (1861), 10 C. B. (N. S.) 523; 31 L. J. (C. P.) 158; 4 L. T. 640; 7 Jur. (N. S.) 913; 10 W. R. 6 363
——— *v.* Pryor (1802), 7 Ves. 237 11, 26, 53
Kempster, *Re*, Kempster *v.* Kempster, [1906] 1 Ch. 446; 75 L. J. (CH.) 286; 94 L. T. 248; 54 W. R. 385 37, 145
Kenah's Trusts, *Re* (1867), 15 W. R. 781 628
Kendall, *Ex parte* (1811), 17 Ves. 514 39, 142
——— *v.* Hamilton (1878), 3 C. P. D. 403; 47 L. J. (Q. B.) 665; 39 L. T. 250; 27 W. R. 121, C. A.; affirmed (1879), 4 App. Cas. 504; 48 L. J. (Q. B.) 705; 41 L. T. 418; 28 W. R. 97, C. A. 39, 335, 336
Kenlis (Lord) *v.* Hodgson, [1895] 2 Ch. 458; 64 L. J. (CH.) 585; 72 L. T. 866; 13 R. 603 248, 251
Kenn's Case (1606), 7 Co. Rep. 42 b; Cro. Jac. 186; Jenk. 289 362, 363
Kennedy, *Ex parte*, *Re* Great Northern Salt and Chemical Works. *See* Great Northern Salt and Chemical Works, *Re*, *Ex parte* Kennedy.
——— *v.* Daly (1804), 1 Sch. & Lef. 355 93
——— *v.* Dodson, [1895] 1 Ch. 334; 64 L. J. (CH.) 257; 72 L. T. 172; 43 W. R. 259; 12 R. 92, C. A. 452
——— *v.* Green (1834), 3 My. & K. 699 85
——— *v.* Lyell (1889), 14 App. Cas. 437; 59 L. J. (Q. B.) 268; 62 L. T. 77; 38 W. R. 353 156, 475, 485, 534, 535, 543
——— *v.* Panama Royal Mail Co. (1867), L. R. 2 Q. B. 580; 8 B. & S. 571; 36 L. J. (Q. B.) 260; 17 L. T. 62; 15 W. R. 1039 23
Kennoule (Lord) *v.* Bedford (Earl) (1676), 1 Cas. in Ch. 295; 1 Eq. Cas. Abr. 31. 70
Kensington (Baron), *Re*, Longford (Earl) *v.* Kensington (Baron), [1902] 1 Ch. 203; 71 L. J. (CH.) 170; 85 L. T. 577; 50 W. R. 201; 18 T. L. R. 89 117
——— *v.* Inglis (1807), 8 East, 273 595, 596
Kent *v.* Jackson (1851), 14 Beav. 367 166
Kenyon *v.* Worthington (1786), 2 Dick. 668 33
Kepitigalla Rubber Estates, Ltd. *v.* National Bank of India, Ltd., [1909] 2 K. B. 1010; 78 L. J. (K. B.) 964; 100 L. T. 516; 25 T. L. R. 402; 53 Sol. Jo. 377; 14 Com. Cas. 116; 16 Mans. 234 388, 399, 400, 401, 458
Kepp *v.* Wiggett (1850), 10 C. B. 35; 20 L. J. (C. P.) 49; 14 Jur. 1137 . . . 372
Ker *v.* Ker (1869), 4 I. R. Eq. 15, C. A. 69, 143
—— *v.* Wauchope (1819), 1 Bli. 1 117, 123
Kernick *v.* Kernick (1864), 9 L. T. 800; 12 W. R. 335 626
Kerrich *v.* Bransby (1727), 7 Bro. Parl. Cas. 437 13
"Kestrel," The (1881), 6 P. D. 182; 4 Asp. M. L. C. 433; 45 L. T. 111; 30 W. R. 182 480
Kettlewell *v.* Watson (1882), 21 Ch. D. 685; 51 L. J. (CH.) 281; 46 L. T. 83; 30 W. R. 402; (1884), 26 Ch. D. 501; 53 L. J. (CH.) 717; 51 L. T. 135; 32 W. R. 865, C. A. 79, 82, 92
Kevan *v.* Mawson (1871), 24 L. T. 395 370
Key *v.* Cotesworth (1852), 7 Exch. 595; 22 L. J. (EX.) 4 430

PAGE
Keys *v.* Williams (1838), 3 Y. & C. (EX.) 55 ; 3 Jur. 950 71
Kidd and Gibbon's Contract, *Re*, [1893] 1 Ch. 695 ; 62 L. J. (CH.) 436 ; 68 L. T. 647 ; 41 W. R. 507 ; 3 R. 268 299
Kidderminster Corporation *v.* Hardwick (1873), L. R. 9 Exch. 13 ; 43 L. J. (EX.) 9 ; 29 L. T. 612 ; 22 W. R. 160 358
Kidney *v.* Cockburn (1831), 2 Russ. & M. 167 560
——— *v.* Coussmaker (1806), 12 Ves. 136 119, 125
Kilbee *v.* Sneyd (1828), 2 Mol. 186 543
Kildare (Earl) *v.* Eustace (1686), 1 Vern. 419 ; 2 Cas. in Ch. 188 ; 1 Eq. Cas. Abr. 133 65
Kimpton *v.* London and North Western Rail. Co. (1854), 9 Exch. 766 ; 2 C. L. R. 1026 ; 23 L. J. (EX.) 232 ; 2 W. R. 430 586, 588
Kinderley *v.* Jervis (1856), 22 Beav. 1 ; 25 L. J. (CH.) 538 ; 2 Jur. (N. S.) 602 ; 4 W. R. 579 79
Kindersley *v.* Chase (1801), Park on Marine Insurance, 8th ed. 743 . . . 341
Kine *v.* Beaumont (1822), 3 Brod. & Bing. 288 ; 7 Moore (C. P.), 112 . . 521, 522
——— *v.* Jolly, [1905] 1 Ch. 480 ; 74 L. J. (CH.) 174 ; 92 L. T. 209 ; 53 W. R. 462 ; 21 T. L. R. 128, C. A. 51
King, *Ex parte* (1802), 7 Ves. 312 586
———, *Re*, Mellor *v.* South Australia Land Mortgage and Agency Co., [1907] 1 Ch. 72 ; 76 L. J. (CH.) 44 ; 95 L. T. 724 160
———, *Re*, Travers *v.* Kelly, [1904] 1 Ch. 363 ; 73 L. J. (CH.) 210 ; 90 L. T. 281 ; 52 W. R. 230 ; 20 T. L. R. 187 231
——— *v.* Birch (1842), 3 Q. B. 425 ; 2 Gal. & Dav. 513 ; 11 L. J. (Q. B.) 183 . 548
——— *v.* Clerk (1697), 1 Salk. 349 ; 5 Mod. Rep. 319 ; Holt (K. B.), 430 ; Comb. 411 ; 12 Mod. Rep. 113 ; Com. 24 486
——— *v.* Hamlett (1834), 2 My. & K. 456 ; Coop. *temp.* Brough. 481 21
——— *v.* Henderson, [1898] A. C. 720 ; 67 L. J. (P. C.) 134 ; 79 L. T. 37 ; 47 W. R. 157 ; 14 T. L. R. 490 353, 483
——— *v.* Hoare (1844), 13 M. & W. 494 ; 2 Dow. & L. 383 ; 14 L. J. (EX.) 29 . 335, 336
——— *v.* King (1864), 15 I. Ch. R. 479 119
——— *v.* Norman (1847), 4 C. B. 884 ; 17 L. J. (C. P.) 23 ; 11 Jur. 824 . 347, 484
——— *v.* Savery (1853), 1 Sm. & G. 271 ; 1 W. R. 141 ; *sub nom.* Savery *v.* King (1856), 5 H. L. Cas. 627 21
——— *v.* Smith, [1900] 2 Ch. 425 ; 69 L. J. (CH.) 598 ; 83 L. T. 815 ; 16 T. L. R. 410 369, 372, 383, 388
——— *v.* Spencer (1904), 20 Cox, C. C. 692 ; 91 L. T. 470 ; 2 L. G. R. 979 ; 68 J. P. 530 445
——— *v.* Victoria Insurance Co., [1896] A. C. 250 ; 65 L. J. (P. C.) 38 ; 74 L. T. 206 ; 44 W. R. 592 149
——— *v.* Zimmerman (1871), L. R. 6 C. P. 466 ; 40 L. J. (C. P.) 278 ; 24 L. T. 623 ; 19 W. R. 1009 26
——— & Co.'s Trade-mark, *Re*, [1892] 2 Ch. 462 ; 62 L. J. (CH.) 153 ; 66 L. T. 491, C. A. 629
King's Leasehold Estates, *Re*, *Ex parte* East of London Rail. Co. (1873), L. R. 16 Eq. 521 ; 29 L. T. 288 ; 21 W. R. 881 76
——— Trusts, *Re* (1892), 29 L. R. Ir. 401 281
Kingdon and Wilson, *Re*, [1902] 2 Ch. 242 ; 71 L. J. (CH.) 604 ; 86 L. T. 639 ; 50 W. R. 533 ; 18 T. L. R. 588, C. A. 215, 316
Kingsford *v.* Merry (1856), 1 H. & N. 503 ; 26 L. J. (CH.) 83 ; 3 Jur. (N. S.) 68 ; 5 W. R. 151 379, 393, 396
Kingston's (Duchess) Case (1776), 2 Smith, L. C., 11th ed., 731 ; 20 State Tr. 537 ; 34 Lords' Journal, 655 . 323, 328, 329, 339, 342, 343, 351, 362, 363, 483, 543, 595
Kinloch-Cooke *v.* Public Trustee, *Re* Conwell's Trusts. *See* Conwell's Trusts, *Re*, Kinloch-Cooke *v.* Public Trustee.
Kinnaird (Lord) *v.* Field, [1905] 2 Ch. 306 ; 74 L. J. (CH.) 554 ; 93 L. T. 147 ; 54 W. R. 3, C. A. 59
Kinnersley *v.* Orpe (1780), 2 Doug. (K. B.) 517 346, 544
Kinnis *v.* Graves (1898), 67 L. J. (Q. B.) 583 ; 78 L. T. 502 ; 46 W. R. 480 . . 334
Kinsey *v.* Kinsey (1754), 2 Ves. Sen. 577 ; 1 Atk. 809 326
Kirby *v.* Harrogate School Board, [1896] 1 Ch. 437 ; 65 L. J. (CH.) 376 ; 74 L. T. 6 ; 60 J. P. 182, C. A. 104
Kirk, *Re*, Kirk *v.* Kirk (1882), 21 Ch. D. 431 ; 47 L. T. 36 ; 31 W. R. 49, C. A. . 232
——— *v.* Eddowes (1844), 3 Hare, 509 130, 139
Kirkham *v.* Smith (1749), 1 Ves. Sen. 258 118, 116
Kirkman *v.* Miles (1807), 13 Ves. 338 115

PAGE
Kirkstall Brewery Co. *v.* Furness Rail. Co. (1874), L. R. 9 Q. B. 468 ; 43 L. J. (Q. B.) 142 ; 30 L. T. 783 ; 22 W. R. 876 461
Kirwan *v.* Kennedy (1869), 3 I. R. Eq. 472 170
Kitcat *v.* Sharp (1882), 52 L. J. (CH.) 134 ; 48 L. T. 64 ; 31 W. R. 227 . 557, 558
Kitchin, *Re*, *Ex parte* Young (1881), 17 Ch. D. 668 ; 50 L. J. (CH.) 824 ; 45 L. T. 90, C. A. 461, 484
Klingeman, *In the Goods of* (1862), 3 Sw. & Tr. 18 ; 32 L. J. (P. & M.) 16 ; 8 L. T. 172 ; 11 W. R. 218 477
Knapping *v.* Tomlinson, Knapping *v.* Bannester (1870), 18 W. R. 684 . . 114
Knatchbull *v.* Fowle (1876), 1 Ch. D. 604 ; 24 W. R. 629 620
——— *v.* Hallett, *Re* Hallett's Estate. *See* Hallett's Estate, *Re*, Knatchbull *v.* Hallett.
Knight *v.* Bowyer (1858), 2 De G. & J. 421 ; 27 L. J. (CH.) 520 ; 4 Jur. (N. S.) 569 ; 6 W. R. 565, C. A. 88
——— *v.* Clarke (1885), 15 Q. B. D. 294 ; 54 L. J. (Q. B.) 509 ; 50 J. P. 84, C. A. 404
——— *v.* Clements (1838), 8 Ad. & El. 215 ; 3 Nev. & P. (Q. B.) 375 ; 1 Will. Woll. & H. 280 ; 7 L. J. (Q. B.) 144 ; 2 Jur. 395 506
——— *v.* Cox (1856), 18 C. B. 645 405, 406
——— *v.* Knight (1734), 3 P. Wms. 331 ; 2 Eq. Cas. Abr. 169 10
——— *v.* ——— (1840), 3 Beav. 148 155
——— *v.* Martin (1819), Gow, 103 521, 606
——— *v.* Simmonds, [1896] 2 Ch. 294 ; 65 L. J. (CH.) 583 ; 74 L. T. 563 ; 44 W. R. 580, C. A. 102
——— *v.* Waterford (Marquis) (1840), 4 Y. & C. (EX.) 293 464
——— *v.* Williams, [1910] 1 Ch. 256 ; 70 L. J. (CH.) 92 ; 42 W. R. 427 ; 83 L. T. 730 375
——— *v.* Young (1813), 2 Ves. & B. 184 608
Knights *v.* Atkyns (1687), 2 Vern. 20 ; 2 Rep. Ch. 400 ; 1 Eq. Cas. Abr. 274 . 107
——— *v.* Wiffen (1870), L. R. 5 Q. B. 660 ; 40 L. J. (Q. B.) 51 ; 23 L. T. 610 ; 19 W. R. 244 378, 384, 386, 410
Knott, *Ex parte* (1806), 11 Ves. 609 84
Knox *v.* Gye (1872), L. R. 5 H. L. 656 ; 42 L. J. (CH.) 234 175
"Knutsford," The, [1891] P. 219 ; 64 L. T. 352 ; 39 W. R. 559 ; 7 Asp. M. L. C. 33 616
Kolchmann *v.* Meurice, [1903] 1 K. B. 534 ; 72 L. J. (K. B.) 289 ; 88 L. T. 369 ; 51 W. R. 356 ; 19 T. L. R. 254, C. A. 62
Kufh *v.* Weston (1799), 3 Esp. 54 441
Kurtz & Co. *v.* Spence & Sons (1887), 57 L. J. (CH.) 238 ; 58 L. T. 438 . 457, 558

L.

LA BANQUE JACQUES-CARTIER *v.* La Banque d'Epargne de la Cité et du District de Montreal (1887), 13 App. Cas. 111 ; 57 L. J. (P. C.) 42 170, 424
Lacey, *Ex parte* (1802), 6 Ves. 625 157
———, *Re*, Howard *v.* Lightfoot, [1907] 1 Ch. 330 ; 76 L. J. (CH.) 316 ; 96 L. T. 306, C. A. 173
Lacon, *Re*, Lacon *v.* Lacon, [1891] 2 Ch. 482 ; 60 L. J. (CH.) 403 ; 64 L. T. 429 ; 39 W. R. 514, C. A. 129, 130, 568
——— *v.* Higgins (1822), 3 Stark. 178 ; Dow. & Ry. (N. P.) 38 489
Lagos *v.* Grunwaldt, [1910] 1 K. B. 41 ; 19 L. J. (K. B.) 85 ; 101 L. T. 620 ; 26 T. L. R. 69 ; 54 Sol. Jo. 216, C. A. 626
La Grange *v.* McAndrew (1879), 4 Q. B. D. 210 ; 48 L. J. (Q. B.) 315 ; 39 L. T. 500 ; 27 W. R. 413 64
Laidlay *v.* Lord Advocate (1890), 15 App. Cas. 468 ; 17 Rettie (H. L.), 67 ; 27 Sc. L. R. 1035 310, 311
Laidler *v.* Coates, R. *v.* Dexter. *See* R. *v.* Dexter, Laidler *v.* Coates.
Laing *v.* Kaine (1800), 2 Bos. & P. 85 606
Lainson *v.* Tremere (1834), 1 Ad. & El. 792 ; 3 Nev. & M. (K. B.) 603 ; 4 L. J. (K. B.) 207 366, 367, 372
Laird *v.* Pim (1841), 7 M. & W. 474 ; 8 Dowl. 860 ; 10 L. J. (EX.) 259 . . . 98
Laire *v.* Phillips (1765), 3 Burr. 1776 486
Lake *v.* Bell, *Re* Bell. *See* Bell, *Re*, Lake *v.* Bell.
——— *v.* Billers (1698), 1 Ld. Raym. 733 544
——— *v.* Craddock (1732), 3 P. Wms. 158 39, 69
——— *v.* Gibson (1729), 1 Eq. Cas. Abr. 290 70
——— *v.* King (1668), 1 Wms. Saund. 131 b ; Sid. 414 ; 1 Mod. Rep. 58 ; 1 Lev. 240 ; 2 Keb. 361 ; Hard. 470 485, 492
Lakin *v.* Lakin (1865), 34 Beav. 443 501

PAGE
Lalor *v.* Jones, *Re* Joy. *See* Joy, *Re*, Lalor *v.* Jones.
Lamb, *Re* (1889), 23 Q. B. D. 5; 58 L. J. (Q. B.) 455; 37 W. R. 506 . . 215, 316
——— *v.* Evans, [1893] 1 Ch. 218; 62 L. J. (CH.) 404; 68 L. T. 131; 41 W. R. 405; 2 R. 189, C. A. 156
——— *v.* Lamb (1857), 5 W. R. 772 128
——— *v.* Munster (1882), 10 Q. B. D. 110; 52 L. J. (Q. B.) 46; 47 L. T. 442; 31 W. R. 117 574
Lambe *v.* Eames (1871), 6 Ch. App. 597; 40 L. J. (CH.) 447 155
——— *v.* Orton (1859), 8 W. R. 111 501
Lambert's Estate, *Re*, Stanton *v.* Lambert (1888), 39 Ch. D. 626; 57 L. J. (CH.) 927; 59 L. T. 429 317
——— Trusts, *Re* (1886), 56 L. T. 15; 56 L. J. (CH.) 122 559
Lamont *v.* Crook (1840), 6 M. & W. 615; 8 Dowl. 737; 4 Jur. 489 . . 579, 590
Lampet's Case (1612), 10 Co. Rep. 46 b; 2 Brownl. 172 102
Lampon *v.* Corke (1822), 5 B. & Ald. 606; 1 Dow. & Ry. (K. B.) 211 . . . 562
Lanauze *v.* Palmer (1827), Mont. & M. 31 521
Lancefield *v.* Iggulden (1874), 10 Ch. App. 136; 44 L. J. (CH.) 203 . . . 145
Land Credit Co. of Ireland, *Re*, *Ex parte* Overend, Gurney & Co. (1869), 4 Ch. App. 460; 39 L. J. (CH.) 27; 20 L. T. 641; 17 W. R. 689 381
Lander and Bagley's Contract, *Re*, [1892] 3 Ch. 41; 61 L. J. (CH.) 707; 67 L. T. 521 568
Lane *v.* Bagshaw (1855), 16 C. B. 576; 3 C. L. R. 919 612
——— *v.* Capsey, [1891] 3 Ch. 411; 61 L. J. (CH.) 55; 65 L. T. 375; 40 W. R. 87 . 55
Lane's Case (1586), 2 Co. Rep. 16 b; 1 Leon. 170; 1 And. 191; Gouldsb. 34...486, 495
Lanesborough (Lord) *v.* Jones (1716), 1 P. Wms. 325 162
Lang *v.* Lang (1837), 8 Sim. 451; 6 L. J. (CH.) 324; 1 Jur. 472 141
Langdon *v.* Hulls (1804), 5 Esp. 156 521
Langen *v.* Tate (1883), 24 Ch. D. 522; 53 L. J. (CH.) 361; 49 L. T. 758; 32 W. R. 189, C. A. 612, 614
Langford *v.* Selmes (1857), 3 K. & J. 220; 3 Jur. (N. S.) 859 . . . 373, 403
Langham *v.* Thompson, *Re* Thompson. *See* Thompson, *Re*, Langham *v.* Thompson.
Langham's Contract, *Re* (1890), 39 W. R. 156, C. A. 299
Langley *v.* Oxford (Lord) (1836), 1 M. & W. 508; 2 Gale, 63; 5 L. J. (EX.) 166.. 462
Langmead *v.* Maple (1865), 18 C. B. (N. S.) 255; 11 Jur. (N. S.) 177; 12 L. T. 143; 13 W. R. 469 326, 349, 359
Langslow *v.* Langslow (1856), 21 Beav. 552; 25 L. J. (CH.) 610; 2 Jur. (N. S.) 1057 119, 122
Langston, *Ex parte* (1810), 17 Ves. 227 92
——— *v.* Boylston (1793), 2 Ves. 101 57
Langton *v.* Higgs (1832), 5 Sim. 228; 1 L. J. (CH.) 150 37
——— *v.* Horton (1841), 3 Beav. 464 48
——— *v.* ——— (1842), 1 Hare, 549; 11 L. J. (CH.) 299; 6 Jur. 910 . . 74
——— *v.* Scott, *Re* Scott. *See* Scott, *Re*, Langton *v.* Scott.
Lanoy *v.* Athol (Duke and Duchess) (1742), 2 Atk. 444 . . . 142, 143, 144
Lansdown *v.* Lansdown (1730), Mos. 364; 2 Jac. & W. 205, n. 24
Lansdowne (Marchioness) *v.* Lansdowne (Marquis) (1820), 2 Bli. 60 . . . 43
Lapsley *v.* Grierson (1848), 1 H. L. Cas. 498 502
Larrard, *Re*, *Ex parte* Yeomans and Heap (1896), 3 Mans. 317, C. A. . 334, 348
Lart, *Re*, Wilkinson *v.* Blades, [1896] 2 Ch. 788; 65 L. J. (CH.) 846; 75 L. T. 175; 45 W. R. 27 348, 365
Lascelles *v.* Butt (1876), 2 Ch. D. 588; 35 L. T. 122; affirmed, 24 W. R. 659, C. A. 39
Latkow *v.* Eamer (1795), 2 Hy. Bl. 437 531
La Trinidad *v.* Browne, [1887] W. N. 208 619
Lauderdale Peerage, The (1885), 10 App. Cas. 692 534
"Laura," The (1865), 3 Moo. P. C. C. (N. S.) 181 375
Laurance *v.* Dixon (1792), Peake, 185 538
Laurie (Petitioner) (1898), 35 Sc. L. R. 496; 25 R. (Ct. of Sess.) 636; 5 Scots Law Times, 334 221
——— *v.* Clutton (1852), 15 Beav. 131; 21 L. J. (CH.) 226; 16 Jur. 825 . . 233
Law *v.* Redditch Local Board, [1892] 1 Q. B. 127; 61 L. J. (Q. B.) 172; 66 L. T. 76; 56 J. P. 292, C. A. 151
Lawder's Estate, *Re* (1861), 11 I. Ch. R. 346 144
Lawes, *Re*, Lawes *v.* Lawes (1881), 20 Ch. D. 81; 45 L. T. 453; 30 W. R. 33, C. A. 132, 133
——— *v.* Bennett (1785), 1 Cox, Eq. Cas. 167 111
——— *v.* Purser (1856), 6 E. & B. 930; 26 L. J. (Q. B.) 25; 3 Jur. (N. S.) 182; 5 W. R. 43 413

PAGE
Lawes *v.* Reed (1835), 2 Lew, C. C. 152 596
Lawford *v.* Bruce, *Re* Bruce. *See* Bruce, *Re*, Lawford *v.* Bruce.
Lawley *v.* Hooper (1745), 3 Atk. 278 14
——— *v.* Lawley (1717), Jac. 71, n. 90
Lawrence *v.* Lawrence (1699), 2 Vern. 365 ; 1 Eq. Cas. Abr. 218 ; Freem. (CH.) 234 121
Lawson *v.* Inland Revenue Commissioners, [1896] 2 I. R. 418 . . . 193, 235
——— *v.* Quare (1887), 32 Sol. Jo. 24 ; 84 L. T. Jo. 25 620
——— *v.* Vacuum Brake Co. (1884), 27 Ch. D. 137 ; 54 L. J. (CH.) 16 ; 51 L. T. 275 ; 33 W. R. 186, C. A. 614
Lea *v.* Fish, *Re* Fish. *See* Fish, *Re*, Lea *v.* Fish.
—— *v.* Wheatley (1678), 20 State Tr. 574, n. 572
Leach *v.* Leach, *Re* Smyth. *See* Smyth, *Re*, Leach *v.* Leach.
Leacroft *v.* Harris, *Re* Harris. *See* Harris, *Re*, Leacroft *v.* Harris.
Leader *v.* Barry (1795), 1 Esp. 353 535
Leahy *v.* De Moleyns, [1896] 1 I. R. 206, C. A. 173
Leather Cloth Co. *v.* American Leather Cloth Co. (1865), 11 H. L. Cas. 523 ; 6 New Rep. 209 ; 35 L. J. (CH.) 53 ; 12 L. T. 742 ; 11 Jur. (N. S.) 513 ; 13 W. R. 873 15
Lebeau *v.* General Steam Navigation Co. (1872), L. R. 8 C. P. 88 ; 42 L. J. (C. P.) 1 ; 27 L. T. 447 ; 21 W. R. 146 383
Lechmere *v.* Carlisle (Earl) (1733), 3 P. Wms. 211 . . 74, 104, 106, 107, 140
——— *v.* Lechmere (Lady) (1735), Cas. *temp.* Talb. 80 ; 2 White & Tud. L. C., 7th ed., p. 399 139, 140
Le Clerc *v.* Greene (1873), 7 I. R. Eq. 371 349
Leconfield, *Re*, Wyndham *v.* Leconfield (1904), 90 L. T. 399 ; 20 T. L. R. 347, C. A. 202, 288
——— *v.* Lonsdale (1870), L. R. 5 C. P. 657 ; 39 L. J. (C. P.) 657 ; 23 L. T. 155 ; 18 W. R. 1165 506
Lee *v.* Alexander (1883), 8 App. Cas. 853 ; 35 L. J. (CH.) 370 ; 14 L. T. 324 ; 14 W. R. 667 566
—— *v.* Angas (1866), L. R. 2 Eq. 59 ; 10 Rettie (H. L.), 91 ; 20 Sc. L. R. 887...580, 581
—— *v.* Binns, *Re* Binns. *See* Binns, *Re*, Lee *v.* Binns.
—— *v.* D'Aranda (1747), 1 Ves. Sen. 1 ; 3 Atk. 419 141
—— *v.* Everest (1857), 2 H. & N. 285 ; 26 L. J. (EX.) 334 ; 5 W. R. 759 . . 584
—— *v.* Lancashire and Yorkshire Rail. Co. (1871), 6 Ch. App. 527 ; 25 L. T. 77 ; 19 W. R. 729 458, 562
—— *v.* Pain (1845), 4 Hare, 201 129
—— *v.* Park (1836), 1 Keen, 714 ; 6 L. J. (CH.) 93 33
—— *v.* Riley (1865), 18 C. B. (N. S.) 722 ; 34 L. J. (C. P.) 212 ; 12 L. T. 388 ; 11 Jur. (N. S.) 527 ; 13 W. R. 751 495
—— *v.* Sankey (1873), L. R. 15 Eq. 204 ; 27 L. T. 809 ; 21 W. R. 286 . . 156
Leeds (Duke) *v.* Amherst (Earl) (1846), 2 Ph. 117 166
——— *v.* Cheetham (1827), 1 Sim. 146 ; 5 L. J. (O. S.) (CH.) 105 27
——— (Duke) *v.* Strafford (Earl) (1798), 4 Ves. 180 39
Leeds and Hanley Theatre of Varieties *v.* Broadbent, [1898] 1 Ch. 343 ; 67 L. J. (CH.) 135 ; 77 L. T. 665 ; 46 W. R. 230 ; 14 T. L. R. 157, C. A. . 152
Lees *v.* Lees, [1868] W. N. 268 628
—— *v.* Patterson (1878), 7 Ch. D. 866 ; 47 L. J. (CH.) 616 ; 38 L. T. 451 ; 26 W. R. 399 60, 61
Legard *v.* Hodges (1792), 1 Ves. 477 ; 4 Bro. C. C. 421 93
Legatt *v.* Tollervey (1811), 14 East, 302 484, 542
Legge *v.* Edmonds (1855), 25 L. J. (CH.) 125 ; 4 W. R. 71 457, 460, 504
Leggott *v.* Barrett (1880), 15 Ch. D. 306 ; 43 L. T. 641 ; 28 W. R. 962, C. A. . 566
——— *v.* Great Northern Rail. Co. (1876), 1 Q. B. D. 599 ; 45 L. J. (Q. B.) 557 ; 35 L. T. 334 ; 24 W. R. 784 336, 347
——— *v.* Western (1884), 12 Q. B. D. 287 ; 53 L. J. (Q. B.) 316 ; 32 W. R. 460 62
Leicester, *Ex parte*, *Re* Higgs. *See* Higgs, *Re*, *Ex parte* Leicester.
Leifchild's Case (1865), L. R. 1 Eq. 231 ; 11 Jur. (N. S.) 941 ; 13 L. T. 267 ; 14 W. R. 22 97
Leigh *v.* Dickeson (1884), 15 Q. B. D. 60 ; 54 L. J. (Q. B.) 18 ; 52 L. T. 790 ; 33 W. R. 538, C. A. 40, 41
——— *v.* Gladstone (1909), 26 T. L. R. 139 573
——— *v.* Rumney, *Re* Revill. *See* Revill, *Re*, Leigh *v.* Rumney.
Leigh's Estate, *Re* (1877), 6 Ch. D. 256 ; 37 L. T. 557 ; 25 W. R. 783, C. A. . 445
Leighton *v.* Leighton (1720), 1 P. Wms. 671 ; 4 Bro. Parl. Cas. 378 ; 2 Eq. Cas. Abr. 523 ; 1 Stra. 404 59

PAGE
Leighton *v.* Leighton (1720), 1 Stra. 308; 2 Bro. Parl. Cas. 217; 2 Eq. Cas. Abr. 523 531
——— *v.* ——— (1874), L. R. 18 Eq. 458; 43 L. J. (CH.) 594; 22 W. R. 727 130
Leishman *v.* Cochrane (1863), 1 Moo. P. C. C. (N. S.) 315; 9 L. T. 104; 12 W. R. 181 527
Leite, *Re*, Leite *v.* Ferreira (1881), 72 L. T. Jo. 97 559
Le Lièvre *v.* Gould, [1893] 1 Q. B. 491; 62 L. J. (Q. B.) 353; 68 L. T. 626; 57 J. P. 484; 41 W. R. 468; 4 R. 274, C. A. 398
Le Marchant *v.* Inland Revenue Commissioners (1875), L. R. 10 Exch. 292; 44 L. J. (EX.) 316; 33 L. T. 50 291
Lemmé, *In the Goods of*, [1892] P. 89; 61 L. J. (P.) 123; 66 L. T. 592 . . 520
Lemon *v.* Dean (1810), 2 Camp. 636, n. 605, 606
Lench *v.* Lench (1805), 10 Ves. 511 140
Le Neve *v.* Le Neve (1747), Amb. 436 86
Leney & Sons, Ltd. *v.* Callingham and Thompson, [1908] 1 K. B. 79; 77 L. J. (K. B.) 64; 97 L. T. 697; 24 T. L. R. 55, C. A. 52
Lennon *v.* Napper (1802), 2 Sch. & Lef. 682 12, 154
Lenzberg's Policy, *Re* (1877), 7 Ch. D. 650; 47 L. J. (CH.) 178; 26 W. R. 258. 20
Leslie, *Re*, *Ex parte* Leslie (1856), 25 L. J. (BCY.) 37, C. A. 377
———, *Re*, Leslie *v.* French (1883), 23 Ch. D. 552; 52 L. J. (CH.) 762; 48 L. T. 564; 31 W. R. 561 41
Lethbridge *v.* A.-G., [1907] A. C. 19; 76 L. J. (K. B.) 84; 95 L. T. 842; 23 T. L. R. 123 180, 192, 195, 196
——— *v.* Thurlow (1851), 15 Beav. 334 132, 133
Lethieullier *v.* Castlemain (Lord) (1726), 1 Dick. 46; Cas. *temp.* King, 60 . 39
Lever & Co. *v.* Goodwin Brothers, [1887] W. N. 107 598
Leveridge, *Re*, Spain *v.* Lejoindre, [1901] 2 Ch. 830; 71 L. J. (CH.) 23; 85 L. T. 458; 50 W. R. 205 231
Leveson *v.* Beales, *Re* Applebee. *See* Applebee, *Re*, Leveson *v.* Beales.
Levita's Claim, [1894] 3 Ch. 365; 64 L. J. (CH.) 13; 71 L. T. 502; 7 R. 532, C. A. 20
Levitt *v.* Levitt (1865), 2 Hem. & M. 626 628
Levy *v.* Lindo (1817), 3 Mer. 81 154
——— *v.* Lovell (1880), 14 Ch. D. 234; 49 L. J. (CH.) 305; 42 L. T. 242; 28 W. R. 602, C. A. 486
——— *v.* Stogdon, [1899] 1 Ch. 5; 68 L. J. (CH.) 19; 79 L. T. 364, C. A. . . 174
Lewes Sanitary Steam Laundry Co., *v.* Barclay & Co. (1906), 95 L. T. 444; 11 Com. Cas. 255; 22 T. L. R. 737 399, 401
Lewes' Trusts, *Re* (1871), 6 Ch. App. 356; 40 L. J. (CH.) 602; 24 L. T. 533; 19 W. R. 617 500, 501
Lewis, *Re*, Foxwell *v.* Lewis (1885), 30 Ch. D. 654; 55 L. J. (CH.) 232; 53 L. T. 387; 34 W. R. 150 115
——— *Re*, Lewis *v.* Lewis, [1904] 2 Ch. 656; 73 L. J. (CH.) 748; 91 L. T. 242; 53 W. R. 393, C. A. 379, 384, 395
——— *Re*, ——— *v.* Smith, [1900] 2 Ch. 176; 69 L. J. (CH.) 406; 82 L. T. 291; 48 W. R. 426 230, 231
——— *v.* Baker, [1905] 1 Ch. 46; 74 L. J. (CH.) 39; 91 L. T. 744; 21 T. L. R. 17 406
——— *v.* Clay (1897), 67 L. J. (Q. B.) 224; 77 L. T. 653; 46 W. R. 319; 14 T. L. R. 149 392, 402, 567
——— *v.* Hill (1749), 1 Ves. Sen. 274 140
——— *v.* James (1886), 32 Ch. D. 326; 56 L. J. (CH.) 163; 50 J. P. 423; 54 L. T. 260; 34 W. R. 619, C. A. 619
——— *v.* Kingsbury (1888), 4 T. L. R. 639, C. A. 614
——— *v.* Marshall (1844), 7 Man. & G. 729; 8 Scott (N. R.), 729; 13 L. J. (C. P.) 193; 8 Jur. 848 428
——— *v.* Poole, [1897] 1 Q. B. 164; 67 L. J. (Q. B.) 73; 77 L. T. 369; 61 J. P. 776; 46 W. R. 93 514
——— *v.* Sapio (1827), Mood. & M. 39 607
Ley *v.* Barlow (1848), 1 Exch. 800; 5 Dow. & L. 375; 5 Ry. & Can. Cas. 1; 17 L. J. (EX.) 105 581
Leyman *v.* Latimer (1878), 3 Ex. D. 352; 47 L. J. (EX.) 470; 37 L. T. 819; 26 W. R. 305; 14 Cox, C. C. 51, C. A. 344
Lickbarrow *v.* Mason (1787), 1 Smith, L. C., 11th ed., 693; 2 Term Rep. 63; 1 Hy. Bl. 357; 6 East, 21 398
Life Association of Scotland *v.* Siddal, Cooper *v.* Greene (1861), 3 De G. F. & J. 58; 4 L. T. 311; 7 Jur. (N. S.) 785; 9 W. R. 541, C. A. . . . 169, 170, 173

PAGE
Light *v.* Anticosti Island (Governor) & Co. (1888), 58 L. T. 25 615
Lightbown *v.* M'Myn, *Re* M'Myn. *See* M'Myn, *Re*, Lightbown *v.* M'Myn.
Lightfoot *v.* Cameron (1776), 2 Wm. Bl. 1113 586, 587
Liles *v.* Terry, [1895] 2 Q. B. 679 ; 65 L. J. (Q. B.) 34 ; 73 L. T. 428 ; 44 W. R. 116, C. A. 19
Lilford (Lord) *v.* A.-G. (1867), L. R. 2 H. L. 63 ; 36 L. J. (EX.) 116 ; 16 L. T. 184 ; 15 W. R. 595 282
Lilley, *Re*, Lilley *v.* Skinner (1907), 97 L. T. 306 ; 71 J. P. 437 ; 5 L. G. R. 1070 ; affirmed, 98 L. T. 110, C. A. 329
——— *v.* London County Council, [1910] A. C. 1 ; 79 L. J. (K. B.) 202 ; 100 L. T. 709 ; 73 J. P. 297 ; 53 Sol. Jo. 429 ; 7 L. G. R. 675, C. A. 329
Lilly, Wilson & Co. *v.* Smales, Eeles & Co., [1892] 1 Q. B. 456 ; 40 W. R. 544 . 567
Lincoln *v.* Wright (1859), 4 De G. & J. 16 ; 28 L. J. (CH.) 705 ; 7 W. R. 350, C. A. 75, 594
Lindley *v.* Lacey (1864), 17 C. B. (N. S.) 578 ; 34 L. J. (C. P.) 7 ; 11 L. T. 273 ; 10 Jur. (N. S.) 1103 ; 13 W. R. 80 428, 567
Lindo *v.* Belisario (1795), 1 Hag. Con. 216 489
——— *v.* London Hospital, *Re* Dresden. *See* Dresden, *Re*, Lindo *v.* London Hospital.
——— *v.* Rodney (1749), 2 Doug. (K. B.) 612 363
Lindsay *v.* Lynch (1804), 2 Sch. & Lef. 1 12
Lindsay Petroleum Co. *v.* Hurd (1874), L. R. 5 P. C. 221 ; 22 W. R. 492 . 169, 170, 174, 397
Line *v.* Taylor (1862), 3 F. & F. 731 507
Lingen *v.* Sowray (1711), 1 P. Wms. 172 ; Prec. Ch. 400 ; Gilb. (CH.) 91 ; Gilb. 325 ; 1 Eq. Cas. Abr. 175 ; 10 Mod. Rep. 39, 528 106, 107, 116
Linley *v.* Houlder (1903), 88 L. T. 829, C. A. 617
Linotype Co., Ltd. *v.* British Empire Type-setting Machine Co., Ltd. (1899), 81 L. T. 321 ; 15 T. L. R. 524 431
Linsell *v.* Bonsor (1835), 2 Scott, 399 ; 1 Hodg. 305 ; 5 L. J. (C. P.) 40 ; 2 Bing. (N. C.) 241 432
Lipscomb *v.* Lipscomb (1868), L. R. 7 Eq. 501 ; 38 L. J. (CH.) 90 ; 17 W. R. 252 . . . 144
Liquidation Estates Purchase Co. *v.* Willoughby, [1898] A. C. 321 ; [1896] 1 Ch. 726 ; 65 L. J. (CH.) 486 ; 74 L. T. 228 ; 44 W. R. 612, C. A. . . . 149
Lishman *v.* Christie (1887), 19 Q. B. D. 333 ; 56 L. J. (Q. B.) 538 ; 57 L. T. 552 ; 35 W. R. 744 ; 6 Asp. M. L. C. 186, C. A. 387
List's Case (1814), 2 Ves. & B. 373 ; 2 Rose, 24 586
Lister *v.* Lister (1839), 3 Y. & C. (EX.) 540 41
——— *v.* Perryman (1870), L. R. 4 H. L. 521 ; 39 L. J. (EX.) 177 ; 23 L. T. 269 ; 19 W. R. 9 431
——— & Co. *v.* Stubbs (1890), 45 Ch. D. 1 ; 59 L. J. (CH.) 570 ; 63 L. T. 75 ; 38 W. R. 548, C. A. 160, 175
Little *v.* Spreadbury (1910), 102 L. T. 829 ; [1910] 2 K. B. 658 ; 26 T. L. R. 552 ; 54 Sol. Jo. 618 390
"Little Lizzie," The (1870), L. R. 3 A. & E. 56 ; 23 L. T. 84 ; 18 W. R. 960 . 529, 531
Liverpool and North Wales Steamship Co., Ltd. *v.* Mersey Trading Co., Ltd., [1909] 1 Ch. 21 ; 78 L. J. (CH.) 17 ; 99 L. T. 863 ; 73 J. P. 19 ; 25 T. L. R. 89, C. A. 345
Liverpool Corporation *v.* Chorley Waterworks Co. (1852), 2 De G. M. & G. 852, C. A. 333, 355
Liverpool Marine Credit Co. *v.* Hunter (1868), 18 L. T. 749 ; 16 W. R. 1090 . 19
Livesey *v.* Harding (1855), 21 Beav. 227 333, 334
——— *v.* Livesey (1827), 3 Russ. 287 161
Livingstone *v.* Rawyards Coal Co. (1880), 5 App. Cas. 25 ; 42 L. T. 334 ; 28 W. R. 357 71
Llanover (Lady) *v.* Homfray. *See* Moggridge *v.* Hall, Llanover (Lady) *v.* Homfray, Phillips *v.* Llanover (Lady).
——— *v.* Homfray, Phillips *v.* Llanover (1881), 19 Ch. D. 224 ; 30 W. R. 557, C. A. 46, 546
Llewellyn *v.* Mackworth (1740), Barn. (Ch.) 445 118
Llewelyn *v.* Washington, *Re* Maddock. *See* Maddock, *Re*, Llewelyn *v.* Washington.
Lloyd, *Re*, Lloyd *v.* Lloyd, [1903] 1 Ch. 385 ; 72 L. J. (CH.) 78 ; 87 L. T. 541 ; 51 W. R. 177 ; 19 T. L. R. 101, C. A. 93
——— *v.* Clark (1843), 6 Beav. 309 48
——— *v.* Johnes (1804), 9 Ves. 37 4
——— *v.* Key (1834), 3 Dowl. 253 612
——— *v.* Loaring (1802), 6 Ves. 773 12

PAGE
Lloyd *v.* Maund (1788), 2 Term Rep. 760 432
—— *v.* Mostyn (1842), 10 M. & W. 478 ; 2 Dowl. (N. S.) 476 ; 12 L. J. (EX.) 1 ; 6 Jur. 974 520, 521, 522
—— *v.* Passingham (1809), 16 Ves. 59 ; Coop. G. 152 538
—— *v.* Willan (1794), 1 Esp. 178 462
Lloyds Bank, Ltd., *v.* Bullock, [1896] 2 Ch. 192 ; 65 L. J. (CH.) 680 ; 74 L. T. 687 ; 44 W. R. 633 81, 369, 372, 379, 388, 394
———— *v.* Cooke, [1907] 1 K. B. 794 ; 76 L. J. (K. B.) 666 ; 96 L. T. 715 ; 23 T. L. R. 429, C. A. 392, 401
Loader *v.* London and India Docks Joint Committee (1891), 55 J. P. 584 ; 65 L. T. 674 ; affirmed 56 J. P. 165 ; 8 T. L. R. 5 445
Lock *v.* Norborne (1688), 3 Mod. Rep. 147 345
Locket *v.* Cary (1864), 3 New Rep. 405 ; 10 Jur. (N. S.) 144 581
Lockett *v.* Nicklin (1848), 2 Exch. 93 ; 19 L. J. (EX.) 403 567
Locking *v.* Parker (1872), 8 Ch. App. 30 ; 42 L. J. (CH.) 257 ; 27 L. T. 635 ; 21 W. R. 113 91
Lockyer *v.* Ferryman (1877), 2 App. Cas. 519 ; 4 Rettie (H. L.), 32 333
Loder *v.* St. Albans (Duke), *Re* St. Albans (Duke). *See* St. Albans (Duke), *Re*, Loder *v.* St. Albans (Duke).
Lodge *v.* National Union Investment Co., Ltd., [1907] 1 Ch. 300 ; 76 L. J. (CH.) 187 ; 96 L. T. 301 ; 23 T. L. R. 187 62, 72
——— *v.* Prichard (1853), 3 De G. M. & G. 906, C. A. 561
Loffus *v.* Maw (1862), 3 Giff. 592 377
Logan *v.* Fairlie (1825), 2 Sim. & St. 284 ; 3 L. J. (O. S.) (CH.) 152 238
Login *v.* Coorg (Princess) (1862), 30 Beav. 632 490
Loibl *v.* Stramffer (1867), 16 L. T. 720 527
Lomas *v.* Wright (1883), 2 My. & K. 769 ; 3 L. J. (CH.) 68 143
Lombard, *Re*, [1904] 2 I. R. 621 195, 196, 210
Londesborough (Lord) *v.* Somerville (1854), 19 Beav. 295 ; 23 L. J. (CH.) 646 . 241, 242
London and County Banking Co. *v.* Nixon. *See* Taylor *v.* London and County Banking Co., London and County Banking Co. *v.* Nixon.
London and Globe Finance Corporation *v.* Kaufman (1899), 69 L. J. (CH.) 196 ; 48 W. R. 458 ; 16 T. L. R. 62 578
London and North Western Rail. Co. *v.* West (1867), L. R. 2 C. P. 553 ; 36 L. J. (C. P.) 245 403
London and Northern Bank, *Re*, *Ex parte* Jones, [1900] 1 Ch. 220 ; 69 L. J. (CH.) 24 ; 81 L. T. 512 ; 7 Mans. 60 556, 557
London and South Western Bank *v.* Wentworth (1880), 5 Ex. D. 96 ; 49 L. J. (EX.) 657 ; 42 L. T. 188 ; 28 W. R. 516 392
London and South Western Rail. Co. *v.* Gomm (1882), 20 Ch. D. 562 ; 51 L. J. (CH.) 530 ; 46 L. T. 449 ; 30 W. R. 620, C. A. 101
London Asphalte Co., *Re* (1907), 23 T. L. R. 406 625, 628
London Assurance Co. *v.* Sainsbury (1783), 3 Doug. (K. B.) 245 149
London Bank of Mexico and South America *v.* Hart (1868), L. R. 6 Eq. 467 ; 18 L. T. 553 610, 614
London Celluloid Co., *Re* (1888), 39 Ch. D. 190 ; 57 L. J. (CH.) 843 ; 59 L. T. 109 ; 36 W. R. 673 ; 1 Meg. 45, C. A. 411
London Chartered Bank of Australia *v.* White (1879), 4 App. Cas. 413 ; 48 L. J. (P. C.) 75 427
London, Chatham and Dover Rail. Co. *v.* South Eastern Rail. Co., [1892] 1 Ch. 120 ; 61 L. J. (CH.) 294 ; 65 L. T. 722 ; 40 W. R. 194, C. A. 27, 74
London Corporation *v.* Clarke (1692), Carth. 181 ; Holt (K. B.), 283 544
———————— *v.* Cox (1866), L. R. 2 H. L. 239 ; 36 L. J. (EX.) 225 ; 16 W. R. 44 476
———————— *v.* Levy (1803), 8 Ves. 398 44
———————— *v.* London Joint Stock Bank (1881), 6 App. Cas. 393 ; 50 L. J. (Q. B.) 594 ; 45 L. T. 81 ; 29 W. R. 870 . . . 486
———————— *v.* Perkins (1734), 3 Bro. Parl. Cas. 602 547
London Financial Association *v.* Kelk (1884), 26 Ch. D. 107 ; 53 L. J. (CH.) 1025 ; 50 L. T. 492 169
———————— *v.* Stevens. *See* Stevens *v.* Mid-Hants Rail. Co.
London General Omnibus Co. *v.* Felton (1896), 12 T. L. R. 213 509
———————— Ltd. *v.* Lavell, [1901] 1 Ch. 135 ; 70 L. J. (CH.) 17 ; 83 L. T. 453 ; 17 T. L. R. 61 ; 18 R. P. C. 74, C. A. 509
London Joint Stock Bank *v.* Simmons, [1892] A. C. 201 ; 61 L. J. (CH.) 723 ; 66 L. T. 625 ; 41 W. R. 108 ; 56 J. P. 644 88

PAGE
London School Board *v.* Harvey (1879), 4 Q. B. D. 451; 48 L. J. (M. C.) 130; 27 W. R. 786 550, 552
Long *v.* Long (1800), 5 Ves. 445 125
——- *v.* Millar (1879), 4 C. P. D. 450; 48 L. J. (Q. B.) 596; 41 L. T. 306; 27 W. R. 720, C. A. 426
——- *v.* Watkinson (1852), 17 Beav. 471 237
Longford (Earl) *v.* Kensington (Baron), *Re* Kensington (Baron). *See* Kensington (Baron), *Re*, Longford (Earl) *v.* Kensington (Baron).
Longman *v.* Bath Electric Tramways, Ltd., [1905] 1 Ch. 646; 74 L. J. (CH.) 424; 92 L. T. 743; 53 W. R. 480; 21 T. L. R. 373; 12 Mans. 147, C. A. . 398, 401, 411
——- *v.* East (1877), 3 C. P. D. 142; 47 L. J. (Q. B.) 211; 38 L. T. 1; 26 W. R. 183, C. A. 487
Longmate *v.* Ledger (1860), 2 Giff. 157; 6 Jur. (N. S.) 481; 8 W. R. 386 . . 22
Longstaffe, *Re*, Blenkarn *v.* Longstaffe (1884), 54 L. J. (CH.) 516; 52 L. T. 681 . 627
Lonsdale (Earl) *v.* Curwen (1799), 3 Bli. 168, n. 509
Loomes *v.* Stotherd (1823), 1 Sim. & St. 458; 1 L. J. (O. S.) (CH.) 220 . . 36
Lord, *Ex parte*, (1750), 2 Ves. 26 603
—— *v.* Colvin (1855), 3 Drew. 222; 3 Eq. Rep. 514; 24 L. J. (CH.) 517; 1 Jur. (N. S.) 298; 3 W. R. 342 598
—— *v.* —— (1860), 1 Drew. & Sm. 24 490, 491
—— *v.* —— (1867), L. R. 3 Eq. 737; 36 L. J. (CH). 354; 16 L. T. 53; 15 W. R. 485. 306, 308, 313
—— *v.* Lord (1855), 5 E. & B. 404; 26 L. J. (Q. B.) 97; 56 L. T. 566; 15 W. R. 443 552
—— *v.* —— [1900] P. 297; 69 L. J. (P.) 54 499
—— *v.* Wormleighton (1821), Jac. 148 33
Lord Advocate *v.* Blantyre (Lord) (1879), 4 App. Cas. 770; 6 Rettie (H. L.), 72; 16 Sc. L. R. 661 452
———— *v.* Bogie, [1894] A. C. 83; 63 L. J. (P. C.) 85; 70 L. T. 533; 6 R. 98 237, 309
———— *v.* Buccleuch (Duke) (1888), 25 Sc. L. R. 249; 15 R. (Ct. of Sess.) 333 287
———— *v.* Christie's Trustees (1905), 12 Scots Law Times, 690 . . 245, 285, 286
———— —— *v.* Constable's Trustees (1880), 17 Sc. L. R. 611; 7 R. (Ct. of Sess.) 855 265, 266, 285
———— *v.* Fife (Earl) (1883), 21 Sc. L. R. 151; 11 R. (Ct. of Sess.) 222...277, 278
———— *v.* Fleming, [1897] A. C. 145; 66 L. J. (P. C.) 41; 76 L. T. 125; 61 J. P. 692; 45 W. R. 674 190, 265, 271
———— *v.* Freckleton's Judicial Factor (1894), 21 R. (Ct. of Sess.) 743; 31 Sc. L. R. 637 244, 245, 249
———— *v.* Gibson (1882), 20 Sc. L. R. 161; 10 R. (Ct. of Sess.) 224 . 275, 276
———— *v.* Glasgow (Earl) (1875), 12 Sc. L. R. 215; 2 R. (Ct. of Sess.) 317 291
———— *v.* Gordon (1872), 10 Macph. (Ct. of Sess.) 1015; 9 Sc. L. R. 648...271
———— *v.* ——- (1895), 32 Sc. L. R. 532; 22 R. (Ct. of Sess.) 639; 2 Scots Law Times, 34 244, 285
———— *v.* Graham (1884), 22 Sc. L. R. 209; 12 R. (Ct. of Sess.) 318 . 271
———— *v.* Hamilton (Duke) (1891), 29 Sc. L. R. 213 244, 251
———— ———— *v.* Harvey's Trustees (1901), 39 Sc. L. R. 71; 4 F. (Ct. of Sess.) 43; 9 Scots Law Times, 244 197
———— *v.* Henderson's Trustees (1905), 42 Sc. L. R. 720; 7 F. (Ct. of Sess.) 963; 13 Scots Law Times, 259 186, 209
———— *v.* Jamieson (1886), 23 Sc. L. R. 510; 13 R. (Ct. of Sess.) 737 . 265
———— *v.* McCulloch (1895), 32 Sc. L. R. 266; 22 R. (Ct. of Sess.) 356; 2 Scots Law Times, 469 271
———— *v.* Macdonald (1862), 24 Dunl. (Ct. of Sess.) 1175; 34 Sc. Jur. 555 272
———— *v.* Macfarlane's Trustees (1893), 31 Sc. L. R. 357; 1 Scots Law Times, 385 308
———— *v.* Mackenzie's Trustees (1905), 42 Sc. L. R. 584; 12 Scots Law Times, 758 197, 279, 280
———— *v.* M'Kersies (1881), 19 Sc. L. R. 438 190, 273
———— *v.* Marshall (1893), 30 Sc. L. R. 599 283
———— *v.* Meiklam (1860), 22 Dunl. (Ct. of Sess.) 1427; 32 Sc. Jur. 651 . 265

PAGE

Lord Advocate *v.* Moray (Countess), [1905] A. C. 531 ; 74 L. J. (P. C.) 122 ; 93 L. T. 569 ; 21 T. L. R. 715 ; 7 Fraser (H. L.), 116 ; 42 Sc. L. R. 839 ; 13 Scots Law Times, 307 221
——— *v.* Moray's (Earl) Trustees (1904), 41 Sc. L. R. 267 ; 6 F. (Ct. of Sess.) 347 ; 11 Scots Law Times, 617 185, 186
——— *v.* Nisbet's Trustees (1878), 15 Sc. L. R. 508 236
——— *v.* Pringle (1878), 15 Sc. L. R. 624 ; 5 R. (Ct. of Sess.) 912 . . 313
——— *v.* Roberts' Trustees (1858), 20 Dunl. (Ct. of Sess.) 449 . . 263
——— *v.* Sidgwick (1877), 14 Sc. L. R. 522 ; 4 R. (Ct. of Sess.) 815 . 277, 278
——— *v.* Stewart, [1902] A. C. 344 ; 71 L. J. (P. C.) 66 ; 86 L. T. 603 ; 50 W. R. 673 ; 18 T. L. R. 618 199
——— *v.* Stewart's Trustees (1899), 36 Sc. L. R. 297 ; 1 F. (Ct. of Sess.) 416 ; 6 Scots Law Times, 289 184, 228, 229
——— *v.* Taylor (Miller's Trustees) (1884), 21 Sc. L. R. 709 ; 11 R. (Ct. of Sess.) 1046 240, 242
——— *v.* Wilsons (1894), 31 Sc. L. R. 819 ; 21 R. (Ct. of Sess.) 997 ; 2 Scots Law Times, 149 190, 191
——— *v.* Wood's Trustees (1910), 53rd Report of Commissioners of Inland Revenue, 50 208, 228
——— of Scotland *v.* Hagart (1872), L. R. 2 Sc. & Div. 217 ; 2 Pater. App. 2002 ; 10 Macpherson (H. L.), 62 ; 44 Sc. Jur. 381 . . . 234, 314
Lord Keeper *v.* Wyld (1682), 1 Vern. 139 ; 1 Eq. Cas. Abr. 38 76
Lorimer *v.* Lorimer (1820), 5 Madd. 363 41
Lorton (Viscount) *v.* Kingston (Earl) (1838), 5 Cl. & Fin. 269 543
Loscombe *v.* Russell (1830), 4 Sim. 8 38
Lothian *v.* Henderson (1803), 3 Bos. & P. 499 341
Louch *v.* Peters (1834), 1 My. & K. 489 ; 3 L. J. (CH.) 167 240
Lound *v.* Grimwade (1888), 39 Ch. D. 605 ; 57 L. J. (CH.) 725 ; 59 L. T. 168 . 73
Lovatt *v.* Williamson, *Re* Whiston's Settlement. *See* Whiston's Settlement, *Re*, Lovatt *v.* Williamson.
Lovelace, *Re* (1859), 4 De G. & J. 340 ; 28 L. J. (CH.) 489 ; 5 Jur. 694 ; 7 W. R. 575, C. A. 272, 275, 276
Lovell *v.* Wallis (1883), 53 L. J. (CH.) 494 ; 49 L. T. 593 620
Loveridge, *Re*, Pearce *v.* Marsh, [1904] 1 Ch. 518 ; 73 L. J. (CH.) 15 ; 89 L. T. 503 ; 52 W. R. 138 112
Lovett *v.* Lovett, [1898] 1 Ch. 82 ; 67 L. J. (CH.) 20 ; 77 L. T. 630 ; 46 W. R. 105 367, 377
Low *v.* Bouverie, [1891] 3 Ch. 82 ; 60 L. J. (CH.) 594 ; 65 L. T. 533 ; 40 W. R. 50, C. A. 322, 366, 377, 378, 379
—— *v.* McGill (1864), 10 L. T. 495 393, 396
Lowden *v.* Watson (1817), 2 Stark. 230 404
Lowe *v.* Baker (1665), Freem. (CH.) 125 48
——- *v.* Dixon (1885), 16 Q. B. D. 445 ; 34 W. R. 441 30, 64
——- *v.* Joliffe (1762), 1 Wm. Bl. 365 605
Lowndes *v.* Bettle (1864), 3 New Rep. 409 ; 33 L. J. (CH.) 451 ; 12 W. R. 399 . 49
Lowther *v.* Carlton (1741), 2 Atk. 242 82
——— *v.* Lowther (1806), 13 Ves. 95 12
Loyd *v.* Freshfield (1826), 2 C. & P. 325 ; 8 Dow. & Ry. (K. B.) 19 . . . 596
—— *v.* Mansell (1722), 2 P. Wms. 73 ; 2 Eq. Cas. Abr. 71 352
Lucan (Earl), *Re*, Hardinge *v.* Cobden (1890), 45 Ch. D. 470 ; 60 L. J. (CH.) 40 ; 53 L. T. 538 ; 39 W. R. 90 103
Lucas *v.* Brandreth (No. 1) (1860), 28 Beav. 273 105
——- *v.* ——— (No. 2) (1860), 28 Beav. 274 94
——- *v.* Lucas (1738), 1 Atk. 270 9
——- *v.* Novosilieski (1795), 1 Esp. 296 441
——- *v.* Williams & Sons, [1892] 2 Q. B. 113 ; 61 L. J. (Q. B.) 595 ; 66 L. T. 706, C. A. 482, 509
Luckett *v.* Wood (1908), 24 T. L. R. 617 487
Lucy's Case (1853), 4 De G. M. & G. 356 ; 22 L. J. (CH.) 732 ; 17 Jur. 1143, C. A. 24
Ludlow Corporation *v.* Greenhouse (1827), 1 Bli. (N. S.) 17 67
Luker *v.* Dennis (1877), 7 Ch. D. 227 ; 47 L. J. (CH.) 174 ; 37 L. T. 827 ; 26 W. R. 167 101
Lumb *v.* Beaumont (1884), 27 Ch. D. 356 ; 53 L. J. (CH.) 1111 ; 51 L. T. 197 ; 52 W. R. 985 509
——- *v.* Osburn, [1884] W. N. 218 619
Lumley *v.* Gye (1854), 3 C. & B. 114 ; 2 C. L. R. 936 ; 23 L. J. (Q. B.) 112 ; 18 Jur. 466 618

PAGE
Lumley *v.* Osborne, [1901] 1 K. B. 532; 70 L. J. (K. B.) 416; 84 L. T. 461; 49 W. R. 374 456, 626
——— *v.* Wagner (1852), 1 De G. M. & G. 604; 21 L. J. (CH.) 898; 16 Jur. 871 . 50
Lush's Trust, *Re* (1869), 4 Ch. App. 591; 38 L. J. (CH.) 650; 21 L. T. 376; 17 W. R. 974 72, 168
Lutkins *v.* Leigh (1734), Cas. *temp.* Talb. 53 145
Lutterell *v.* Reynell (1670), 1 Mod. Rep. 282 547
Luxmore *v.* Gordon (1890), 7 T. L. R. 150 619
Lyall *v.* Lyall (1872), L. R. 15 Eq. 1; 42 L. J. (CH.) 195; 27 L. T. 530; 21 W. R. 34 275, 276
——— *v.* Paton (1856), 25 L. J. (CH.) 746 238
Lyddon *v.* Ellison (1854), 19 Beav. 565; 18 Jur. 1066 132
Lyell *v.* Kennedy (1884), 27 Ch. D. 1; 51 L. J. (CH.) 937; 50 L. T. 730, C. A. 458
——— *v.* ——— (1887), 56 L. T. 647; 35 W. R. 725, C. A. 537
——— *v.* ———, Kennedy *v.* Lyell (1889), 14 App. Cas. 437; 59 L. J. (Q. B.) 268; 62 L. T. 77; 38 W. R. 353 156, 475, 485, 534, 535, 543
Lygon *v.* Strutt (1795), 2 Anst. 601 505, 514
Lyle *v.* Richards (1866), L. R. 1 H. L. 222; 35 L. J. (Q. B.) 214; 15 L. T. 1; 12 Jur. (N. S.) 947 432, 564
Lynch *v.* Clerke (1697), 3 Salk. 154; Holt (K. B.), 293 523, 536, 538
——— *v.* Nurdin (1841), 1 Q. B. 29; 4 Per. & Dav. 672; 10 L. J. (Q. B.) 73; 5 Jur. 797 495
——— *v.* City of London Sewers Commissioners (1886), 32 Ch. D. 72; 55 L. J. (CH.) 409; 54 L. T. 699; 50 J. P. 548, C. A. 396
Lynch's Lessee *v.* Lynch (1843), 6 I. L. R. 131 376
Lyne, *Ex parte* (1822), 3 Stark. 132 586
Lyon *v.* Reed (1844), 13 M. & W. 285; 13 L. J. (EX.) 377; 8 Jur. 762. 324, 375, 376
Lyons *v.* De Pass (1840), 11 Ad. & El. 326; 3 Per. & Dav. 177; 9 C. & P. 68; 9 L. J. (Q. B.) 51; 4 Jur. 505 486
Lysaght *v.* Edwards (1876), 2 Ch. D. 499; 45 L. J. (CH.) 554; 24 L. T. 787; 24 W. R. 778 99
Lyttleton *v.* Cross (1824), 3 B. & C. 117; 6 Dow. & Ry. (K. B.) 81 36

M.

McALLISTER *v.* Rochester (Bishop) (1880), 5 C. P. D. 194; 49 L. J. (Q. B.) 114; 42 L. T. 22 380
McAllum *v.* Reid (1869), cited L. R. 3 A. & E. 57 451
Macalpine & Co. *v.* Calder & Co., [1893] 1 Q. B. 545; 62 L. J. (Q. B.) 607; 68 L. T. 426; 41 W. R. 436; 4 R. 314, C. A. 509
Macartney *v.* Graham (1828), 2 Sim. 285 26
Macaulay *v.* Glass (1902), 47 Sol. Jo. 71 612, 615
——— *v.* Shackell (1827), 1 Bli. (N. S.) 96 46
Macbeath *v.* Haldimand (1786), 1 Term Rep. 172 430
Macbryde *v.* Weekes (1856), 22 Beav. 533; 2 Jur. (N. S.) 918 154
M'Call *v.* M'Call (1843), 2 Con & Law. 184 488
M'Cance *v.* London and North Western Rail. Co. (1861), 7 H. & N. 477; affirmed (1864), 3 H. & C. 343; 34 L. J. (EX.) 39; 11 L. T. 426; 10 Jur. (N. S.) 1058; 12 W. R. 1086 383, 386
McCarogher *v.* Whieldon (1867), L. R. 3 Eq. 236; 36 L. J. (CH.) 196; 15 W. R. 296 135
M'Carthy *v.* Decaix (1831), 2 Russ. & M. 614 166
M'Causland *v.* O'Callaghan, [1904] 1 I. R. 376, C. A. 36
M'Clean *v.* Kennard (1874), 43 L. J. (CH.) 323; 30 L. T. 186; 22 W. R. 382 . 567
Macclesfield (Earl) *v.* Davis (1814), 3 Ves. & B. 16 13
McCollin *v.* Gilpin (1880), 5 Q. B. D. 390; 49 L. J. (Q. B.) 558; 42 L. T. 899; 44 J. P. 650; 28 W. R. 813; affirmed (1881), 6 Q. B. D. 516; 44 L. T. 914; 45 J. P. 828; 29 W. R. 408, C. A. 567
McCombie *v.* Anton (1843), 6 Man. & G. 27; 6 Scott (N. R.), 923 547
McConnel *v.* Murphy (1873), L. R. 5 P. C. 203; 28 L. T. 713; 21 W. R. 609 . 358
M'Cormick *v.* Garnett (1854), 5 De G. M. & G. 278; 2 Eq. Rep. 536; 23 L. J. (CH.) 777; 18 Jur. 412; 2 W. R. 403 488
——— *v.* Grogan (1869), L. R. 4 H. L. 82, affirming 1 I. R. Eq. 313; 17 W. R. 961 75
M'Craw *v.* Gentry (1812), 3 Camp. 232 606
Maccullam *v.* Turton (1828), 2 Y. & J. 183 574
M'Cullough *v.* Munn, [1908] 2 I. R. 194, C. A. 565

PAGE
Macdonald *v.* Antelme Patterson & Co., [1884] W. N. 72 544, 623
——— *v.* Macdonald (1872), L. R. 14 Eq. 60; 26 L. T. 685; 20 W. R. 739 . 489
——— *v.* Whitfield (1883), 8 App. Cas. 733; 52 L. J. (P. C.) 70; 49 L. T. 466 568
Macdonald's Trustees *v.* Aberdeen Magistrates (1902), 39 Sc. L. R. 745; 4 F. (Ct. of Sess.) 907; 10 Scots Law Times, 177 242
McDonald *v.* McDonald (1875), L. R. 2 Sc. & Div. 482; 2 Rettie (H. L.), 125; 12 Sc. L. R. 635 119
McDonnell *v.* White (1865), 11 H. L. Cas. 570 172, 173
McDougall *v.* Knight (1890), 25 Q. B. D. 1; 59 L. J. (Q. B.) 517; 63 L. T. 43; 54 J. P. 788; 38 W. R. 553, C. A. 332
——— *v.* Purrier (1830), 2 Dow & Cl. 135 506
McEvoy *v.* Drogheda Harbour Commissioners (1867), 16 W. R. 34 378
McEwan *v.* Smith (1849), 2 H. L. Cas. 309; 13 Jur. 265 392
M'Fadden *v.* Murdock (1867), 1 I. R. C. L. 211 481
MacFarlane *v.* Giannacopulo (1858), 3 H. & N. 860; 28 L. J. (EX.) 72 . 384, 398
Macfarlane (Lord) *v.* Lord Advocate, [1894] A. C. 291; 6 R. 287 248
M'Gahey *v.* Alston and Sewell (1836), 2 M. & W. 206; 2 Gale, 238; 6 L. J. (EX.) 29 443, 519
McGlade *v.* Royal London Mutual Insurance Society, Ltd., [1910] 2 Ch. 169; 103 L. T. 155; 26 T. L. R. 471; 54 Sol. Jo. 505, C. A. 365
McGlynn *v.* Bradlaw, [1902] 2 I. R. 154 436
McGowan *v.* Middleton (1883), 11 Q. B. D. 464; 52 L. J. (Q. B.) 355; 31 W. R. 835, C. A. 61, 63
McGregor *v.* Rhodes (1856), 6 E. & B. 266; 25 L. J. (Q. B.) 318; 2 Jur. (N. S.) 834; 4 W. R. 483 394
——— *v.* Topham (1850), 3 H. L. Cas. 132 605
M'Hardy *v.* Hitchcock (1848), 11 Beav. 93 612
McHenry *v.* Davies (1870), L. R. 10 Eq. 88; 39 L. J. (CH.) 866; 22 L. T. 643; 18 W. R. 855 380, 394
——— *v.* Lewis (1882), 22 Ch. D. 397; 52 L. J. (CH.) 325; 47 L. T. 549; 31 W. R. 305, C. A. 361
Macintosh-Walker *v.* Walker, *Re* Walker. *See* Walker, *Re*, Mackintosh-Walker *v.* Walker.
McKay's Case, [1896] 2 Ch. 757; 65 L. J. (CH.) 909; 75 L. T. 298; 3 Mans. 274 411, 412
Mackechnie, Petitioner (1898), 6 Scots Law Times, 242 223
M'Kenire *v.* Fraser (1803), 9 Ves. 5 512
Mackenzie *v.* British Linen Co. (1881), 6 App. Cas. 82; 44 L. T. 431; 29 W. R. 477 379, 382, 384, 385, 396
——— *v.* Forbes (1870), L. R. 10 Eq. 178; 39 L. J. (CH.) 485; 18 W. R. 686; 22 L. T. 703 235, 238, 301
——— *v.* Johnston (1819), 4 Madd. 373 28, 43
——— *v.* Mackenzie (1852), 5 De G. & Sm. 338 625
McKewan *v.* Sanderson (1873), L. R. 15 Eq. 229; 42 L. J. (CH.) 296; 28 L. T. 159; (1875), L. R. 20 Eq. 65 20
Mackintosh *v.* Smith and Lowe (1865), 4 Macq. 913 323, 355
Mackreth *v.* Symmons (1808), 15 Ves. 329; 2 White & Tud. L. C., 7th ed., 926...79, 92
Mackworth *v.* Penrose (1728), 1 Dick. 50 546
Maclean's Trusts (1874), L. R. 19 Eq. 274; 44 L. J. (CH.) 145; 32 L. T. 632; 23 W. R. 206 264
McLean and Hope *v.* Fleming (1871), L. R. 2 Sc. & Div. 128; 25 L. T. 317 . 387
McLeod *v.* Power, [1898] 2 Ch. 295; 67 L. J. (CH.) 551; 79 L. T. 67; 47 W. R. 74 336
M'Mahon *v.* Burchell (1846), 5 Hare, 322; 2 Ph. 127 41
McMahon, *Re*, McMahon *v.* McMahon (1886), 55 L. T. 763 92
——— *v.* Lennard (1858), 6 H. L. Cas. 970 443
——— *v.* McElroy (1869), 5 I. R. Eq. 1 502
McManus *v.* Cooke (1887), 35 Ch. D. 681; 56 L. J. (CH.) 662; 56 L. T. 900; 51 J. P. 708; 35 W. R. 754 12, 65
M'Myn, *Re*, Lightbown *v.* M'Myn (1886), 33 Ch. D. 575; 55 L. J. (CH.) 845; 55 L. T. 834; 35 W. R. 179 210
Macnaghten *v.* Paterson, [1907] A. C. 483; 76 L. J. (P. C.) 94; 97 L. T. 442; 23 T. L. R. 727 72, 380
M'Naghten's Case (1843), 10 Cl. & Fin. 200 481
M'Neil *v.* Perchard (1795), 1 Esp. 263 549
McRae, *Re*, Forster *v.* Davis, Norden *v.* McRae (1883), 25 Ch. D. 16; 53 L. J. (CH.) 1132; 49 L. T. 544; 32 W. R. 304, C. A. 39

PAGE
Maddever, *Re*, Three Towns Banking Co. *v.* Maddever (1884), 27 Ch. D. 523 ; 53 L. J. (CH.) 998 ; 52 L. T. 35 ; 33 W. R. 286, C. A. 168
Maddison *v.* Alderson (1883), 8 App. Cas. 473 ; 49 L. T. 303 ; 47 J. P. 821 ; 31 W. R. 820 12, 76, 65, 377
——— *v.* Chapman (1861), 1 John. & H. 470 122
Maddock, *Re*, Llewelyn *v.* Washington, [1901] 2 Ch. 372 ; 70 L. J. (CH.) 660 ; 85 L. T. 12 ; 50 W. R. 54 220
——— *Re*, ——— *v.* ——— [1902] 2 Ch. 220 ; 71 L. J. (CH.) 567 ; 86 L. T. 644 ; 50 W. R. 598, C. A. 75, 237
Maddox *v.* Miller (1813), 1 M. & S. 738 432
Madell *v.* Thomas & Co., [1891] 1 Q. B. 230 ; 60 L. J. (Q. B.) 227 ; 64 L. T. 9 ; 39 W. R. 280, C. A. 79, 370
Maden *v.* Catanach (1861), 7 H. & N. 360 ; 31 L. J. (EX.) 118 ; 5 L. T. 288 ; 10 W. R. 112 591
Magan, *Re* (1908), I. L. T., May 19th 203
Magdalen College, Oxford (President etc.) *v.* A.-G. (1857), 6 H. L. Cas. 189 ; 26 L. J. (CH.) 620 ; 3 Jur. (N. S.) 675 172
Magdalen Hospital (Governors) *v.* Knotts (1877), 8 Ch. D. 709 ; 47 L. J. (CH.) 726 ; 38 L. T. 624 ; 26 W. R. 646 435, 442
——— (President and Governors) *v.* Knotts (1879), 4 App. Cas. 324 ; 48 L. J. (CH.) 579 ; 40 L. T. 466 ; 27 W. R. 602 403
Magee, *Ex parte*, Middleton *v.* Pollock. *See* Middleton *v.* Pollock, *Ex parte* Magee.
———, *Re*, *Ex parte* Magee (1885), 15 Q. B. D. 332 ; 54 L. J. (Q. B.) 394 ; 33 W. R. 655 628
Maggi, *Re*, Winehouse *v.* Winehouse (1882), 20 Ch. D. 545 ; 51 L. J. (CH.) 560 ; 46 L. T. 362 ; 30 W. R. 729 36
Magnay *v.* Burt (1844), 5 Q. B. 381 ; Dav. & Mer. 652 ; 7 Jur. 1116 . 586, 587, 588
Magnus *v.* National Bank of Scotland (1888), 57 L. J. (CH.) 902 ; 58 L. T. 617 ; 36 W. R. 602 327, 359
Magrath *v.* Hardy (1838), 4 Bing. (N. C.) 782 ; 6 Scott, 627 ; 6 Dowl. 749 ; 1 Arn. 352 ; 7 L. J. (C. P.) 299 ; 2 Jur. 594 350
——— *v.* Reichel (1887), 57 L. T. 850 344
Maguire's Case, *Re* St. George's Steam Packet Co. *See* St. George's Steam Packet Co., *Re*, Maguire's Case.
Mahon's Trust, *Re* (1852), 9 Hare, 459 ; 22 L. J. (CH.) 75 527
Mahoney *v.* East Holyford Mining Co. (1875), L. R. 7 H. L. 869 ; 33 L. T. 338 ; I. R. 9 C. L. 306 381, 390
Mahony *v.* Waterford, Limerick, and Western Rail. Co., [1900] 2 I. R. 273 . 435
Mainland *v.* Upjohn (1889), 41 Ch. D. 126 ; 58 L. J. (CH.) 361 ; 60 L. T. 614 ; 37 W. R. 411 91
Mair's Estate, *Re* (1873), 42 L. J. (CH.) 882 ; 28 L. T. 760 ; 21 W. R. 749 . 604
Maitlands' Case (1853), 4 De G. M. & G. 769, C. A. 172
Makin *v.* A.-G. for New South Wales, [1894] A. C. 57 ; 63 L. J. (P. C.) 41 ; 69 L. T. 778 ; 58 J. P. 148 ; 6 R. 373 ; 17 Cox, C. C. 704 454
Malan *v.* Young (1889), 6 T. L. R. 38 594
Malcolm *v.* Day (1819), 3 Moore (C. P.), 579 579
——— *v.* Ray (1819), 3 Moore (C. P.), 222 590
Malcolmson *v.* O'Dea (1863), 10 H. L. Cas. 593 ; 9 L. T. 93 ; 9 Jur. (N. S.) 1135 ; 12 W. R. 178 442, 515, 543
Male *v.* Roberts (1800), 3 Esp. 163 488
Malim *v.* Keighley (1794), 2 Ves. 333 155
Mallan *v.* May (1843), 11 M. & W. 653 ; 12 L. J. (EX.) 376 ; 7 Jur. 536 . . 432
Mallinson *v.* Carr, [1891] 1 Q. B. 48 ; 60 L. J. (M. C.) 34 ; 63 L. T. 459 ; 55 J. P. 102 ; 39 W. R. 270 ; 17 Cox, C. C. 220 449
Mallock *v.* Galton (1735), 1 Dick. 65. 326
Mallott *v.* Wilson, [1903] 2 Ch. 494 ; 72 L. J. (CH.) 664 ; 89 L. T. 522 . . 143
Malone *v.* L'Estrange (1839), 2 I. Eq. R. 16 534
Maloney *v.* Bartley (1812), 3 Camp. 210 574
Malpas *v.* Ackland (1827), 3 Russ. 273 87
——— *v.* Clements (1850), 19 L. J. (Q. B.) 435 557
——— *v.* London and South Western Rail. Co. (1866), L. R. 1 C. P. 336 ; Har. & Ruth. 227 ; 35 L. J. (C. P.) 166 ; 13 L. T. 710 ; 12 Jur. (N. S.) 271 ; 14 W. R. 391 448
Maltby *v.* Russel (1825), 2 Sim. & St. 227 ; 3 L. J. (O. S.) (CH.) 85 . . . 36
Man *v.* Ricketts (1844), 7 Beav. 93 505, 512
—— *v.* Ward (1741), 2 Atk. 228 13, 14
Manaton *v.* Squire (1677), Freem. (CH.) 26 ; 2 Cas. in Ch. 237 40

PAGE
Manchester and Liverpool District Banking Co. *v.* Parkinson (1888), 22 Q. B. D. 173; 58 L. J. (Q. B.) 262; 37 W. R. 264, C. A. 56
Manchester and Oldham Bank *v.* Cook & Co. (1883), 49 L. T. 674 . . 385, 386
Manchester and Southport Rail. Co., *Re* (1854), 19 Beav. 365 110
Manchester Brewery Co. *v.* Coombs, [1900] 2 Ch. 608; 70 L. J. (CH.) 814; 82 L. T. 347; 16 T. L. R. 299 65, 451
Manchester Corporation *v.* Lyons (1882), 22 Ch. D. 299 528
Manchester Trust *v.* Furness, [1895] 2 Q. B. 539; 64 L. J. (Q. B.) 766; 73 L. T. 110; 44 W. R. 178; 14 R. 739, C. A.; 8 Asp. M. L. C. 57 88
Mangena *v.* Wright, [1909] 2 K. B. 958; 78 L. J. (K. B.) 879; 100 L. T. 960; 25 T. L. R. 534; 53 Sol. Jo. 485 355
Manley *v.* Shaw (1840), Car. & M. 361 570, 592
Manners *v.* Mew (1885), 29 Ch. D. 725; 54 L. J. (CH.) 909; 53 L. T. 84 . 78, 80
Manning *v.* Eastern Counties Rail. Co. (1843), 12 M. & W. 237; 13 L. J. (EX.) 265 552
Mansel *v.* Clanricarde (1885), 54 L. J. (CH.) 982; 53 L. T. 496 622
——Lewis *v.* Rees (1910), 54 Sol. Jo. 327; 102 L. T. 237 377
Mansell *v.* Clements (1874), L. R. 9 C. P. 139 608
Manser *v.* Back (1848), 6 Hare, 443 23
Manson *v.* Heartsink (1803), 4 Esp. 103 602
Mantle *v.* Wollington (1607), Cro. Jac. 166 373
Manton *v.* Phillips (1863), 9 L. T. 289 335
Maple *v.* Stephenson, [1888] W. N. 62 618
March, *Ex parte*, *Re* Hilton. *See* Hilton, *Re*, *Ex parte* March.
—— *v.* Russell (1837), 3 My. & Cr. 31; 6 L. J. (CH.) 303; 1 Jur. 588 . 160, 170
Marchmount Peerage Case (1822) 536
Marcus, *Re*, Marcus *v.* Marcus (1887), 56 L. J. (CH.) 830 241
Mare *v.* Sandford (1859), 1 Giff. 288 20
Margetson and Jones, *Re*, [1897] 2 Ch. 314; 66 L. J. (CH.) 619; 76 L. T. 805; 45 W. R. 645 620
"Maria das Dores," The (1863), Brown. & Lush. 27; 32 L. J. (P. M. & A.) 63; 7 L. T. 838; 11 W. R. 500 542
Marianski *v.* Cairns (1852), 1 Macq. 212 543
Marine Investment Co. *v.* Haviside (1872), L. R. 5 H. L. 624; 42 L. J. (CH.) 173 506, 516
Marjoribanks *v.* Hovenden (1843), 6 I. Eq. R. 238 85
Marker *v.* Marker (1851), 9 Hare, 1 170
Market Overt Case (1596), 5 Co. Rep. 83 b; 1 And. 344; Moore (K. B.), 360; Poph. 84 486
Markham and Darter's Case, [1899] 1 Ch. 414; 68 L. J. (CH.) 215; 80 L. T. 282; 47 W. R. 509; 15 T. L. R. 143; 6 Mans. 84; affirmed, [1899] 2 Ch. 480; 68 L. J. (CH.) 724; 81 L. T. 145; 15 T. L. R. 491, C. A. . 380, 383, 411
Marks *v.* Beyfus (1890), 25 Q. B. D. 494; 59 L. J. (Q. B.) 479; 38 W. R. 705, C. A. 427, 573
Marlborough (Duke), *Re*, Davis *v.* Whitehead, [1894] 2 Ch. 133; 63 L. J. (CH.) 471; 70 L. T. 314; 42 W. R. 456 75, 567
Marriage *v.* Skiggs, *Re* Skiggs. *See* Skiggs, *Re*, Marriage *v.* Skiggs.
Marriot *v.* Marriot (1725), 1 Stra. 666; Gilb. (CH.) 203 553
Marriott *v.* Hampton (1797), 7 Term Rep. 269; 2 Esp. 546 331
Marris *v.* Burton (1840), 11 Sim. 161; 9 L. J. (CH.) 373 241
Marsden *v.* Overbury (1856), 18 C. & B. 34; 25 L. J. (C. P.) 200 580
Marsden's Estate, *Re* (1889), 40 Ch. D. 475; 58 L. J. (CH.) 260; 60 L. T. 696; 37 W. R. 525 619
Marsh *v.* Collett (1798), 2 Esp. 665 505, 512
—— *v.* Lee (1670), 2 Vent. 337 81, 83
Marshall *v.* Gingell (1882), 21 Ch. D. 790; 51 L. J. (CH.) 818; 47 L. T. 859; 31 W. R. 63 94
—— *v.* Green (1875), 1 C. P. D. 35; 45 L. J. (Q. B.) 153; 33 L. T. 404; 24 W. R. 175 426
—— *v.* Lamb (1843), 5 Q. B. 115; Dav. & Mer. 315; 13 L. J. (Q. B.) 75; 7 Jur. 850 443
—— *v.* Lord Advocate (1874), 11 Sc. L. R. 392; 1 R. (Ct. of Sess.) 847...234, 314
—— *v.* Marshall (1879), 5 P. D. 19; 48 L. J. (P.) 49; 39 L. T. 640; 27 W. R. 399 63
—— *v.* National Provincial Bank of England (1892), 61 L. J. (CH.) 465; 66 L. T. 525; 40 W. R. 328 394, 630
—— *v.* York, Newcastle and Berwick Rail. Co. (1851), 11 C. B. 398 . . 589
Marsham, *Re* (1863), 9 L. T. 533 255

PAGE
Marston *v.* Allen (1841), 8 M. & W. 494 ; 1 Dowl. (N. S.) 442 ; 11 L. J. (EX.) 122...402
——— *v.* Downes (1834), 1 Ad. & El. 31 ; 4 Nev. & M. (K. B.) 861 ; 6 C. & P. 381 ; 3 L. J. (K. B.) 158 520, 570
Martin, *Re* (1889), 23 L. R. Ir. 413 306
——— *v.* Andrews (1856), 7 E. & B. 1 ; 26 L. J. (Q. B.) 39 ; 9 Jur. (N. S.) 1121 ; 5 W. R. 67 579, 584
——— *v.* Bell (1816), 1 Stark. 413 ; 6 M. & S. 220 521
——— *v.* Douglas (1867), 16 W. R. 268 382
——— *v.* Martin (1749), 1 Ves. Sen. 211 32, 33
——— *v.* ———, *Re* Bourne. *See* Bourne, *Re*, Martin *v.* Martin.
——— *v.* Nutkin (1724), 2 P. Wms. 266 ; 2 Eq. Cas. Abr. 23 50
——— *v.* Powning (1869), 4 Ch. App. 356 ; 38 L. J. (CH.) 212 ; 20 L. T. 133 ; 17 W. R. 186 28
——— *v.* Price, [1894] 1 Ch. 276 ; 63 L. J. (CH.) 209 ; 70 L. J. 202 ; 42 W. R. 262 ; 7 R. 90, C. A. 51
——— *v.* Trimmer, Davidson *v.* Trimmer, *Re* Davidson. *See* Davidson, *Re*, Martin *v.* Trimmer, Davidson *v.* Trimmer.
Martindale *v.* Falkner (1846), 2 C. B. 706 ; 2 Dow. & L. 600 ; 15 L. J. (C. P.) 91 ; 10 Jur. 161 499
Martineau, *Re* (1884), 48 J. P. 295 237
Martinez *v.* Cooper (1826), 2 Russ. 198 379
Martinius *v.* Helmuth (1817), 2 Ves. & B., 2nd ed., 412, n. 58
Martinson *v.* Clowes (1882), 21 Ch. D. 857 ; 51 L. J. (CH.) 594 ; 54 L. T. 882 ; 30 W. R. 795 173
Martyn *v.* Podger (1770), 5 Burr. 2631 ; 2 Wm. Bl. 701 544
"Mary" (or "Alexandra"), The (1868), L. R. 2 A. & E. 319 ; 38 L. J. (ADM.) 29 ; 18 L. T. 891 ; 17 W. R. 551 575
Maryon-Wilson, *Re*, Wilson *v.* Maryon-Wilson, [1899] 2 Ch. 489 ; 68 L. J. (CH.) 580 ; 81 L. T. 73 ; 47 W. R. 635 197
———, *Re*, ——— *v.* ——— [1900] 1 Ch. 555 ; 69 L. J. (CH.) 310 ; 82 L. T. 171 ; 48 W. R. 338 ; 16 T. L. R. 256, C. A. 231
Marzetti *v.* Smith & Son (1883), 5 Asp. M. L. C. 166 ; 49 L. T. 580, C. A. . . 444, 445
Maskelyne *v.* Stollery (1899), 16 T. L. R. 97 430
Mason *v.* Gardiner (1793), 4 Bro. C. C. 436 71
——— *v.* Mason (1816), 1 Mer. 308 503
——— *v.* Motor Traction Co., Ltd., [1905] 1 Ch. 419 ; 74 L. J. (CH.) 273 ; 92 L. T. 234 ; 21 T. L. R. 238 ; 12 Mans. 31 516
——— *v.* Sainsbury (1782), 3 Doug. (K. B.) 61 149
——— *v.* Wood (1875), 1 C. P. D. 63 ; 45 L. J. (Q. B.) 76 ; 33 L. T. 571 ; 24 W. R. 41 506
——— and Barry, Ltd. *v.* Comptoir d'Escompte (1890), 38 W. R. 685 . . 614
Masonic and General Life Assurance Co. *v.* Sharpe, *Re* Sharpe, *Re* Bennett. *See* Sharpe, *Re*, *Re* Bennett, Masonic and General Life Assurance Co. *v.* Sharpe.
Massam *v.* Thorley's Cattle Food Co. (1880), 14 Ch. D. 748 ; 42 L. T. 851 ; 28 W. R. 966 326
Massey *v.* Allen (1879), 13 Ch. D. 558 ; 49 L. J. (CH.) 76 ; 41 L. T. 788 ; 28 W. R. 212 464, 465
Masson, Templier & Co. *v.* De Fries, [1909] 2 K. B. 831 ; 101 L. T. 476 ; 25 T. L. R. 784 ; 53 Sol. Jo. 744, C. A. 145
Master *v.* Hansard (1876), 4 Ch. D. 718 ; 46 L. J. (CH.) 505 ; 36 L. T. 535 ; 25 W. R. 570, C. A. 101
Masterman *v.* Judson (1832), 1 Moo. & S. 367 ; 1 L. J. (C. P.) 86 ; 8 Bing. 224...579, 590
Masters *v.* Masters (1718), 1 P. Wms. 421 145
Matheson *v.* Inland Revenue Commissioners (1898), 14 Sheriff Court Reports, 156 189
——— *v.* Ludwig, *Re* Doetsch. *See* Doetsch, *Re*, Matheson *v.* Ludwig.
——— *v.* Ross (1849), 2 H. L. Cas. 286 ; 13 Jur. 307 516
Mathew *v.* Brise (1851), 14 Beav. 341 171
Mathews *v.* Mathews (1755), 2 Ves. Sen. 635 137
——— *v.* Saurin (1893), 31 L. R. Ir. 181 52
Mathias *v.* Mathias (1858), 3 Sm. & G. 552 ; 4 Jur. (N. S.) 780 140
Matson *v.* Swift (1845), 8 Beav. 368 ; 14 L. J. (CH.) 354 ; 9 Jur. 521 . . . 308
Matthaei *v.* Galitzin (1874), L. R. 18 Eq. 340 ; 43 L. J. (CH.) 356 ; 30 L. T. 455 ; 22 W. R. 700 66

PAGE
Matthew *v.* Northern Assurance Co. (1878), 9 Ch. D. 80; 47 L. J. (CH.) 562; 38 L. T. 468; 27 W. R. 51 217
Matthews, *In the Goods of*, [1898] P. 17; 67 L. J. (P.) 11; 77 L. T. 630 . . 500
———, *Re*, *Ex parte* Powell (1876), 1 Ch. D. 501; 45 L. J. (BCY.) 100; 34 L. T. 224; 24 W. R. 378, C. A. 449
——— *v.* Alexander (1873), 7 I. R. C. L. 573 556
——— *v.* Usher, [1900] 2 Q. B. 535; 69 L. J. (Q. B.) 856; 83 L. T. 353; 49 W. R. 40; 16 T. L. R. 493, C. A. 64
Maugham *v.* Hubbard (1828), 8 B. & C. 14; 2 Man. & Ry. (K. B.) 5; 6 L. J. (O. S.) (K. B.) 229 595
Maundrell *v.* Maundrell (1805), 10 Ves. 246 81, 84
Maunsell *v.* Ainsworth (1840), 8 Dowl. 869; H. & W. 5 578, 590
Maxfield *v.* Burton (1873), L. R. 17 Eq. 15; 43 L. J. (CH.) 46; 29 L. T. 571; 22 W. R. 148 88
Maxwell *v.* Maxwell (1852), 2 De G. M. & G. 705; 22 L. J. (CH.) 43; 16 Jur. 982, C. A. 120
May, *Re* (1885), 28 Ch. D. 516; 54 L. J. (CH.) 338; 52 L. T. 79; 33 W. R. 917, C. A. 332, 333, 334
——— *v.* Kelly (1897), 31 I. L. T. 67 603
——— *v.* Newton (1887), 34 Ch. D. 347; 56 L. J. (CH.) 313; 56 L. T. 140; 35 W. R. 363 623
——— *v.* Skey (1849), 16 Sim. 588; 18 L. J. (CH.) 306; 13 Jur. 594 . . 149, 150
——— *v.* Taylor (1843), 6 Man. & G. 261; 6 Scott (N. R.), 974; 12 L. J. (C. P.) 314; 7 Jur. 515 460
Mayd *v.* Field (1876), 3 Ch. D. 587; 45 L. J. (CH.) 699; 34 L. T. 614; 24 W. R. 660 135
Mayfair Property Co. *v.* Johnston, [1894] 1 Ch. 508; 63 L. J. (CH.) 399; 70 L. T. 485; 8 R. 781 40, 41
Maynard *v.* Consolidated Kent Collieries Corporation, [1903] 2 K. B. 121; 72 L. J. (K. B.) 121; 88 L. T. 676; 52 W. R. 117; 19 T. L. R. 448; 10 Mans. 386, C. A. 515
——— *v.* Eaton (1874), 9 Ch. App. 414; 43 L. J. (CH.) 641; 30 L. T. 241; 22 W. R. 457 24
Mayne *v.* Butter (1864), 11 L. T. 410; 13 W. R. 128 628
Meadows *v.* Kingston (Duchess) (1775), Amb. 756 363
Measures Brothers, Ltd. *v.* Measures, [1910] 2 Ch. 248; 102 L. T. 794; 26 T. L. R. 488; 54 Sol. Jo. 521, C. A. 50
Meath (Bishop) *v.* Winchester (Marquis) (1836), 3 Bing. (N. C.) 183; 3 Scott, 561; 4 Cl. & Fin. 445; Alc. & N. 508 428, 458, 513, 514
Medawar *v.* Grand Hotel Co., [1891] 2 Q. B. 11; 60 L. J. (Q. B.) 209; 64 L. T. 851; 55 J. P. 614, C. A. 434
Meddowcroft *v.* Huguenin (1844), 4 Moo. P. C. C. 386 352
Mee *v.* Reid (1790), Peake, 33 592
Meek *v.* Devenish (1877), 6 Ch. D. 566; 36 L. T. 911; 25 W. R. 688 . . 113, 115
——— *v.* Ward (1853), 10 Hare, Appendix, i.; 1 W. R. 275 627
Meekins *v.* Smith (1791), 1 Hy. Bl. 636 586
Meers (Sir T.) *v.* Stourton (Lord) (1711), 1 P. Wms. 146; 1 Salk. 512 . . 592
Meggy *v.* Imperial Discount Co. (1877), 3 Q. B. D. 711; 47 L. J. (Q. B.) 119; 38 L. T. 309; 26 W. R. 342, C. A. 379
Mehrtens *v.* Andrews (1839), 3 Beav. 72 170
Meinertzagen *v.* Walters (1872), 7 Ch. App. 670; 41 L. J. (CH.) 801; 27 L. T. 326; 20 W. R. 918 133
Melbourne Banking Corporation *v.* Brougham (1882), 7 App. Cas. 307; 46 L. T. 603; 30 W. R. 925 459
Melen *v.* Andrews (1829), Mood. & M. 336 546
Melhuish *v.* Collier (1850), 15 Q. B. 878; 19 L. J. (Q. B.) 493; 14 Jur. 621...446, 600
Mellers *v.* Devonshire (Duke) (1852), 16 Beav. 252; 22 L. J. (CH.) 310; 1 W. R. 44 27
Mellersh *v.* Brown (1890), 45 Ch. D. 225; 60 L. J. (CH.) 43; 63 L. T. 189; 38 W. R. 732 175
Mellick *v.* Asylum (President and Guardians) (1821), Jac. 180 210
Mellor *v.* Denham (1880), 5 Q. B. D. 467; 49 L. J. (M. C.) 89; 42 L. T. 493; 44 J. P. 472, C. A. 515
——— *v.* South Australia Land Mortgage and Agency Co., *Re* King. *See* King, *Re*, Mellor *v.* South Australia Land Mortgage and Agency Co.
——— *v.* Thompson (1835), 31 Ch. D. 55; 55 L. J. (CH.) 942; 54 L. T. 219, C. A. 594
——— *v.* Walmesley, [1905] 2 Ch. 164; 74 L. J. (CH.) 475; 93 L. T. 574; 53 W. R. 581; 21 T. L. R. 591, C. A. 370, 466
Meluish *v.* Milton (1876), 3 Ch. D. 27; 45 L. J. (CH.) 836; 35 L. T. 82; 24 W. R. 892, C. A. 13, 340, 553

PAGE
Melville's (Lord) Case (1806), 29 State Tr. 550 495
Menzies (Petitioner) (1903), 10 Scots Law Times, 636 223
Mercantile Bank of Sydney *v.* Taylor, [1893] A. C. 317 ; 57 J. P. 741 ; 1 R. 371...566
Mercantile Investment and General Trust Co. *v.* River Plate Trust, Loan and Agency Co., [1894] 1 Ch. 578 ; 63 L. J. (CH.) 366 ; 70 L. T. 131 ; 42 W. R. 365 ; 8 R. 791 345, 346, 347
Mercantile Investment Trust Co. *v.* River Plate Trust Co., [1892] 2 Ch. 303; 61 L. J. (CH.) 473 ; 66 L. T. 711 66
Mercer *v.* Denne, [1904] 2 Ch. 534 ; 74 L. J. (CH.) 71 ; 91 L. T. 513 ; 68 J. P. 479 ; affirmed, [1905] 2 Ch. 538 ; 3 L. G. R. 1293 ; 74 L. J. (CH.) 723 ; 93 L. T. 412 ; 70 J. P. 65 ; 54 W. R. 303, C. A....465, 468, 469, 475, 514, 528, 529, 532, 564
Merchants of the Staple of England (Mayor etc.) *v.* Bank of England (Governor & Co.) (1887), 21 Q. B. D. 160 ; 57 L. J. (Q. B.) 418 ; 52 J. P. 580 ; 36 W. R. 880, C. A. 399, 412
Meredith *v.* Footner (1843), 11 M. & W. 202 ; 12 L. J. (EX.) 183 462
——— *v.* Hodges (1807), 2 Bos. & P. (N. R.) 453 390
——— *v.* Saunders (1814), 2 Dow, 514 377
——— *v.* Vick (1857), 23 Beav. 559 115
Merle *v.* More (1826), Ry. & M. 390 572
Merrick *v.* Wakley (1838), 8 Ad. & El. 170 ; 3 Nev. & P. (Q. B.) 284 ; 1 Will. Woll. & H. 268 ; 8 C. & P. 283 ; 7 L. J. (Q. B.) 190 ; 2 Jur. 838 474
Merry *v.* Abney (1663), 1 Cas. in Ch. 38 ; 1 Eq. Cas. Abr. 333 84
Mersey Docks and Harbour Board, *Ex parte*, [1899] 1 Q. B. 546 ; 68 L. J. (Q. B.) 540 ; 80 L. T. 143 ; 47 W. R. 306 ; 15 T. L. R. 199, C. A. 407
Metcalf *v.* Hervey (1749), 1 Ves. Sen. 248 57, 58
Metropolitan Asylum and District (Managers) *v.* Hill (1882), 47 L. T. 29 . . 452
Metropolitan Bank *v.* Heiron (1880), 5 Ex. D. 319 ; 43 L. T. 676 ; 29 W. R. 370, C. A. 175
Metropolitan (Brush) Electric Light and Power Co., *Re*, *Ex parte* Offor (1884), 54 L. J. (CH.) 253 ; 51 L. T. 816 617
Metropolitan Electric Supply Co., Ltd. *v.* Ginder, [1901] 2 Ch. 799 ; 70 L. J. (CH.) 862 ; 84 L. T. 818 ; 65 J. P. 519 ; 49 W. R. 508 ; 17 T. L. R. 435. . 50
Metropolitan Rail. Co. *v.* Jackson (1877), 3 App. Cas. 193 ; 47 L. J. (Q. B.) 303 ; 37 L. T. 679 ; 26 W. R. 175 429
Metters *v.* Brown (1863), 1 H. & C. 686 ; 32 L. J. (EX.) 138 ; 7 L. T. 795 ; 9 Jur. (N. S.) 416 ; 11 W. R. 429 346, 368, 442
Meux *v* Maltby (1818), 2 Swan. 277 88
Meux's Brewery Co. *v.* City of London Electric Lighting Co. *See* Shelfer *v.* City of London Electric Lighting Co., Meux's Brewery Co. *v.* Same Co.
Mexborough (Earl) *v.* Savile (1903), 88 L. T. 131 ; 19 T. L. R. 287 220
Meyding *v.* Hinchcliff, *Re* Turner. *See* Turner, *Re*, Meyding *v.* Hinchcliff.
Meyler *v.* Meyler (1883), 11 L. R. Ir. 522 94
Meyrick, *Re*, Meyrick *v.* Hargreaves, [1897] 1 Ch. 99 ; 66 L. J. (CH.) 33 ; 75 L. T. 621 ; 45 W. R. 120 216, 222
——— *v.* James (1877), 46 L. J. (CH.) 579 621
Michael, *Re*, Dessau *v.* Lewin, [1885] W. N. 104 ; 52 L. T. 609 623
Michell *v.* Rabbetts. *See* Swinnerton *v.* Stafford (Marquis).
Michie's Executors *v.* Michie (1905), 42 Sc. L. R. 386 ; 7 F. (Ct. of Sess.) 509 ; 12 Scots Law Times, 738 222, 241
Micholls *v.* Samuel, *Re* Beddington. *See* Beddington, *Re*, Micholls *v.* Samuel.
Micklethwait, *Re* (1855), 11 Exch. 452 ; 25 L. J. (EX.) 19 263, 291
Micklethwart's Case (1640), Clay. 84 571
Middlesex (Sheriff's) Case (1840), 11 Ad. & El. 273 ; 3 Per. & Dav. 349 ; 4 Jur. 70 ; 8 Dowl. 451 485
Middleton *v.* Barker (1873), 29 L. T. 643 94
——— *v.* Barned (1849), 4 Exch. 241; 18 L. J. (EX.) 433 599
——— *v.* Pollock, *Ex parte* Magee (1875), L. R. 20 Eq. 29 ; 44 L. J. (CH.) 584 ; 33 L. T. 240 ; 23 W. R. 766 163
——— *v.* ———, *Ex parte* Weatherall (1876), 4 Ch. D. 49 ; 46 L. J. (CH.) 39 ; 35 L. T. 608 ; 25 W. R. 94 386
Midland Rail. Co. *v.* Martin, [1893] 2 Q. B. 172 ; 62 L. J. (Q. B.) 517 ; 69 L. T. 353 ; 58 J. P. 39 ; 17 Cox, C. C. 687 ; 5 R. 480 337
Mighell *v.* Johore (Sultan), [1894] 1 Q. B. 149 ; 63 L. J. (Q. B.) 593 ; 70 L. T. 64 ; 58 J. P. 244 ; 9 R. 447, C. A. 476, 493, 497
Milbank *v.* Milbank, [1900] 1 Ch. 376 ; 69 L. J. (CH.) 287 ; 82 L. T. 63, C. A. . 572
Mildmay *v.* Mildmay (1682), 1 Vern. 53 ; 2 Cas. in Ch. 102 ; 1 Eq. Cas. Abr. 67...543
——— *v.* Quicke (1877), 6 Ch. D. 553 ; 46 L. J. (CH.) 667 ; 25 W. R. 788 . 112

PAGE
Mildmay *v.* Smith (1671), 2 Saund. 343 ; 2 Keb. 821 360
Mildmay's Case (1584), 1 Co. Rep. 175 a ; Moore (K. B.), 144 ; Cro. Eliz. 34 ; Jenk. 247 499
Mileham's Trust, *Re* (1852), 13 Beav. 507 503
Miles *v.* Furber (1873), L. R. 8 Q. B. 77 ; 42 L. J. (Q. B.) 41 ; 27 L. T. 756 ; 21 W. R. 262 390
——— *v.* Harrison (1874), 9 Ch. App. 316 ; 22 W. R. 441 146
——— *v.* McIlwraith (1883), 8 App. Cas. 120 ; 52 L. J. (P. C.) 17 ; 48 L. T. 689 ; 31 W. R. 591 383, 391
——— *v.* New Zealand Alford Estate Co. (1886), 32 Ch. D. 266 ; 55 L. J. (CH.) 801 ; 54 L. T. 582 ; 34 W. R. 669, C. A. 24
——— *v.* R. (1897), 41st Report of Inland Revenue Commissioners, 167 . . 188
Mill *v.* Hill (1852), 3 H. L. Cas. 828 157
Miller *v.* Appleton (1906), 50 Sol. Jo. 192 584
——— *v.* Collins, [1896] 1 Ch. 573 ; 65 L. J. (CH.) 353 ; 74 L. T. 122 ; 44 W. R. 466, C. A. 114
——— *v.* Cook (1870), L. R. 10 Eq. 641 ; 40 L. J. (CH.) 11 ; 22 L. T. 740 ; 18 W. R. 1061 21
——— *v.* Dwyer (1891), 27 L. R. Ir. 510 620
——— *v.* Johnson (1797), 2 Esp. 602 543
——— *v.* Race (1758), 1 Burr. 452 393
——— *v.* Thurgood (1864), 33 Beav. 496 ; 33 L. J. (CH.) 511 ; 10 L. T. 255 ; 10 Jur. (N. S.) 304 ; 12 W. R. 600 121, 122
——— *v.* Travers (1832), 8 Bing. 244 ; 1 Moo. & S. 342 566
——— *v.* Warmington (1820), 1 Jac. & W. 484 40, 41
Milligan *v.* Mitchell (1837), 3 My. & Cr. 72 ; 7 L. J. (CH.) 37 ; 1 Jur. 888 . . 534
Millman *v.* Tucker (1803), Peake, Add. Cas. 222 575
Mills *v.* Barber (1836), 1 M. & W. 425 ; 5 Dowl. 77 ; 2 Gale, 5 ; 5 L. J. (EX.) 204...433
——— *v.* Drewitt (1855), 20 Beav. 632 173
——— *v.* Fox (1887), 37 Ch. D. 153 ; 57 L. J. (CH.) 56 ; 57 L. T. 792 ; 36 W. R. 219...377, 397
——— *v.* Haywood (1877), 6 Ch. D. 196, C. A. 174
——— *v.* Jennings (1880), 13 Ch. D. 639 ; 49 L. J. (CH.) 209 ; 42 L. T. 169 ; 28 W. R. 549, C. A. 71
Mills' Estate, *Re*, *Ex parte* Works and Public Buildings Commissioners (1886), 34 Ch. D. 24 ; 56 L. J. (CH.) 60 ; 55 L. T. 465 ; 51 J. P. 151 ; 35 W. R. 65, C. A. 487
Milltown (Earl) *v.* Stewart (1837), 3 My. & Cr. 18 54
Milne *v.* Leisler (1862), 7 H. & N. 786 ; 31 L. J. (EX.) 257 ; 5 L. T. 802 ; 8 Jur. (N. S.) 121 ; 10 W. R. 250 438
Milner, *Re*, *Ex parte* Milner (1885), 15 Q. B. D. 605 ; 54 L. J. (Q. B.) 425 ; 53 L. T. 652 ; 33 W. R. 867 ; 2 Morr. 190, C. A. 20
Milroy *v.* Lord (1862), 4 De G. F. & J. 264 ; 31 L. J. (CH.) 798 ; 7 L. T. 178 ; 8 Jur. (N. S.) 806, C. A. 98
Milton *v.* Studd, [1910] 2 K. B. 118 ; 102 L. T. 573 ; 74 J. P. 217 ; 26 T. L. R. 392 507
Milward *v.* Thanet (Earl) (1801), 5 Ves. 720, n. 174
Minchin *v.* Nance (1841), 4 Beav. 332 99
Minet *v.* Morgan (1873), 8 Ch. App. 361 ; 42 L. J. (CH.) 627 ; 28 L. T. 573 ; 21 W. R. 467 572, 574
Minna Craig Steamship Co. *v.* Chartered Mercantile Bank of India, London and China, [1897] 1 Q. B. 460 ; 66 L. J. (Q. B.) 339 ; 76 L. T. 310 ; 45 W. R. 338, C. A. 328, 338
Minshall *v.* Lloyd (1837), 2 M. & W. 450 ; Murp. & H. 125 ; 6 L. J. (EX.) 115 ; 1 Jur. 336. 519
Mirehouse *v.* Scaife (1837), 2 My. & Cr. 695 ; 7 L. J. (CH.) 22 145
Mitchell *v.* Hayne (1824), 2 Sim. & St. 63 57
——— *v.* Henry (1880), 15 Ch. D. 181 ; 43 L. T. 186, C. A. 509
——— *v.* Homfray (1881), 8 Q. B. D. 587 ; 50 L. J. (Q. B.) 460 ; 45 L. T. 694 ; 29 W. R. 558, C. A. 19, 174
——— *v.* Stephens (1894), 29 L. J. N. C. 389 509
Mitchell's Claim, *Re* River Steamer Co. *See* River Steamer Co., *Re*, Mitchell's Claim.
Mitchelson *v.* Piper (1836), 8 Sim. 64 ; 5 L. J. (CH.) 294 36
"M. Moxham," The (1876), 1 P. D. 107, C. A. 614
Mocatta *v.* Murgatroyd (1718), 1 P. Wms. 393 ; 2 Eq. Cas. Abr. 612 . . . 80
Mogg *v.* Hodges (1750), 2 Ves. Sen. 52. 146
——— *v.* Mogg (1786), 2 Dick. 670. 49

PAGE
Moggridge *v.* Hall, Llanover (Lady) *v.* Homfray, Phillips *v.* Llanover (Lady) (1879), 13 Ch. D. 380 ; 28 W. R. 487 46
Mogridge *v.* Clapp, [1892] 3 Ch. 382 ; 61 L. J. (CH.) 534 ; 67 L. T. 100 ; 40 W. R. 663, C. A. 87, 88
Mohun's (Lord) Case (undated), cited in Cook *v.* Fountain (1672), 3 Swan. 585 . 149
Moir's Trustees *v.* Lord Advocate (1874), 11 Sc. L. R. 157 ; 1 R. (Ct. of Sess.) 345 234, 314
Moises *v.* Thornton (1799), 8 Term Rep. 303 ; 3 Esp. 4 510, 607
Mold *v.* Wheatcroft (1859), 27 Beav. 510 397
Mole *v.* Mansfield (1845), 15 Sim. 41 41
——— *v.* Smith (1822), Jac. 490 42
Molineux *v.* Evered, *Re* Evered. *See* Evered, *Re*, Molineux *v.* Evered.
Mollett *v.* Brayne (1809), 2 Camp. 103 375
Molloy *v.* Mutual Reserve Life Insurance Co. (1906), 94 L. T. 756 ; 22 T. L. R. 525, C. A. 174, 379
Mollwo, March & Co. *v.* Court of Wards (1872), L. R. 4 P. C. 419 390
Molony *v.* Kernan (1842), 2 Dr. & War. 31 76
Molton *v.* Camroux (1848), 2 Exch. 487 ; affirmed (1849), 4 Exch. 17 . . . 16
Molyneux *v.* Hawtrey, [1903] 2 K. B. 487 ; 72 L. J. (K. B.) 873 ; 89 L. T. 350 ; 52 W. R. 23, C. A. 101
Monaton *v.* Molesworth (1757), 1 Eden, 18 49
Monck *v.* Monck (Lord) (1810), 1 Ball & B. 298 129
Mondel *v.* Steele (1841), 8 M. & W. 300 ; 9 Dowl. 812 ; 5 Jur. 511 613
Monke *v.* Butler (1614), 1 Roll. Rep. 83 506
Monkton *v.* A.-G. (1831), 2 Russ. & M. 147 . . . 468, 470, 471, 560, 561, 565
Monroe *v.* Twisleton (1802), Peake, Add. Cas. 219 573
Montagu, *Re*, Faber *v.* Montagu, [1896] 1 Ch. 549 ; 65 L. J. (CH.) 372 ; 74 L. T. 346 ; 44 W. R. 583 128
——— *v.* Forwood, [1893] 2 Q. B. 350 ; 69 L. T. 371 ; 42 W. R. 124 ; 4 R. 579, C. A. 395
——— *v.* Sandwich (Earl) (1886), 32 Ch. D. 525 ; 55 L. J. (CH.) 925 ; 54 L. T. 502, C. A. 93, 129, 135, 136
Montague (Lord) *v.* Dudman (1751), 2 Ves. Sen. 396 44
——— *v.* Harrison (1857), 3 C. B. (N. S.) 292 ; 27 L. J. (C. P.) 24 ; 4 Jur. (N. S.) 29 ; 6 W. R. 43 586
——— (Samuel) & Co. *v.* Weston, Clevedon and Portishead Light Railways Co. (1903), 19 T. L. R. 272 412
Montefiore *v.* Guedalla (1859), 1 De G. F. & J. 93 ; 29 L. J. (CH.) 65 ; 1 L. T. 251 ; 6 Jur. (N. S.) 329 ; 8 W. R. 53, C. A. 133
Montefiori *v.* Montefiori (1762), 1 Wm. Bl. 363 369, 376, 382
Moon, *Re*, Holmes *v.* Holmes, [1907] 2 Ch. 304 ; 76 L. J. (CH.) 535 . . . 35
Moore, *Ex parte*, *Re* Stokoe. See Stokoe, *Re*, *Ex parte* Moore.
———, *Re*, Moore *v.* Moore, [1901] 1 Ch. 691 ; 78 L. J. (CH.) 691 ; 49 W. R. 373 . 220
——— *v.* Battie (1759), Amb. 371 332, 355
——— *v.* Bennett (1678), 2 Cas. in Ch. 246 ; 1 Eq. Cas. Abr. 331 87
——— *v.* Booth (1797), 3 Ves. 350 586
——— *v.* Frowd (1837), 3 My. & Cr. 45 ; 6 L. J. (CH.) 372 ; 1 Jur. 653 . . 158
——— *v.* Garwood (1849), 4 Exch. 681 ; 19 L. J. (EX.) 15 430
——— *v.* Greg (1848), 2 Ph. 717 97
——— *v.* Marrable (1866), 1 Ch. App. 217 ; 13 L. T. 725 174
——— *v.* Oxford (Bishop), [1904] A. C. 283 ; 73 L. J. (P. C.) 43 ; 90 L. T. 425 . 603
——— *v.* Usher (1835), 7 Sim. 383 ; 4 L. J. (CH.) 205 57
Moores *v.* Choat (1839), 8 Sim. 508 ; 8 L. J. (CH.) 128 ; 3 Jur. 220 . . . 97
Moors *v.* Marriott (1878), 7 Ch. D. 543 ; 47 L. J. (CH.) 331 ; 42 J. P. 452 ; 26 W. R. 626 168
Mordaunt *v.* Benwell (1881), 19 Ch. D. 302 ; 51 L. J. (CH.) 247 ; 45 L. T. 585 ; 30 W. R. 227 112
——— Brothers *v.* British Oil and Cake Mills, Ltd., [1910] 2 K. B. 502 ; 54 Sol. Jo. 654 ; 15 Com. Cas. 285 383
More *v.* Woreham (1580), Cary, 142 589
Morely's (Lord) Case (1666), Kel. 53 ; 1 Keb. 896 ; 1 Sid. 227 ; 1 Lev. 180 . 547
Morewood *v.* Wood (1791), 14 East, 328 608
Morgan, *Ex parte*, *Re* Simpson. *See* Simpson, *Re*, *Ex parte* Morgan.
———, *Re*, Smith *v.* May, [1900] 2 Ch. 474 ; 69 L. J. (CH.) 735 ; 48 W. R. 670 111, 112
——— *v.* Brydges (1818), 2 Stark. 314 598
——— *v.* Chetwynd, Chetwynd *v.* Morgan, *Re* Anstis. *See* Anstis, *Re*, Chetwynd *v.* Morgan, Morgan *v.* Chetwynd.

PAGE
Morgan *v.* Couchman (1853), 14 C. B. 100; 23 L. J. (C. P.) 36 378
——— *v.* Dyet, *Re* Dyet. *See* Dyet, *Re*, Morgan *v.* Dyet.
——— *v.* Edwards, Edwards *v.* Morgan. *See* Edwards *v.* Morgan, Morgan *v.* Edwards.
——— *v.* Jeffreys, [1910] 1 Ch. 620; 79 L. J. (CH.) 630; 74 J. P. 154; 26 T. L. R. 324 91
——— *v.* Marsack (1816), 2 Mer. 107 58
——— *v.* Milman (1853), 3 De G. M. & G. 24; 22 L. J. (CH.) 897; 17 Jur. 193; 1 W. R. 134, C. A. 110
——— *v.* Morgan (1832), 2 Moo. & S. 490; 2 L. J. (C. P.) 27; 9 Bing. 359 . 605
——— *v.* ——— (1853), 4 I. Ch. R. 606 126
——— *v.* Nicholl (1866), L. R. 2 C. P. 117; 36 L. J. (C. P.) 86; 12 Jur. (N. S.) 963; 15 L. T. 184; 15 W. R. 110 546
——— *v.* Seymour (1638), 1 Rep. Ch. 64 70
Moriarty *v.* London, Chatham and Dover Rail. Co. (1870), L. R. 5 Q. B. 314; 39 L. J. (Q. B.) 109; 22 L. T. 163; 18 W. R. 625 424, 446
Morier, *Ex parte*, *Re* Willis. *See* Willis, *Re*, *Ex parte* Morier.
Morley *v.* Bird (1798), 3 Ves. 628 70
——— *v.* Loughnan, [1893] 1 Ch. 736; 62 L. J. (CH.) 515; 68 L. T. 619; 3 R. 592 18, 19
Mornington *v.* Keane (1858), 2 De G. & J. 292; 27 L. J. (CH.) 791; 4 Jur. (N. S.) 981; 6 W. R. 434 93, 140
Morony *v.* O'Dea (1809), 1 Ball & B. 109 21, 22
Morrell *v.* Firth (1838), 3 M. & W. 402; 1 Horn & H. 100; 7 L. J. (EX.) 172; 2 Jur. 619 432
Morret *v.* Westerne (1710), 2 Vern. 663; 1 Eq. Cas. Abr. 164 346
Morrice *v.* Bank of England (1735), 3 P. Wms. 402, n.; (1736), 3 Swan. 573; Cas. *temp.* Talb. 217; (1737), 2 Bro. Parl. Cas. 465 31, 33, 34, 35
Morris, *Ex parte* (1907), 72 J. P. 5 571
——— *v.* Bethell (1869), L. R. 5 C. P. 47; 21 L. T. 323; 18 W. R. 137 . 390
——— *v.* Davies (1828), 1 Mood. & R. 271, n.; 3 C. & P. 215 537
——— *v.* ——— (1837), 5 Cl. & Fin. 163 504
——— *v.* Edwardes (1890), 15 App. Cas. 309; 60 L. J. (Q. B.) 292; 63 L. T. 26 . 574
——— *v.* Griffiths, *Re* Raw. *See* Raw, *Re*, Morris *v.* Griffiths.
——— *v.* Livie (1842), 1 Y. & C. Ch. Cas. 380; 11 L. J. (CH.) 172 . . 234, 241
——— *v.* Miller (1767), 4 Burr. 2057 538
——— *v.* Morris (1847), 15 Sim. 505 49
——— *v.* Morris's Trustees (1904), 11 Scots Law Times, 793 220
——— *v.* ——— ——— (1904), 12 Scots Law Times, 612 221
——— *v.* Woore, *Re* Boxer. *See* Boxer, *Re*, Morris *v.* Woore.
Morrison, *Re*, Morrison *v.* Morrison (1910), 102 L. T. 530; 26 T. L. R. 395 . 219
——— *v.* Arnold (1817), 19 Ves. 670 45
——— *v.* Lennard (1827), 3 C. & P. 127 569
——— *v.* Universal Marine Insurance Co. (1873), L. R. 8 Exch. 197; 42 L. J. (EX.) 115; 21 W. R. 774 384, 397
Morse *v.* Faulkner (1792), 1 Anst. 11 375
——— *v.* Royal (1806), 12 Ves. 355 157, 169, 172
Mortimer *v.* Cottrell (1789), 2 Cox, Eq. Cas. 205 49
Mortlock *v.* Buller (1804), 10 Ves. 292 14, 377
Morton *v.* Woods (1869), L. R. 4 Q. B. 293; 9 B. & S. 632; 38 L. J. (Q. B.) 81; 17 W. R. 414 354, 367, 406
Moseley Green Coal and Coke Co., Ltd., *Re*, Barrett's Case (1864), 4 De G. J. & Sm. 416; 10 L. T. 594; 10 Jur. (N. S.) 711; 12 W. R. 925 . . 97
———————————, *Re*, Fox's Case (1863), 3 De G. J. & Sm. 465 555
Mosely *v.* Virgin (1796), 3 Ves. 184 12
Moses, *Re*, Moses *v.* Valentine, [1908] 2 Ch. 235; 77 L. J. (CH.) 783; 99 L. T. 519 490
——— *v.* Crafter (1831), 4 C. & P. 524 313
——— *v.* Macferlan (1760), 2 Burr. 1005 9, 22
Mosley *v.* Ward (1861), 29 Beav. 407 118
Moss *v.* Anglo-Egyptian Navigation Co. (1865), 1 Ch. App. 108; 35 L. J. (CH.) 179; 12 Jur. (N. S.) 13; 14 W. R. 150 330, 350
——— *v.* Cooper (1861), 1 John. & H. 352; 4 L. T. 790 76
——— *v.* London and North Western Rail. Co. (1874), 22 W. R. 532 . . . 383
Mossop *v.* Eadon (1810), 16 Ves. 430 26
Mostyn *v.* Fabrigas (1774), 1 Cowp. 161 488

PAGE
Mostyn *v.* West Mostyn Coal and Iron Co. (1876), 1 C. P. D. 145; 45 L. J. (Q. B.) 401; 34 L. T. 325; 24 W. R. 401 62
Moth *v.* Atwood (1801), 5 Ves. 845 173
Motteram *v.* Eastern Counties Rail. Co. (1859), 7 C. B. (N. S.) 58; 6 Jur. (N. S.) 759; 29 L. J. (C. P.) 57 527
Moulis *v.* Owen, [1907] 1 K. B. 746; 76 L. J. (K. B.) 396; 96 L. T. 596; 23 T. L. R. 348, C. A. 73
Mounsey *v.* Burnham (1841), 1 Hare, 15 605
Mountford, *Ex parte* (1808), 14 Ves. 606 92
Mountnoy *v.* Collier (1853), 1 E. & B. 630; 22 L. J. (Q. B.) 124; 15 Jur. 503; 1 W. R. 179 404
Mowatt *v.* Castle Steel and Iron Works (1886), 34 Ch. D. 58; 55 L. T. 645, C. A. 346, 368, 381, 510
Mower *v.* Orr (1849), 7 Hare, 473; 18 L. J. (CH.) 361; 13 Jur. 421 106
Mower's Trusts, *Re*, (1869), L. R. 8 Eq. 110; 20 L. T. 838 144
Moxon *v.* Payne (1873), 8 Ch. App. 881; 43 L. J. (CH.) 240 166, 171
Muir *v.* City of Glasgow Bank (1879), 4 App. Cas. 337; 6 Rettie (H. L.), 21; 16 Sc. L. R. 483 97
——— *v.* Kirby (1887), 32 Sol. Jo. 139 621
Mules *v.* Jennings (1853), 8 Exch. 830 265
Mulholland *v.* Killen (1874), 9 I. R. Eq. 471 543
Mullett *v.* Hunt (1833), 1 Cr. & M. 752; 3 Tyr. 875; 2 L. J. (EX.) 287 . . 579, 589, 590
Mumford *v.* Stohwasser (1874), 43 L. J. (CH.) 694; L. R. 18 Eq. 556; 30 L. T. 859; 22 W. R. 833 83, 84, 88
Mundell, *Re*, Fenton *v.* Cumberlege (1883), 52 L. J. (CH.) 756; 48 L. T. 776...578, 599
Mundy and Roper's Contract, *Re*, [1899] 1 Ch. 275; 68 L. J. (CH.) 135; 79 L. T. 583; 47 W. R. 226, C. A. 193, 198
Munns and Longden, *Re* (1884), 32 W. R. 675 619
Munster *v.* Cox (1885), 10 App. Cas. 680; 55 L. J. (Q. B.) 108; 53 L. T. 474; 34 W. R. 461 336
Murietta *v.* Wolfhagen (1849), 2 Car. & Kir. 744 607
Murray, *In the Goods of* (1837), 1 Curt. 596 503
——— *v.* Flavell, *Re* Flavell. *See* Flavell, *Re*, Murray *v.* Flavell.
——— *v.* Milner (1879), 12 Ch. D. 845; 48 L. J. (CH.) 775; 41 L. T. 213; 27 W. R. 881 470
——— *v.* Stair (Earl) (1823), 2 B. & C. 82; 3 Dow. & Ry. (K. B.) 278 . . 567
Muskerry (Lord) *v.* Skeffington (1868), L. R. 3 H. L. 144 343
Mutlow *v.* Bigg (1875), 1 Ch. D. 385; 45 L. J. (CH.) 282; 34 L. T. 278; 24 W. R. 409, C. A. 115
Mutual Reserve Life Insurance Co. *v.* Foster (1902), 20 T. L. R. 715 . . 174
Mutzenbecher *v.* La Aseguradora Española, [1906] 1 K. B. 254; 75 L. J. (K. B.) 172; 94 L. T. 127; 54 W. R. 207; 22 T. L. R. 175, C. A. 556
Mysore West Gold Mining, *Re* (1889), 42 Ch. D. 535; 58 L. J. (CH.) 731; 61 L. T. 453; 37 W. R. 794; 1 Meg. 347 609

N.

NADIN *v.* Bassett (1883), 25 Ch. D. 21; 53 L. J. (CH.) 253; 49 L. T. 454; 32 W. R. 70, C. A. 548, 612, 614, 615
Nail *v.* Punter (1832), 5 Sim. 555 72, 307
Naismith *v.* Boyes, [1899] A. C. 495; 1 Fraser (H. L.), 79; 36 Sc. L. R. 973 . 108
Nanney *v.* Morgan (1887), 37 Ch. D. 346; 57 L. J. (CH.) 311; 58 L. T. 238; 41 W. R. 545, C. A. 103
Nantes *v.* Corrock (1803), 9 Ves. 182 16
Narracott *v.* Narracott (1864), 33 Sw. & Tr. 408; 33 L. J. (P. & M.) 61; 10 L. T. 389; 10 Jur. (N. S.) 640; 12 W. R. 1064 454
Nash, *Re*, Cook *v.* Frederick, [1910] 1 Ch. 1; 79 L. J. (CH.) 1; 101 L. T. 837; 26 T. L. R. 57; 54 Sol. Jo. 48, C. A. 94, 119
——— *v.* Ali Khan (1892), 8 T. L. R. 444, C. A. 591
——— *v.* De Freville, [1900] 2 Q. B. 72; 69 L. J. (Q. B.) 484; 82 L. T. 642; 48 W. R. 434; 16 T. L. R. 268, C. A. 324, 398, 402
——— *v.* Inman, [1908] 2 K. B. 1; 77 L. J. (K. B.) 626; 98 L. T. 658; 24 T. L. R. 401; 52 Sol. Jo. 335, C. A. 432
——— *v.* Turner (1794), 1 Esp. 217 366
Natal Land and Colonization Co. *v.* Good (1868), L. R. 2 P. C. 121; 5 Moo. P. C. C. (N. S.) 132; 16 W. R. 1086 346

PAGE
Nathan, *Re* (1884), 12 Q. B. D. 461; 53 L. J. (Q. B.) 229; 51 L. T. 46; 48 J. P. 452; 32 W. R. 543, C. A. 318
——— *v.* Ogdens, Ltd., (1905), 93 L. T. 553 562
National Association of Plasterers *v.* Smithies, [1906] A. C. 434; 75 L. J. (K. B.) 861; 95 L. T. 71; 22 T. L. R. 678 575
National Assurance Co. *v.* Scott, [1909] 1 I. R. 325 160
National Bank of Australasia *v.* Falkingham & Sons, [1902] A. C. 585; 71 L. J. (P. C.) 105; 87 L. T. 90; 18 T. L. R. 737 566
National Bolivian Co. *v.* Wilson (1880), 5 App. Cas. 176; 43 L. T. 60 . 337, 350
National Mercantile Bank *v.* Hampson (1880), 5 Q. B. D. 177; 49 L. J. (Q. B.) 480; 28 W. R. 424 393
National Permanent Benefit Building Society, *Re*, *Ex parte* Williamson (1869), 5 Ch. App. 309; 22 L. T. 284; 34 J. P. 341; 18 W. R. 388 150
National Provincial Bank of England *v.* Jackson (1886), 33 Ch. D. 1; 55 L. T. 458; 34 W. R. 597, C. A. 80
Naylor *v.* Winch (1824), 1 Sim. & St. 555 16, 17, 24
Neal *v.* Jay (*circa* 1683), cited 12 Mod. Rep. 86; 1 Salk. 281; Skin. 623 . . 563
—— *v.* Jolley, *Re* Jolley. *See* Jolley, *Re*, Neal *v.* Jolley.
—— d. Athol (Duke) *v.* Wilding (1741), 2 Stra. 1151 560
Neale *v.* Electric and Ordnance Accessories Co., Ltd., [1906] 2 K. B. 558; 75 L. J. (K. B.) 974; 95 L. T. 592; 22 T. L. R. 732, C. A. 365
——— *v.* Fry (*circa* 1683), cited 1 Salk. 281. *See* S. C. *sub nom.* Neal *v.* Jay . 563
Neame *v.* Moorsom (1866), L. R. 3 Eq. 91; 36 L. J. (CH.) 274; 12 Jur. (N. S.) 913; 15 W. R. 51 148
Neate *v.* Marlborough (Duke) (1838), 3 My. & Cr. 407 56
Neave *v.* Moss (1823), 1 Bing. 360; 8 Moore (C. P.), 389; 2 L. J. (O. S.) (C. P.) 25 . 373
Needham *v.* Bremner (1866), L. R. 1 C. P. 583; 1 Har. & Ruth. 731; 35 L. J. (C. P.) 313; 14 L. T. 437; 12 Jur. (N. S.) 434; 14 W. R. 694 . 329, 343, 545
——— *v.* Fraser (1845) 3 Dow. & L. 190; 1 C. B. 815; 14 L. J. (C. P.) 256; 9 Jur. 734 579, 590
Neesom *v.* Clarkson (1845), 4 Hare, 97; 9 Jur. 82 71, 167, 168
Neeves *v.* Burrage (1849), 14 Q. B. 504; 19 L. J. (Q. B.) 68; 14 Jur. 177 . . 485
Neil, *Re*, *Ex parte* Burden (1881), 16 Ch. D. 675; 44 L. T. 525; 29 W. R. 879, C. A. . . . 152
Neill *v.* Devonshire (Duke) (1882), 8 App. Cas. 135; 31 W. R. 622...452, 467, 544, 545
Neilson *v.* Betts (1871), L. R. 5 H. L. 1; 40 L. J. (CH.) 317; 19 W. R. 1121 . 68
——— *v.* Harford (1841), 8 M. & W. 806; 11 L. J. (EX.) 20 430
Neison *v.* Walters, *Re* Walters. *See* Walters, *Re*, Neison *v.* Walters.
Nelson *v.* Bridges (1839), 2 Beav. 239 67
——— (Earl) *v.* Bridport (Lord) (1845), 8 Beav. 527; 10 Jur. 871 . . 488, 489
——— *v.* Couch (1863), 15 C. B. (N. S.) 99; 33 L. J. (C. P.) 46; 8 L. T. 577; 10 Jur. (N. S.) 366; 11 W. R. 964 332, 337, 363
——— *v.* Robins, *Re* Robins. *See* Robins, *Re*, Nelson *v.* Robins.
——— *v.* Stocker (1859), 4 De G. & J. 458; 28 L. J. (CH.) 760; 5 Jur. (N. S.) 751; 7 W. R. 603, C. A. 72
——— *v.* Whittall (1817), 1 B. & Ald. 19 511, 605
——— (Edward) & Co., Ltd. *v.* Taber & Co., [1903], 2 K. B. 367; 72 L. J. (K. B.) 771; 89 L. T. 21; 10 Mans. 427 164
Nelthrop *v.* Hill (1669), 1 Cas. in Ch. 135 161
Nepean *v.* Doe d. Knight (1837), 2 M. & W. 894; 7 L. J. (EX.) 335 500
Nesbitt, *Re* (1844), 2 Dow. & L. 529; 14 L. J. (M. C.) 30 485
——— *v.* Parrett (1902), 18 T. L. R. 510, C. A. 571
Netherwood *v.* Wilkinson (1855), 17 C. B. 226 589
Nevil *v.* Johnson (1703), 2 Vern. 447; 1 Eq. Cas. Abr. 227 547
Nevill *v.* Snelling (1880), 15 Ch. D. 679; 49 L. J. (CH.) 777; 43 L. T. 244; 29 W. R. 375 21
Neville *v.* Benjamin, *Re* Benjamin. *See* Benjamin, *Re*, Neville *v.* Benjamin.
——— *v.* Fine Art and General Insurance Co., [1897] A. C. 68; 66 L. J. (Q. B.) 195; 75 L. T. 606; 61 J. P. 500 431
——— *v.* Wilkinson (1782), 1 Bro. C. C. 543 20, 377, 382
New *v.* Burns (1894), 64 L. J. (Q. B.) 104; 71 L. T. 681; 43 W. R. 182; 14 R. 339, C. A. 614
New Callao Co., *Re* (1882), 47 L. T. 175; 30 W. R. 647, C. A. 625
New Ixion Tyre and Cycle Co. *v.* Spilsbury, [1898] 2 Ch. 484; 79 L. T. 229; 15 R. P. C. 567, C. A. 87
New, Prance, and Garrard's Trustee *v.* Hunting, [1897] 1 Q. B. 607 . . 457, 460
New Romney Corporation *v.* New Romney Sewers Commissioners, [1892] 1 Q. B. 840; 61 L. J. (Q. B.) 538; 56 J. P. 756, C. A. 529

PAGE
New Westminster Brewery Co. *v.* Hannah (1875), 1 Ch. D. 278 ; 24 W. R. 137 . 620
New York Breweries Co. *v.* A.-G., [1899] A. C. 62 ; 68 L. J. (Q. B.) 135 ; 79 L. T. 568 ; 63 J. P. 179 ; 48 W. R. 32 ; 15 T. L. R. 93 . 215, 217, 305, 315, 317
New York Life Insurance Co. *v.* Fletcher (1886), 117 United States Reports, 519...386
Newall *v.* Elliott (1863), 1 H. L. Cas. 797 ; 32 L. J. (EX.) 120 ; 7 L. T. 753 ; 9 Jur. (N. S.) 359 ; 11 W. R. 438 . 356, 364, 545
Newbold and the Metropolitan Rail. Co., *Re* (1863), 14 C. B. (N. S.) 405 . 545
Newberry *v.* Benson (1853), 23 L. J. (CH.) 1003 . 561
Newby *v.* Sims, [1894] 1 Q. B. 478 ; 63 L. J. (M. C.) 228 ; 70 L. T. 105 ; 58 J. P. 263 ; 10 R. 596 . 478
Newcastle (Duke) *v.* Broxtowe (Hundred) (1832), 4 B. & Ad. 273 ; 1 Nev. & M. (K. B.) 598 ; 2 L. J. (M. C.) 47 . 468, 528, 530
Newell *v.* Radford (1867), L. R. 3 C. P. 52 ; 37 L. J. (C. P.) 1 ; 17 L. T. 118 ; 16 W. R. 97 . 426, 568
Newfoundland Government *v.* Newfoundland Rail. Co. (1888), 13 App. Cas. 199 ; 57 L. J. (P. C.) 35 ; 58 L. T. 285 . 104, 164
Newham *v.* May (1824), 13 Price, 749 ; M'Cle. 511 . 67
——— *v.* Raithby (1811), 1 Phillim. 315 . 538
Newington *v.* Levy (1870), L. R. 6 C. P. 180 ; 40 L. J. (C. P.) 29 ; 23 L. T. 595 ; 19 W. R. 473 . 333, 358
Newlands *v.* National Employers' Accident Association (1885), 54 L. J. (Q. B.) 428 ; 53 L. T. 242 ; 49 J. P. 628, C. A. . 385
——— *v.* Paynter (1840), 4 My. & Cr. 408 . 48
Newman *v.* Barton (1690), 2 Vern. 205 . 160, 161
——— *v.* Newman (1783), 1 Bro. C. C. 186 . 117, 124
——— *v.* ——— (1885), 28 Ch. D. 674 ; 54 L. J. (CH.) 598 ; 52 L. T. 422 ; 33 W. R. 505 . 82
Newport and South Wales Shipowners' Co., *Re*, Rowland's Case, [1880] W. N. 80, C. A. . 411
Newton, *Re* (1860), 2 De G. F. & J. 3, C. A. . 625
——— *v.* Askew (1848), 6 Hare, 319 . 586
——— *v.* Belcher (1848), 6 Ry. & Can. Cas. 38 ; 12 Q. B. 921 ; 18 L. J. (Q. B.) 53 ; 13 Jur. 253 . 597
——— *v.* Bennet (1782), 1 Bro. C. C. 135 . 34
——— *v.* Chaplin (1850), 10 C. B. 356 ; 19 L. J. (C. P.) 374 ; 14 Jur. 1121 . 520
——— *v.* Constable (1841), 2 Q. B. 157 ; 1 Gal. & Dav. 408 ; 9 Dowl. 933 ; 10 L. J. (Q. B.) 349 ; 6 Jur. 317 . 587
——— *v.* Harland (1840), 1 Man. & G. 956 ; 1 Scott (N. R.), 502 ; 9 Dowl. 16 : 1 Woll. 53 ; 4 Jur. 992 . 578, 583
——— *v.* Liddiard (1848), 12 Q. B. 925 ; 6 Ry. & Can. Cas. 42 ; 18 L. J. (Q. B.) 53. . 384
——— *v.* Newton (1868), L. R. 6 Eq. 135 ; reversed (1868) 4 Ch. App. 143 ; 38 L. J. (CH.) 145 ; 19 L. T. 588 ; 17 W. R. 238. . 78, 81
——— *v.* Rolfe, *Re* Frith. *See* Frith, *Re*, Newton *v.* Rolfe.
Niblett *v.* Daniel (1731), Bunb. 310 . 546
Nicholls, *In the Goods of* (1872), L. R. 2 P. & D. 461 ; 41 L. J. (P.) 88 ; 27 L. T. 323 ; 21 W. R. 161 . 501
——— *v.* Dowding and Kemp (1815), 1 Stark. 81 . 594
——— *v.* Judson (1742), 2 Atk. 300 . 138
——— *v.* Parker (1805), 14 East, 331, n. . 468
Nichols *v.* Nichols (1737), 1 Atk. 409 . 19
Nicholson *v.* Hooper (1838), 4 My. & Cr. 179 . 48, 168
——— *v.* Rose (1859), 4 De G. & J. 10, C. A. . 564
Nickells *v.* Atherstone (1847), 10 Q. B. 944 ; 16 L. J. (Q. B.) 371 ; 11 Jur. 778 . 375, 376
Niell *v.* Morley (1804), 9 Ves. 478 . 16
"Nifa," The, [1892] P. 411 ; 7 Asp. M. L. C. 324 ; 62 L. J. (P.) 12 ; 69 L. T. 56 ; 1 R. 540 . 445
Nisbet *v.* Smith (1789), 2 Bro. C. C. 579 . 51
——— and Potts' Contract, *Re*, [1905] 1 Ch. 391 ; 74 L. J. (CH.) 310 ; 92 L. T. 448 ; 53 W. R. 297 ; 21 T. L. R. 261 ; affirmed, [1906] 1 Ch. 386 ; 75 L. J. (CH.) 238 ; 94 L. T. 297 ; 54 W. R. 286 ; 22 T. L. R. 234, C. A. . 51, 89, 101
Nisbett's Trustees *v.* Learmonth (1845), 8 Dunl. (Ct. of Sess.) 69 ; 18 Sc. Jur. 34 . 245, 254, 257
Nixon *v.* Albion Marine Insurance Co. (1867), L. R. 2 Exch. 338 ; 36 L. J. (EX.) 180 ; 16 L. T. 568 ; 15 W. R. 964 . 515
——— *v.* Freeman (1860), 5 H. & N. 647 ; 29 L. J. (EX.) 271 ; 2 L. T. 361 ; 6 Jur. (N. S.) 983 . 492

PAGE
Nixon *v.* Mayoh (1831), 1 Mood. & R. 76 581
Noakes & Co., Ltd. *v.* Rice, [1902] A. C. 24; 71 L. J. (CH.) 139; 86 L. T. 62; 66 J. P. 147; 50 W. R. 305; 18 T. L. R. 196 91, 101
Noble *v.* Brett (1858), 24 Beav. 499; 27 L. J. (CH.) 516 160
—— *v.* Edwardes, Edwardes *v.* Noble (1877), 5 Ch. D. 378; 37 L. T. 7, C. A. 154
—— *v.* Kennoway (1780), 2 Doug. (K. B.) 510 445
—— *v.* Ward (1867), L. R. 2 Exch. 135; 36 L. J. (EX.) 91; 15 W. R. 520 426
Noel *v.* Bewley (1829), 3 Sim. 103 104, 374
—— *v.* Henley (Lord) (1819), 7 Price, 241 257, 258, 298
—— *v.* Robinson (1682), 1 Vern. 90 70, 160
—— *v.* Wells (1668), 1 Lev. 235; 2 Vent. 358; 2 Cas. in Ch. 145; 2 Rep. Ch. 248; 1 Sid. 359; 3 Keb. 337 328, 338, 362
Nokes *v.* Fish (1857), 3 Drew. 735 97
Norden *v.* McRae, *Re* McRae, Forster *v.* Davis. *See* McRae, *Re*, Forster *v.* Davis, Norden *v.* McRae.
Nordenfelt *v.* Maxim Nordenfelt Guns and Ammunition Co., [1894] A. C. 535; 63 L. J. (CH.) 908; 71 L. T. 489; 11 R. 1 69
Norfolk's (Duke) Case (1685), 3 Cas. in Ch. (Sel. Cas. Ch.) 28; Poll. 223; 1 Eq. Cas. Abr. 192 94
Norman *v.* Ricketts (1886), 3 T. L. R. 182 556
Normanby (Marquis) *v.* Devonshire (Duke) (1697), Freem. (CH.) 216 . . . 12
Normanshaw *v.* Normanshaw and Measham (1893), 69 L. T. 468 572
Norris *v.* Chambres (1861), 29 Beav. 246; 30 L. J. (CH.) 285; 7 Jur. (N. S.) 59 . 66
—— *v.* Wilkinson (1806), 12 Ves. 192 92
North *v.* Ansell (1731), 2 P. Wms. 618 17
—— *v.* Way (1681), 1 Vern. 13; 2 Cas. in Ch. 78; 1 Eq. Cas. Abr. 255 . . 94
North Australian Territory Co., *Re* Archer's Case. *See* Archer's Case, *Re* North Australian Territory Co.
—— *v.* Goldsborough, Mort & Co., [1893] 2 Ch. 381; 62 L. J. (CH.) 603; 69 L. T. 4; 41 W. R. 501; 2 R. 397, C. A. . . . 602
North British Australasian Co., *Re*, *Ex parte* Swan (1859), 7 C. B. (N. S.) 400; 30 L. J. (C. P.) 113 398
North Cheshire and Manchester Brewery Co. *v.* Manchester Brewery Co., [1899] A. C. 83; 68 L. J. (CH.) 74; 79 L. T. 645; 15 T. L. R. 110 . . . 509
North Eastern Rail Co. *v.* Martin (1848), 2 Ph. 758 28
North Staffordshire Rail. Co. *v.* Hanley Corporation (1909), 73 J. P. 477; 26 T. L. R. 20, C. A. 466, 528
Northern Counties of England Fire Insurance Co. *v.* Whipp (1884), 26 Ch. D. 482; 53 L. J. (CH.) 629; 51 L. T. 806; 32 W. R. 626, C. A. 80
Northumberland (Duke) *v.* A.-G., [1905] A. C. 406; 74 L. J. (K. B.) 734; 93 L. T. 88; 54 W. R. 31; 21 T. L. R. 639...263, 265, 266 267, 268, 287, 294
—— *v.* Todd (1878), 7 Ch. D. 777; 47 L. J. (CH.) 343; 38 L. T. 746; 26 W. R. 350 628
—— (Earl) *v.* Aylesford (Earl) (1760), Amb. 540; *sub nom.* Northumberland (Duke) *v.* Egremont (Lord) (1768), Amb. 657 126
Norton *v.* Florence Land and Public Works Co. (1877), 7 Ch. D. 332; 38 L. T. 377 66
—— *v.* Levy, *Re* Defries. *See* Defries, *Re*, Norton *v.* Levy.
—— *v.* Wood (1830), 1 Russ. & M. 178 165
Norton's Settlement, *Re*, Norton *v.* Norton, [1908] 1 Ch. 471; 77 L. J. (CH.) 312; 99 L. T. 257, C. A. 59
Norway *v.* Rowe (1812), 19 Ves. 144 55, 174, 395
Norwich (Bishop) *v.* Berney (1866), 36 L. J. (ECCL.) 8 603
Nothard *v.* Pepper (1864), 17 C. B. (N. S.) 39; 10 L. T. 782; 10 Jur. (N. S.) 1077 531
Noton *v.* Brooks (1861), 7 H. & N. 499; 8 Jur. (N. S.) 155; 10 W. R. 111 . . 413
Nottingham Guardians *v.* Tomkinson (1879), 4 C. P. D. 343; 48 L. J. (M. C.) 171; 28 W. R. 151 576
Nottingham Patent Brick and Tile Co. *v.* Butler (1885), 15 Q. B. D. 261; affirmed (1886) 16 Q. B. D. 778; 55 L. J. (Q. B.) 280; 54 L. T. 444; 34 W. R. 405, C. A. 101
Nottley *v.* Palmer (1854), 2 Drew. 93; 2 W. R. 208 121
Nouvion *v.* Freeman (1889), 15 App. Cas. 1; 59 L. J. (CH.) 257; 62 L. T. 189; 38 W. R. 581 326, 483
Novelli *v.* Rossi (1831), 2 B. & Ad. 757; 9 L. J. (O. S.) (K. B.) 307 . . . 338

PAGE

Noys *v.* Mordaunt (1706), 2 Vern. 581 ; Gilb. (CH.) 2 ; Prec. Ch. 265 ; 1 Eq. Cas. Abr. 273 117
Nunn's Estate, *Re*, [1894] 1 I. R. 252 306, 316
Nutt *v.* Easton, [1899] 1 Ch. 873 ; 68 L. J. (CH.) 367 ; 80 L. T. 353 ; 47 W. R. 430 ; affirmed, [1900] 1 Ch. 29 ; 69 L. J. (CH.) 46 ; 81 L. T. 530, C. A. . 173
Nye *v.* Macdonald (1870), L. R. 3 P. C. 331 ; 39 L. J. (P. C.) 34 ; 23 L. T. 220 ; 18 W. R. 1075 497
Nympsfield (Parish) *v.* Woodchester (Parish) (1742), 2 Stra. 1172 ; Burr. S. C. 191 340

O.

OASTLER *v.* Henderson (1877), 2 Q. B. D. 575 ; 46 L. J. (Q. B.) 607 ; 37 L. T. 22, C. A. 375
Oatway, *Re*, Hertslet *v.* Oatway, [1903] 2 Ch. 356 ; 72 L. J. (CH.) 575 ; 88 L. T. 622 160
Oberrheinische Metallwerke *v.* Cocks, [1906] W. N. 127 50
O'Brien *v.* Salisbury (Marquis) (1889), 6 T. L. R. 133 431
Ochsenbein *v.* Papelier (1873), 8 Ch. App. 695 ; 42 L. J. (CH.) 861 ; 28 L. T. 459 ; 21 W. R. 516 11
O'Connor *v.* Majoribanks (1842) 6 Jur. 509 573
——— *v.* Malone (1839), 6 Cl. & Fin. 572 ; Macl. & Rob. 468 326, 359, 534
——— *v.* Spaight (1804), 1 Sch. & Lef. 305 28
Oetzes *v.* Jennes, *Re* Jennes. *See* Jennes, *Re*, Oetzes *v.* Jennes.
Official Receiver, *Ex parte*, *Re* Arnott. *See* Arnott, *Re*, *Ex parte* Official Receiver.
———————, *Ex parte*, *Re* Desportes. *See* Desportes, *Re*, *Ex parte* Official Receiver.
———————, *Ex parte Re*, Graydon. *See* Graydon, *Re*, *Ex parte* Official Receiver.
———————, *Ex parte*, *Re* Horniblow. *See* Horniblow, *Re*, *Ex parte* Official Receiver.
———————, *Ex parte*, *Re* Tyler. *See* Tyler, *Re*, *Ex parte* Official Receiver.
Offor, *Ex parte*, *Re* Metropolitan (Brush) Electric Light and Power Co. *See* Metropolitan (Brush) Electric Light and Power Co., *Re*, *Ex parte* Offor.
Ogden *v.* Ogden, [1908] P. 46 ; 77 L. J. (P.) 34 ; 97 L. T. 827 ; 24 T. L. R. 94, C. A. . . . 328, 339, 343
Ogilvie *v.* West Australian Mortgage and Agency Corporation, [1896] A. C. 257 ; 65 L. J. (P. C.) 46 ; 74 L. T. 201 378, 384, 385, 396
Ogle *v.* Atkinson (1814), 5 Taunt. 759 407
—— *v.* Cook (1748), 1 Ves. Sen. 177 605
O'Grady *v.* Synan, [1900] 2 I. R. 602, C. A. 354, 355
Ohlsen *v.* Terrero (1874), 10 Ch. App. 127 ; 44 L. J. (CH.) 155 ; 31 L. T. 811 ; 23 W. R. 195, C. A. 600
O'Keeffe *v.* Walsh, [1903] 2 I. R. 681, C. A. 62
Oldenburg (Prince), *In the Goods of* (1884), 9 P. D. 234 ; 53 L. J. (P.) 46 ; 49 J. P. 104 ; 32 W. R. 724 477
Oldfield *v.* Preston (1862), 3 De G. F. & J. 398 ; 31 L. J. (CH.) 256 ; 5 L. T. 650 ; 8 Jur. (N. S.) 107 ; 10 W. R. 257, C. A. 278
Oldham *v.* Hughes (1742), 2 Atk. 452 114
O'Leary's Estate, *Re*, [1896] 1 I. R. 283 234
Oliver *v.* Brighouse (or Brickland) (1732), cited 1 Ves. Sen. 1 ; 3 Atk. 420 . . 141
—— *v.* Hinton, [1899] 2 Ch. 264 ; 68 L. J. (CH.) 583 ; 81 L. T. 212 ; 48 W. R. 3 ; 15 T. L. R. 450, C. A. 80, 88
—— *v.* Hunting (1890), 44 Ch. D. 205 ; 59 L. J. (CH.) 255 ; 62 L. T. 108 ; 38 W. R. 618, C. A. 426
—— *v.* Nautilus Steam Shipping Co., [1903] 2 K. B. 639 ; 72 L. J. (K. B.) 857 ; 89 L. T. 318 ; 52 W. R. 200 ; 19 T. L. R. 697 ; 9 Asp. M. L. C. 436, C. A. . 383, 457, 558, 562
Oliver's Claim, *Re* East London Rail. Co. *See* East London Rail. Co., *Re*, Oliver's Claim.
——— Settlement, *Re*, Evered *v.* Leigh, [1905] 1 Ch. 191 ; 71 L. J. (CH.) 62 . 95, 119

PAGE
Olley *v.* Fisher (1886), 34 Ch. D. 367; 56 L. J. (CH.) 208; 55 L. T. 807; 35 W. R. 301 62
Olliver *v.* King (1856), 8 De G. M. & G. 110; 25 L. J. (CH.) 427; 2 Jur. (N. S.) 312; 2 W. R. 382, C. A. 168
Omeally *v.* Newell (1807), 8 East, 364 628
Omichund *v.* Barker (1745), Willes, 538 476
Ommaney *v.* Stilwell (1856), 23 Beav. 328; 2 Jur. (N. S.) 1058 501
Omychund *v.* Barker (1744), 1 Atk. 21 591
O'Neill (Lord), *Re* (1886), 20 L. R. Ir. 73 290
Ongley *v.* Hill (1874), 22 W. R. 817 610
Onions *v.* Cohen (1865), 2 Hem. & M. 354; 34 L. J. (CH.) 338; 12 L. T. 15; 11 Jur. (N. S.) 198 53
Onward Building Society *v.* Smithson, [1893] 1 Ch. 1; 41 W. R. 53, C. A. 367, 379
Oppenheimer *v.* Robinson South African Banking Co. (1900), *Times*, January 31st, May 31st, C. A. 615
Orby *v.* Trigg (1722), 9 Mod. Rep. 2; 2 Eq. Cas. Abr. 599 91
Orde, *Re* (1883), 24 Ch. D. 271; 52 L. J. (CH.) 832; 49 L. T. 430; 31 W. R. 801, C. A. 625
Orford (Countess), *Re*, Cartwright *v.* Del Balzo (Duke), [1896] 1 Ch. 257; 65 L. J. (CH.) 253; 73 L. T. 681; 44 W. R. 383 221
——— (Earl) *v.* Daston (1702), Colles, 229 36
Oriental Steam Navigation Co., *Re*, *Ex parte* Briggs (1861), 4 De G. F. & J. 191; 31 L. J. (CH.) 241; 5 L. T. 477; 8 Jur. (N. S.) 201; 10 W. R. 125 . 174
Orlebar, *Re*, Wynter *v.* Orlebar, [1908] 1 Ch. 136; 77 L. J. (CH.) 54; 98 L. T. 19; 24 T. L. R. 42 220
Ormonde (Marquis) *v.* Kynnersley (1820), 5 Madd. 369 90
O'Rourke *v.* Railways Commissioner (1880), 15 App. Cas. 371; 59 L. J. (P. C.) 72; 63 L. T. 66 566
Orpen, *Re*, Beswick *v.* Orpen (1880), 16 Ch. D. 202; 50 L. J. (CH.) 25; 43 L. T. 728; 29 W. R. 467 164
Orr *v.* Kaines (1751), 2 Ves. Sen. 194 161
— *v.* Morice (1821), 3 Brod. & Bing. 139; 6 Moore (C. P.), 347 606
Orrell *v.* Orrell (1871), 6 Ch. App. 302; 40 L. J. (CH.) 539; 24 L. T. 245; 19 W. R. 370 120
Orrell Colliery and Fire Brick Co., *Re* (1879), 12 Ch. D. 681; 48 L. J. (CH.) 655 . 483
Orsmond, *Re*, Drury *v.* Orsmond (1887), 58 L. T. 24 36
Osborn *v.* London Dock Co. (1855), 10 Exch. 698; 3 C. L. R. 313; 24 L. J. (EX.) 140; 1 Jur. (N. S.) 93; 3 W. R. 238 575
Osborne *v.* Bradley, [1903] 2 Ch. 446; 73 L. J. (CH.) 49; 89 L. T. 11 . 101, 102
O'Shea *v.* Wood, [1891] P. 286; 60 L. J. (P.) 83; 65 L. T. 250, C. A. . . 582
Osmaston *v.* Land Financiers' Association, [1878] W. N. 101 626
Osmond *v.* Fitzroy (1731), 3 P. Wms. 129; 2 Eq. Cas. Abr. 186 16
Ottaway, *Re*, *Ex parte* Child (1882), 20 Ch. D. 126; 51 L. J. (CH.) 494; 46 L. T. 118; 30 W. R. 282, C. A. 597, 622, 624
Otter *v.* Vaux (Lord) (1856), 6 De G. M. & G. 638; 26 L. J. (CH.) 128; 3 Jur. (N. S.) 169; 5 W. R. 188 148
Otto, *Ex parte*, R. *v.* Lushington. *See* R. *v.* Lushington, *Ex parte* Otto.
Ottos Kopje Diamond Mines, Ltd., *Re*, [1893] 1 Ch. 618; 62 L. J. (CH.) 166; 68 L. T. 138; 41 W. R. 258 322, 408, 409
Outram *v.* Morewood (1803), 3 East, 346 331, 343, 344, 544
——— *v.* Outram, [1877] W. N. 75 593
Ovens, *In the Goods of* (1892), 29 L. R. Ir. 451 511
Ovenston *v.* Wilson (1847), 2 Car. & Kir. 1 607
Over *v.* Harwood, [1900] 1 Q. B. 803; 69 L. J. (Q. B.) 272; 64 J. P. 326; 48 W. R. 608; 16 T. L. R. 163 498, 499
Overend, Gurney & Co., *Ex parte*, *Re* Land Credit Co. of Ireland. *See* Land Credit Co. of Ireland, *Re*, *Ex parte* Overend, Gurney & Co.
Overton *v.* Banister (1844), 3 Hare, 503; 8 Jur. 906 72
——— *v.* Harvey (1850), 9 C. B. 324; 1 L. M. & P. 233; 19 L. J. (C. P.) 256; 14 Jur. 902 326, 332
Ovey, *Re*, Broadbent *v.* Barrow (1885), 31 Ch. D. 113; 55 L. J. (CH.) 103; 53 L. T. 723; 34 W. R. 100 146
Owen, *Re*, [1894] 3 Ch. 220; 63 L. J. (CH.) 749; 71 L. T. 181; 43 W. R. 55; 8 R. 566. 93
——— *v.* Flack (1826), 2 Sim. & St. 600; 4 L. J. (O. S.) (CH.) 202 446
——— *v.* Warburton (1805), 1 Bos. & P. (N. R.) 326 571
——— and Gutch *v.* Homan (1853), 4 H. L. Cas. 997 54, 55
Owens *v.* Dickenson (1840), Cr. & Ph. 48; 4 Jur. 1151 34

PAGE
Oxenden *v.* Compton (Lord) (1793), 2 Ves. 69 112
Oxford and Cambridge Universities *v.* Gill & Sons (1899), *Times*, June 14th . 449
Oxford Poor Rate Case (1857), 8 E. & B. 184 497
Oxford's (Earl) Case (1615), 1 Rep. Ch. 1 5, 7, 47, 168, 394

P.

PADBURY *v.* Clark (1850), 2 Mac. & G. 298 ; 2 H. & Tw. 341 ; 19 L. J. (CH.) 533...122, 126
Paddock *v.* Forrester (1841), 3 Scott (N. R.), 715 ; 3 Man. & G. 903 ; 1 Dowl. (N. S.) 527 ; 11 L. J. (C. P.) 107 457, 558
Padwick *v.* Stanley (1852), 9 Hare, 627 ; 16 Jur. 586 52, 156
Page, *Re*, Hill *v.* Fladgate, [1910] 1 Ch. 489 ; 102 L. T. 388 ; 54 Sol. Jo. 305, C. A. 59
Paget *v.* Ede (1874), L. R. 18 Eq. 118 ; 43 L. J. (CH.) 571 ; 30 L. T. 228 ; 22 W. R. 625 65
—— *v.* Gee (1753), Amb. 198 29, 68
—— *v.* Marshall (1884), 28 Ch. D. 255 ; 54 L. J. (CH.) 575 ; 51 L. T. 351 ; 49 J. P. 85 ; 33 W. R. 608 22, 23
Paine *v.* Jones (1874), L. R. 18 Eq. 320 ; 43 L. J. (CH.) 787 ; 30 L. T. 779 ; 22 W. R. 807 368, 374
—— and Layton, *Ex parte*, *Re* South Essex Estuary and Reclamation Co. *See* South Essex Estuary and Reclamation Co., *Re*, *Ex parte* Paine and Layton.
Palace Shipping Co., Ltd. *v.* Caine, [1907] A. C. 386 ; 76 L. J. (K. B.) 1079 ; 23 T. L. R. 731 344
Palmer, *Re*, Palmer *v.* Rose-Innes, [1900] W. N. 9 220, 229
——— *v.* Crowle (1738), Andr. 382 571
——— *v.* Ekins (1728), 2 Ld. Raym., 1550 ; 2 Stra. 817 ; 1 Barn. (K. B.) 103 . 403
——— *v.* Lock (1880), 15 Ch. D. 294 ; 50 L. J. (CH.) 113 ; 43 L. T. 454 ; 28 W. R. 926, C. A. 141
——— *v.* Maclear and M'Grath (1858), 1 Sw. & Tr. 149 597
——— *v.* Moore, [1900] A. C. 293 ; 69 L. J. (P. C.) 64 ; 82 L. T. 167 . 173, 382
——— *v.* Neave (1805), 11 Ves. 165 20
——— *v.* ——— (1856), 8 De G. M. & G. 74 ; 25 L. J. (CH.) 461 ; 2 Jur. (N. S.) 268, C. A. 133, 566
——— *v.* Temple (1839), 9 Ad. & El. 508 ; 1 Per. & Dav. 379 ; 8 L. J. (Q. B.) 179 349
——— *v.* Whitmore (1832), 5 Sim. 178 307
——— & Co. and Hosken & Co., *Re*, [1898] 1 Q. B. 131 ; 67 L. J. (Q. B.) 1 ; 77 L. T. 350 ; 46 W. R. 49, C. A. 545
Palmes, *Re*, Palmes *v.* R., [1901] W. N. 146 ; 111 L. T. Jo. 275 . . . 470, 626
Pankhurst *v.* Howell (1870), 6 Ch. App. 136 ; 19 W. R. 312 129
Panther Lead Co., *Re*, [1896] 1 Ch. 978 ; 65 L. J. (CH.) 499 ; 44 W. R. 573 ; 3 Mans. 165 375
Panton *v.* Jones (1813), 3 Camp. 372 406
Papendick *v.* Bridgwater (1855), 5 E. & B. 166 ; 24 L. J. (Q. B.) 289 ; 1 Jur. (N. S.) 657 ; 3 W. R. 490 460
Parbury's Case, [1896] 1 Ch. 100 ; 65 L. J. (CH.) 104 ; 73 L. T. 506 ; 44 W. R. 107 ; 2 Mans. 616 411
Pardo *v.* Bingham (1868), L. R. 6 Eq. 485 34
Pardoe *v.* Price (1844), 13 M. & W. 267 ; 14 L. J. (EX.) 212 519
Pargeter *v.* Harris (1845), 7 Q. B. 708 ; 15 L. J. (Q. B.) 113 ; 10 Jur. 260 . . 367
Paris *v.* Gilham (1813), Coop. G. 56 58
"Parisian," The (1887), 13 P. D. 16 ; 6 Asp. M. L. C. 249 ; 57 L. J. (ADM.) 13 ; 58 L. T. 92 ; 36 W. R. 704 614, 621, 622, 624
Parker, *Re* (1859), 4 H. & N. 666 ; 29 L. J. (EX.) 66 ; 5 Jur. (N. S.) 1058 ; 7 W. R. 600 239
———, *Re*, *Ex parte* Turquand (1885), 14 Q. B. D. 636 ; 54 L. J. (Q. B.) 242 ; 53 L. T. 579 ; 33 W. R. 437, C. A. 427
——— *v.* Gerrard (1754), Amb. 236 41
——— *v.* Gordon (1806), 7 East, 385 ; 3 Smith, K. B. 358 ; 6 Esp. 41 . . 495
——— *v.* Hoskins (1810), 2 Taunt. 223 605
——— *v.* Ibbetson (1858), 4 C. B. (N. S.) 346 ; 27 L. J. (C. P.) 236 ; 4 Jur. (N. S.) 536 ; 6 W. R. 519 444
——— *v.* Jones, [1910] 2 K. B. 32 ; 102 L. T. 685 ; 26 T. L. R. 403 . . . 389
——— *v.* Lewis (1873), 8 Ch. App. 1035 ; 43 L. J. (CH.) 281 ; 29 L. T. 199 ; 21 W. R. 923 343, 347
——— *v.* McKenna (1874), 10 Ch. App. 96 ; 44 L. J. (CH.) 425 ; 31 L. T. 739 ; 23 W. R. 271 68, 158

PAGE
Parker *v.* M'William (1830), 4 Moo. & P. 480; 8 L. J. (O. S.) (C. P.) 276; 6 Bing. 683 594
——— *v.* Manning (1798), 7 Term Rep. 537 405
——— *v.* Morrell (1848), 2 Ph. 453; 17 L. J. (CH.) 226; 12 Jur. 253 . . . 461
——— *v.* Pullen, *Re* Pullen. *See* Pullen, *Re*, Parker *v.* Pullen.
——— *v.* Simpson (1869), 18 W. R. 204 352
——— *v.* South Eastern Rail. Co., Gabill *v.* Same (1877), 2 C. P. D. 416; 46 L. J. (Q. B.) 768; 36 L. T. 540; 25 W. R. 564, C. A. 448
——— *v.* Sowerby (1854), 4 De G. M. & G. 321; 23 L. J. (CH.) 623; 18 Jur. 523; 2 W. R. 547; 2 Eq. Rep. 664, C. A. 121
Parker-Jervis, *Re*, Salt *v.* Locker, [1898] 2 Ch. 643; 67 L. J. (CH.) 682; 79 L. T. 403; 47 W. R. 147 222, 231
Parkhurst *v.* Lowten (1816), 1 Mer. 391 574
Parkin *v.* Moon (1836), 7 C. & P. 408 598, 600
——— *v.* Thorold (1852), 16 Beav. 59; 16 Jur. 959 154
Parkinson *v.* Crawshay, [1894] W. N. 85 628
——— *v.* Francis (1846), 15 Sim. 160 533
Parmiter *v.* Coupland (1840), 6 M. & W. 105; 9 L. J. (EX.) 202; 4 Jur. 701 . 431
——— *v.* Parmiter (1861), 3 De G. F. & J. 461; 30 L. J. (CH.) 508; 3 L. T. 799 517
Parnell *v.* Wood, [1892] P. 137 554
Parr *v.* Parr (1833), 1 My. & K. 647; 2 L. J. (CH.) 167 267
Parrott, *Re*, *Ex parte* Cullen, [1891] 2 Q. B. 151; 60 L. J. (Q. B.) 567; 64 L. T. 801; 39 W. R. 543; 8 Morr. 185 511
Parry *v.* House (1817), Holt (N. P.), 489 402
——— *v.* May and Morret (1833), 1 Mood. & R. 279 521
Partington *v.* A.-G. (1869), L. R. 4 H. L. 100 308, 309, 312
Parsons, *Re*, Stockley *v.* Parsons (1890), 45 Ch. D. 51; 59 L. J. (CH.) 666; 62 L. T. 929; 38 W. R. 712 45
——— *v.* Miller, *Re* Stokes. *See* Stokes, *Re*, Parsons *v.* Miller.
——— *v.* New Zealand Shipping Co., [1901] 1 K. B. 548; 70 L. J. (K. B.) 404; 84 L. T. 218; 49 W. R. 355; 17 T. L. R. 274; 6 Com. Cas. 41; 9 Asp. M. L. C. 170, C. A. 387, 563
Parsons' Trust, *Re* (1868), 18 L. T. 704 504
Partington *v.* Hawthorne (1888), 52 J. P. 807 335
Partridge *v.* Coates (1824), Ry. & M. 153 521
——— *v.* Ward, *Re* Bridgwater's Settlement. *See* Bridgwater's Settlement, *Re*, Partridge *v.* Ward.
Pascoe *v.* Swan (1859), 27 Beav. 508; 29 L. J. (CH.) 159; 1 L. T. 17; 5 Jur. (N. S.) 1235; 8 W. R. 130 41
Patent Safety Gun Cotton Co. *v.* Wilson (1880), 49 L. J. (Q. B.) 713, C. A. . 399
Paterson *v.* Scott (1852), 1 De G. M. & G. 531; 21 L. J. (CH.) 346; 16 Jur. 898, C. A. 145
Patman *v.* Harland (1881), 17 Ch. D. 353; 50 L. J. (CH.) 642; 44 L. T. 728; 29 W. R. 707 87
Patrick, *Re*, Bills *v.* Tatham, [1891] 1 Ch. 82; 60 L. J. (CH.) 111; 63 L. T. 752; 39 W. R. 113, C. A. 98
——— *v.* Simpson (1889), 24 Q. B. D. 128; 59 L. J. (Q. B.) 7; 61 L. T. 686 . 155
Patrickson *v.* Patrickson (1865), L. R. 1 P. & D. 86; 55 L. J. (P. & M.) 48; 13 L. T. 567; 12 Jur. (N. S.) 30; 14 W. R. 212 504
Patterson *v.* Black (1780), 1 Park on Marine Insurance, 8th ed., 920 . . . 501
——— *v.* Wooler (1876), 2 Ch. D. 586; 45 L. J. (CH.) 274; 24 W. R. 455 . 620
Pattisson *v.* Gilford (1874), L. R. 18 Eq. 259; 43 L. J. (CH.) 524; 22 W. R. 673. 52
Pattle *v.* Hornibrook, [1897] 1 Ch. 25; 66 L. J. (CH.) 144; 75 L. T. 475; 45 W. R. 123 567
Pawlett *v.* A.-G. (1667), Hard. 465; 1 Eq. Cas. Abr. 311 94
Paxton *v.* Douglas (1803), 8 Ves. 520 33
——— *v.* ——— (1812), 2 Ves. 225 574
Payne *v.* Bennett, *Re* Goodrich. *See* Goodrich, *Re*, Payne *v.* Bennett.
——— *v.* Grey, *Re* Stamford and Warrington (Earl). *See* Stamford and Warrington (Earl), *Re*, Payne *v.* Grey.
——— *v.* Ibbotson (1858), 27 L. J. (EX.) 341 595, 597
——— *v.* R., [1902] A. C. 552; 71 L. J. (P. C.) 128; 87 L. T. 84; 51 W. R. 351; 18 T. L. R. 725 193
——— (David) & Co., Ltd., *Re*, Young *v.* Payne (David) & Co., [1904] 2 Ch. 608; 73 L. J. (CH.) 849; 91 L. T. 777; 20 T. L. R. 590; 11 Mans. 437, C. A. 84
Payton & Co., Ltd. *v.* Snelling, Lampard & Co., [1901] A. C. 308; 70 L. J. (CH.) 644; 85 L. T. 287; 17 R. P. C. 628 509

PAGE
Peace *v.* Brookes, [1895] 2 Q. B. 451; 2 Mans. 491; 64 L. J. (Q. B.) 747; 72 L. T. 798; 15 R. 593 511
Peaceable *v.* Watson (1811), 4 Taunt. 16 463
Peachy *v.* Somerset (Duke) (1721), 1 Stra. 447; Prec. Ch. 568; 2 Eq. Cas. Abr. 227, 228 151
Peacock *v.* Burt (1834), 4 L. J. (CH.) 33 83
——— *v.* Evans (1809), 16 Ves. 512 17, 21, 72
——— *v.* Harper (1878), 7 Ch. D. 648; 47 L. J. (CH.) 238; 38 L. T. 143; 26 W. R. 109 457, 558, 621
Peacock's Estate, *Re* (1872), L. R. 14 Eq. 236; 27 L. T. 472 130
Peake *v.* Highfield (1826), 1 Russ. 559 53
Pearce, *Re* (1857), 24 Beav. 491 239
——— *v.* Creswick (1843), 2 Hare, 286 28, 44
——— *v.* Davis (1834), 1 Mood. & R. 365 562
——— *v.* Foster (1885), 15 Q. B. D. 114; 54 L. J. (Q. B.) 432; 52 L. T. 886; 50 J. P. 4; 33 W. R. 919, C. A. 572
——— *v.* Gardner (1852), 10 Hare, 287 108
——— *v.* Hooper (1810), 3 Taunt, 60 606
Peareth *v.* Marriott (1882), 22 Ch. D. 182; 52 L. J. (CH.) 221; 48 L. T. 170; 31 W. R. 68, C. A. 334
Pearl Life Assurance Co. *v.* Johnson, [1909] 2 K. B. 288; 78 L. J. (K. B.) 777; 100 L. T. 483; 73 J. P. 216 366
Pearly *v.* Smith (1745), 3 Atk. 260 29
Pearse *v.* Dobinson (1865), 35 L. J. (CH.) 110; 13 L. T. 519; 14 W. R. 121 . 326
——— *v.* Morrice (1834), 2 Ad. & El. 84; 4 Nev. & M. (K. B.) 48 366
——— *v.* Pearse (1838), 9 Sim. 430 309
——— *v.* ——— (1853), 2 W. R. 129 240
Pearson *v.* A.-G., *Re* Perton. *See* Perton, *Re*, Pearson *v.* A.-G.
——— *v.* Cardon (1831), 2 Russ. & M. 606 58
——— *v.* Iles (1781), 2 Doug. (K. B.) 556 590
——— *v.* Lane (1809), 17 Ves. 101 104, 112
——— *v.* Lemaitre (1843), 5 Man. & G. 700; 6 Scott (N. R.), 607; 12 L. J. (C. P.) 253; 7 Jur. 748 453
——— *v.* Shaw (1844), 7 Ir. L. R. 1 492
——— *v.* Wilcox (1853), 10 Hare, Appendix, xxxv.; 1 Eq. Rep. 239; 1 W. R. 492 625
Pease *v.* Chaytor (1861), 1 B. & S. 658; 31 L. J. (M. C.) 1; 5 L. T. 280; 8 Jur. (N. S.) 482; 10 W. R. 16; (1863), 3 B. & S. 620; 8 L. T. 613; 32 L. J. (M. C.) 121; 9 Jur. (N. S.) 664; 11 W. R. 563 335
Peck, *In the Goods of* (1860), 2 Sw. & Tr. 507; 29 L. J. (P. M. & A.) 95 . . 500
—— *v.* Peck (1870), 21 L. T. 670; 18 W. R. 295 597
Pedder's Settlement, *Re* (1854), 5 De G. M. & G. 890; 3 Eq. Rep. 157; 24 L. J. (CH.) 313; 3 W. R. 136, C. A. 107, 115
Pedler *v.* Paige (1833), 1 Mood. & R. 258 605
Peek *v.* Gurney (1873), L. R. 6 H. L. 377; 43 L. J. (CH.) 19; 22 W. R. 29 . 15, 68, 175
Pegge *v.* Neath and District Tramways Co., Ltd., [1898] 1 Ch. 183; 67 L. J. (CH.) 17; 77 L. T. 550; 46 W. R. 243; 14 T. L. R. 62 74
Pegler *v.* Gillatt, *Re* Anderson. *See* Anderson, *Re*, Pegler *v.* Gillatt.
Pell *v.* Daubeny (1850), 5 Exch. 955; 20 L. J. (EX.) 44 584
Pemberton *v.* Hughes, [1899] 1 Ch. 781; 68 L. J. (CH.) 281; 80 L. T. 369; 27 W. R. 354; 15 T. L. R. 211, C. A. 338, 483
——— *v.* Topham (1838), 1 Beav. 316; 2 Jur. 1009 31
Penfold *v.* Dixon, *Re* Dixon. *See* Dixon, *Re*, Penfold *v.* Dixon.
Penn *v.* Baltimore (Lord) (1750), 1 Ves. Sen. 444 65
Pennefather *v.* Pennefather (1872), 6 I. R. Eq. 171 502
Pennell *v.* Deffell (1853), 4 De G. M. & G. 372; 23 L. J. (CH.) 115; 18 Jur. 273; 1 W. R. 499, C. A. 159, 160
——— *v.* Franklin, *Re* White. *See* White, *Re*, Pennell *v.* Franklin.
Penniman *v.* Hill (1876), 24 W. R. 245 593
Penny *v.* Allen (1857), 7 De G. M. & G. 409; 3 Jur. (N. S.) 273; 5 W. R. 303 . 168
——— *v.* Hanson (1887), 18 Q. B. D. 478; 56 L. J. (M. C.) 41; 56 L. T. 235; 51 J. P. 167; 35 W. R. 379; 16 Cox, C. C. 173 494
——— *v.* Pidcock, *Re* Pidcock. See Pidcock, *Re*, Penny *v.* Pidcock.
Penson *v.* Cartwright (1614), Cro. Jac. 345; 2 Bulst. 207 5
Percival, *Ex parte*, R. *v.* Brixton Prison (Governor). *See* R. *v.* Brixton Prison (Governor), *Ex parte* Percival.
——— *v.* Nanson (1851), 7 Exch. 1; 21 L. J. (EX.) 1 464

PAGE
Percival *v.* R. (1864), 3 H. & C. 217 ; 33 L. J. (EX.) 289 ; 10 L. T. 622 ; 10 Jur. (N. S.) 1059 ; 12 W. R. 966 313, 318
Perham *v.* Kempster, [1907] 1 Ch. 373 ; 76 L. J. (CH.) 223 ; 96 L. T. 297 . 83
Perkins, *Re*, Brown *v.* Perkins (1909), 101 L. T. 345 ; 53 Sol. Jo. 698 . 108, 109
——— *v.* Slater (1875), 1 Ch. D. 83 ; 45 L. J. (CH.) 224 ; 24 W. R. 39 . . 624
——— *v.* Vaughan (1842), 4 Man. & G. 988 ; 1 Dowl. (N. S.) 700 ; 6 Jur. 1114 438, 455
Perrat *v.* Ballard (1681), 2 Cas. in Ch. 72 44
Perry *v.* Barnett (1885), 15 Q. B. D. 388 ; 54 L. J. (Q. B.) 466 ; 53 L. T. 585, C. A. 445
——— *v.* Gibson (1834), 1 Ad. & El. 48 ; 3 Nev. & M. (K. B) 462 ; 3 L. J. (K. B.) 158...597
——— *v.* Holl (1860), 2 De G. F. & J. 38 ; 29 L. J. (CH.) 677 ; 2 L. T. 585 ; 6 Jur. (N. S.) 661 ; 8 W. R. 570 85
——— *v.* Meadowcroft (1846), 10 Beav. 122 351
——— *v.* Phelips (1798), 4 Ves. 108 139
——— *v.* ——— (1804), 10 Ves. 34 33, 48
——— *v.* Phosphor Bronze Co. (1894), 71 L. T. 854 ; 14 R. 351, C. A. . . . 555
——— *v.* Whitehead (1801), 6 Ves. 544 132
Perry's Executors *v.* R. (1868), L. R. 4 Exch. 27 ; 19 L. T. 520 ; 17 W. R. 382 . 237, 309, 313, 318
Perry-Herrick *v.* Attwood (1857), 2 De G. & J. 21 ; 27 L. J. (CH.) 121 ; 4 Jur. (N. S.) 101 ; 6 W. R. 204, C. A. 81, 394
Persse *v.* Persse (1856), 5 H. L. Cas. 671 587
Perth Earldom, The (1848), 2 H. L. Cas. 865 534, 565
Perton, *Re*, Pearson *v.* A.-G. (1885), 53 L. T. 707 470
Peruvian Guano Co. *v.* Dreyfus Brothers & Co., [1892] A. C. 166 ; 61 L. J. (CH.) 749 ; 66 L. T. 536 ; 7 Asp. M. L. C. 225 71
Petch *v.* Lyon (1846), 9 Q. B. 147 ; 15 L. J. (Q. B.) 393 424, 462
Peter *v.* Rich (1630), 1 Rep. Ch. 19 ; 1 Eq. Cas. Abr. 114 30, 70
Peterborough (Earl) *v.* Germaine (1709), 6 Bro. Parl. Cas. 1 333
——————— *v.* Norfolk (Duchess) (1702), Prec. Ch. 212 ; affirmed *sub nom.* Peterborough (Earl) *v.* Germaine (1703), 3 Bro. Parl. Cas. 310 . . 546
Peters *v.* Fleming (1840), 6 M. & W. 42 ; 9 L. J. (EX.) 81 432, 494
——— *v.* Lewes and East Grinstead Rail. Co. (1881), 18 Ch. D. 429 ; 50 L. J. (CH.) 839 ; 45 L. T. 234 ; 29 W. R. 875, C. A. 113
——— *v.* Tilly (1886), 11 P. D. 145 ; 55 L. J. (P.) 75 ; 35 W. R. 183 . . 333, 359
Peterson *v.* Peterson (1866), L. R. 3 Eq. 111 ; 36 L. J. (CH.) 101 ; 15 W. R. 164...161
Petit *v.* Smith (1695), 1 P. Wms. 7 ; Comb. 378 ; 5 Mod. Rep. 247 ; Com. 3 ; 1 Ld. Raym. 86 69
Peto *v.* Brighton, Uckfield and Tunbridge Wells Rail. Co. (1863), 1 Hem. & M. 468 ; 32 L. J. (CH.) 677 ; 11 W. R. 874 50
——— *v.* Hammond (1861), 30 Beav. 495 ; 31 L. J. (CH.) 354 ; 8 Jur. (N. S.) 550 . 87
Petre *v.* Espinasse (1834), 2 My. & K. 496 17
——— *v.* Petre (1853), 1 Drew. 371 154
Petrie *v.* Nuttall (1856), 11 Exch. 569 ; 25 L. J. (EX.) 200 ; 4 W. R. 234 . 329, 343, 349, 543, 544
Pettiward *v.* Prescott (1802), 7 Ves. 541 120
Petty *v.* Styward (1632), 1 Rep. Ch. 31 ; Toth. 183 ; 1 Eq. Cas. Abr. 290 . . 69
Peverett, *In the Goods of*, [1902] P. 205 ; 71 L. J. (P.) 114 ; 87 L. T. 143 . . 605
Peyton, *Re* (1861), 7 H. & N. 265 ; 31 L. J. (EX.) 50 ; 5 L. T. 313 ; 7 Jur. (N. S.) 921 ; 9 W. R. 838 265, 290
Pfiel *v.* Vanbatenberg (1810), 2 Camp. 439 562
Phelps *v.* Prew (1854), 3 E. & B. 430 ; 2 C. L. R. 1422 ; 23 L. J. (Q. B.) 140 ; 18 Jur. 249 ; 2 W. R. 258 581, 582
——— *v.* Prothero (1855), 7 De G. M. & G. 722 365
——— *v.* ——— (1855), 16 C. B. 370 ; 3 C. L. R. 906 ; 24 L. J. (C. P.) 225 ; 1 Jur. (N. S.) 1170 365
Phené *v.* Popplewell (1862), 12 C. B. (N. S.) 334 ; 31 L. J. (C. P.) 235 ; 6 L. T. 247 ; 8 Jur. (N. S.) 1104 ; 10 W. R. 523 375
Phené's Trusts, *Re* (1870), 5 Ch. App. 139 ; 39 L. J. (CH.) 316 ; 22 L. T. 111 ; 18 W. R. 303 440, 500, 501
Philbrick's Settlement, *Re* (1865), 34 L. J. (CH.) 368 ; 12 L. T. 261 ; 11 Jur. (N. S.) 558 ; 13 W. R. 570 252
Philips *v.* Bury (1694), 1 Ld. Raym. 5 ; Comb. 265 ; Holt (K. B.), 715 ; 1 Show. 360 ; 4 Mod. Rep. 106 ; Skin. 447 ; Show. Parl. Cas. 35 ; Carth. 180 ; 2 Term Rep. 346 328, 332, 362, 363
——— *v.* Philips (1844), 3 Hare, 281 137
Philipson *v.* Chase (1809), 2 Camp. 110 521, 522
Phillips, *Ex parte* (1812), 19 Ves. 118 112

PAGE
Phillips *v.* Gutteridge (1859), 4 De G. & J. 531, C. A. 148
——— *v.* Homfray (1883), 24 Ch. D. 439; 52 L. J. (CH.) 833; 49 L. T. 5; 32 W. R. 6, C. A. 68
——— *v.* Howell, [1901] 2 Ch. 773; 71 L. J. (CH.) 13; 85 L. T. 777; 50 W. R. 73 163
——— *v.* Hudson (1867), 2 Ch. App. 243; 36 L. J. (CH.) 301; 16 L. T. 221; 15 W. R. 370 529, 530
——— *v.* Im Thurn (1865), 18 C. B. (N. S.) 694; 11 Jur. (N. S.) 489; 13 W. R. 750 394
——— *v.* Llanover (Lady). *See* Moggridge *v.* Hall, Llanover (Lady) *v.* Homfray, Phillips *v.* Llanover (Lady).
——— *v.* Llanover. *See* Llanover *v.* Homfray, Phillips *v.* Llanover.
——— *v.* Middlesex (Sheriff) (1795), 1 Esp. 355 597
——— *v.* Miller (1875), L. R. 10 C. P. 420; 44 L. J. (C. P.) 265; 32 L. T. 638; 23 W. R. 834 81, 88
——— *v.* Phillips (1852), 9 Hare, 471 28
——— *v.* ——— (1861), 4 De G. F. & J. 208; 31 L. J. (CH.) 321; 5 L. T. 655; 8 Jur. (N. S.) 145; 10 W. R. 236 77, 79, 83
——— *v.* Pound (1852), 7 Exch. 881; 21 L. J. (EX.) 277; 16 Jur. 645 . . 586
——— *v.* Prentice (1843), 2 Hare, 542; 12 L. J. (CH.) 497; 7 Jur. 528 . . 625
——— *v.* Probyn, [1899] 1 Ch. 811; 68 L. J. (CH.) 401; 80 L. T. 513; 15 T. L. R. 324 73
——— *v.* Sylvester (1872), 8 Ch. App. 173; 42 L. J. (CH.) 225; 27 L. T. 840; 21 W. R. 179 99
——— *v.* Ward (1863), 2 H. & C. 717; 33 L. J. (EX.) 7; 9 L. T. 345; 9 Jur. (N. S.) 1182; 12 W. R. 106 336, 350
Phillips' (William) Insurance, *Re* (1883), 23 Ch. D. 235; 52 L. J. (CH.) 441; 48 L. T. 81; 31 W. R. 511, C. A. 264
Phillpotts *v.* Phillpotts (1850), 10 C. B. 85; 20 L. J. (C. P.) 11 370
Phipps *v.* Parker (1808), 1 Camp. 412 606
——— *v.* Sculthorpe (1817), 1 B. & Ald. 50 402
Phosphate Sewage Co. *v.* Moleson (1879), 4 App. Cas. 801 333
Pickard *v.* Sears (1837), 6 Ad. & El. 469; 2 Nev. & P. (Q. B.) 488 . 323, 324, 369, 377, 382
Pickering *v.* Noyes (1823), 1 B. & C. 263; 2 Dow. & Ry. (Q. B.) 386 . . . 574
——— *v.* Stamford (Lord) (1793), 2 Ves. 272 168
——— *v.* ——— ——— (1795), 2 Ves. 581 172
——— *v.* Stephenson (1872), L. R. 14 Eq. 322; 41 L. J. (CH.) 493; 26 L. T. 608; 20 W. R. 654 488
——— *v.* Vowles (1783), 1 Bro. C. C. 197 155
Pickersgill *v.* Rodger (1876), 5 Ch. D. 163 117, 121, 122, 123
Pickett *v.* Loggon (1807), 14 Ves. 215 17
——— *v.* Packham (1869), 4 Ch. App. 190; 16 W. R. 1177 440
Pickup *v.* Thames Insurance Co. (1878), 3 Q. B. D. 594; 47 L. J. (Q. B.) 749; 39 L. T. 341; 26 W. R. 689; 4 Asp. M. L. C. 43, C. A. . . 433, 434, 441
Pidcock, *Re*, Penny *v.* Pidcock (1907), 51 Sol. Jo. 514 92
Pidding *v.* Franks (1849), 1 Mac. & G. 56; 1 H. & Tw. 220; 18 L. J. (CH.) 295; 13 Jur. 593 413
Piddocke *v.* Burt, [1894] 1 Ch. 343; 63 L. J. (CH.) 246; 70 L. T. 553; 42 W. R. 248; 8 R. 104 156
Piercy, *Re*, Whitwham *v.* Piercy, [1898] 1 Ch. 565; 67 L. J. (CH.) 297; 78 L. T. 277; 46 W. R. 503, C. A. 146
Piers *v.* Piers (1849), 2 H. L. Cas. 331; 13 Jur. 569 504
Pierse *v.* Waring (1745), cited, 1 P. Wms. (6th ed.) 121; 2 Ves. Sen. 547 . . 19
Piggot *v.* Eastern Counties Rail. Co. (1846), 3 C. B. 229; 15 L. J. (C. P.) 235; 10 Jur. 571 452
Piggott *v.* Stratton (1859), 1 De G. F. & J. 33; 29 L. J. (CH.) 1; 1 L. T. 111; 6 Jur. (N. S.) 129; 8 W. R. 13, C. A. 48, 377, 378
——— *v.* Toogood, [1904] W. N. 130; 39 L. J. N. C. 329; 48 Sol. Jo. 573 . 620
——— *v.* Williams (1821), Madd. & G. 95 162
Pigott, *Re* (1833), 1 Cr. & M. 827; 3 Tyr. 859; 2 L. J. (EX.) 298 . . . 252
——— *v.* Pigott (1867), L. R. 4 Eq. 549; 37 L. J. (CH.) 116; 16 L. T. 766 . 307
Pike *v.* Dickinson (1873), 21 W. R. 862 622
—— *v.* Hoare (1763), 2 Eden, 182 66
—— *v.* Ongley (1886), 18 Q. B. D. 708; 56 L. J. (Q. B.) 373; 35 W. R. 534, C. A. 444
Pilcher *v.* Rawlins (1870), L. R. 11 Eq. 53; 40 L. J. (CH.) 105; 23 L. T. 756; 19 W. R. 217. 368

PAGE
Pilcher *v.* Rawlins (1872), 7 Ch. App. 259 ; 41 L. J. (CH.) 485 ; 25 L. T. 921 ; 20 W. R. 281, C. A. 82, 84
Pilkington *v.* Gray, [1899] A. C. 401 ; 68 L. J. (P. C.) 63 606
——— *v.* Himsworth (1835), 1 Y. & C. (EX.) 612 ; 5 L. J. (EX. EQ.) 47 . 627
Pilot *v.* Craze (1888), 52 J. P. 311 446
Pim *v.* Curell (1840), 6 M. & W. 234 343, 544, 545
Pimm, *Re*, Sharpe *v.* Hodgson, [1904] 2 Ch. 345 ; 73 L. J. (CH.) 627 ; 91 L. T. 190 ; 52 W. R. 648 222, 231
Pinchin *v.* Simms (1861), 30 Beav. 119 137, 138
Pincoffs, *Re*, *Ex parte* Jacobson (1882), 22 Ch. D. 312 ; 48 L. T. 197 ; 31 W. R. 554, C. A. 429
Pinnell *v.* Hallett (1751), Amb. 106 140, 141
Pinney *v.* Hunt (1877), 6 Ch. D. 98 ; 26 W. R. 69 518, 553
——— *v.* Pinney (1828), 8 B. & C. 335 ; 2 Mood. & R. 436 . . 518, 553
Pipe *v.* Fulcher (1858), 1 E. & E. 111 ; 28 L. J. (Q. B.) 12 ; 5 Jur. (N. S.) 146 ; 7 W. R. 19 469, 564
Piper *v.* Chappell (1845), 14 M. & W. 624 ; 9 Jur. 601 486
Pirie *v.* Iron (1832), 1 Moo. & S. 223 ; 1 Dowl. 252 ; 8 Bing. 143 . . . 613
Pitcher *v.* King (1845), 2 Dow. & L. 755 ; 14 L. J. (Q. B.) 99 ; 9 Jur. 348 . 578, 589
Pitman *v.* Maddox (1699), 2 Salk. 690 465
——— *v.* Pitman, *Re* Bird. *See* Bird, *Re*, Pitman *v.* Pitman.
Pitt *v.* Chappelow (1841), 8 M. & W. 616 ; 10 L. J. (EX.) 487 394
—— *v.* Coomes (1834), 5 B. & Ad. 1078 ; 3 Nev. & M. (K. B.) 212 . . . 537
—— *v.* Hill and Broadway (1674), Cas. *temp.* Finch, 70 326
—— *v.* Hunt (1681), 1 Vern. 18 ; 2 Cas. in Ch. 73 8, 94
—— *v.* Mackreth (1788), 2 Bro. C. C. 400 157
—— *v.* Pitt (1758), 2 Lee, 508 210
—— *v.* —— (1856), 22 Beav. 294 147
Pitt-Rivers, *Re*, Scott *v.* Pitt-Rivers, [1902] 1 Ch. 403 ; 71 L. J. (CH.) 225 ; 66 L. T. 6 ; 66 J. P. 275 ; 50 W. R. 342 ; 18 T. L. R. 272, C. A. . . . 75
Pitton *v.* Walter (1719), 1 Stra. 162 545
Plaice *v.* Allcock (1866), 4 F. & F. 1074 445
Planché *v.* Braham (1837), 8 C. & P. 68 ; 5 Scott, 242 ; 3 Hodg. 288 ; 7 L. J. (C. P.) 25 ; 1 Jur. 823 ; 4 Bing. (N. C.) 17 429
Plancq *v.* Marks (1905), 94 L. T. 577 ; 70 J. P. 216 ; 22 T. L. R. 432 ; 4 L. G. R. 503 ; 21 Cox, C. C. 157 604
Platt *v.* A.-G. of New South Wales (1878), 3 App. Cas. 336 ; 47 L. J. (P. C.) 26 ; 38 L. T. 74 ; 26 W. R. 516 450
—— *v.* Routh (1841), 3 Beav. 257 ; 10 L. J. (CH.) 131 ; affirmed *sub nom.* Drake *v.* A.-G. (1843), 10 Cl. & Fin. 257 248, 307
—— *v.* Rowe (1909), 26 T. L. R. 49 410, 411
Plaxton *v.* Dare (1829), 10 B. & C. 17 ; 5 Man. & Ry. (K. B.) 1 ; 8 L. J. (O. S.) (K. B.) 98 513
Plimmer *v.* Wellington Corporation (1884), 9 App. Cas. 699 ; 53 L. J. (P. C.) 104 ; 51 L. T. 475 ; 49 J. P. 116 71, 168
Plitt, *Ex parte*, *Re* Brown. *See* Brown, *Re*, *Ex parte* Plitt.
Plowes *v.* Bossey (1862), 2 Drew. & Sm. 145 ; 31 L. J. (CH.) 681 ; 7 L. T. 306 ; 8 Jur. (N. S.) 352 ; 10 W. R. 332 504
Plumb *v.* Fluitt (1791), 2 Anst. 432 88
Plumer *v.* Briscoe (1847), 11 Q. B. 46 ; 17 L. J. (Q. B.) 158 ; 12 Jur. 351 . . 443, 511, 606
Plumptre's Marriage Settlement, *Re*, Underhill *v.* Plumptre, [1910] 1 Ch. 609 ; 79 L. J. (CH.) 340 ; 102 L. T. 315 ; 26 T. L. R. 321 ; 54 Sol. Jo. 326 . . 73
Plunkett *v.* Cobbett (1804), 5 Esp. 136 573
——— *v.* Lewis (1844), 3 Hare, 316 136, 139
Pneumatic Tyre Co. *v.* Leicester Pneumatic Tyre and Automatic Valve Co. (1899), 16 R. P. C. 531 543
Pocock's Claim, Trickett's Claim, Carew's Claim, *Re* Romford Canal Co. *See* Romford Canal Co., *Re*, Pocock's Claim, Trickett's Claim, Carew's Claim.
Pocock's Policy, *Re* (1871), 6 Ch. App. 445 ; 40 L. J. (CH.) 681 ; 25 L. T. 233 ; 199 W. R. 801 264
Poë *v.* Spencer Cooper, *Re* Spencer Cooper. *See* Spencer Cooper, *Re*, Poë *v.* Spencer Cooper.
Polak *v.* Everett (1876), 1 Q. B. D. 669 ; 24 W. R. 689, C. A. 395
Pole *v.* Somers (Lord) (1801), 6 Ves. 308 121, 131
Police Commissioner *v.* Donovan, [1903] 1 K. B. 895 ; 72 L. J. (K. B.) 545 ; 88 L. T. 555 ; 67 J. P. 147 ; 52 W. R. 14 ; 19 T. L. R. 392 ; 20 Cox, C. C. 435 474, 550, 632

PAGE
Polini *v.* Grey, Sturla *v.* Freccia (1879), 12 Ch. D. 411 ; 40 L. T. 861, C. A....473, 532, 533
Pollard, *Ex parte*, *Re* Courtney. *See* Courtney, *Re*, *Ex parte* Pollard.
——— *v.* Bell (1800), 8 Term Rep. 434 341
——— *v.* Scott (1791), Peake, 18 564
Polley *v.* Seymour (1872), 2 Y. & C. (EX.) 708 ; 7 L. J. (EX. EQ.) 12 ; 1 Jur. 958...105
Pollock, *Re*, Pollock *v.* Worrall (1885), 28 Ch. D. 552 ; 54 L. J. (CH.) 489 ; 52 L. T. 718, C. A. 129, 130
Pomeroy *v.* Baddeley (1826), Ry. & M. 430 593
Pomfret *v.* Windsor (1752), 2 Ves. Sen. 472 173
Pond *v.* Dimes (1833), 2 Dowl. 730 ; 3 Moo. & S. 161 613
Ponsford *v.* Walton (1868), L. R. 3 C. P. 167 ; 37 L. J. (C. P.) 113 ; 17 L. T. 511 ; 16 W. R. 363 517
Pontifex and Wood, Ltd. *v.* Hartley & Co. (1893), 62 L. J. (Q. B.) 196 ; 4 R. 245, C. A. 566, 567
Poole, *Ex parte*, *Re* Symes. *See* Symes, *Re*, *Ex parte* Poole.
——— *v.* Dicas (1835), 1 Bing. (N. C.) 649 ; 1 Scott, 600 ; 1 Hodg. 162 ; 7 C. & P. 79 ; 4 L. J. (C. P.) 196 465
——— *v.* Warren (1838), 8 Ad. & El. 582 ; 3 Nev. & P. (Q. B.) 693 ; 3 Jur. 23 . 606
Poole Corporation *v.* Whitt (1846), 15 M. & W. 571 ; 16 L. J. (EX.) 229 . . 404
Poole's Estate, *Re*, Thompson *v.* Bennett (1877), 6 Ch. D. 739 ; 46 L. J. (CH.) 803 ; 37 L. T. 119 ; 25 W. R. 862 34
Pooley *v.* Goodwin (1835), 4 Ad. & El. 94 ; 5 Nev. & M. (K. B.) 466 516
Pooley's Trustees *v.* Whetham (1886), 33 Ch. D. 111 ; 55 L. J. (CH.) 899 ; 55 L. T. 333 ; 34 W. R. 689, C. A. 173
Poore *v.* Clark (1742), 2 Atk. 515 346
Pope, *Re* (1886), 17 Q. B. D. 743 ; 55 L. J. (Q. B.) 522 ; 55 L. T. 369 ; 34 W. R. 693, C. A. 55
Porcher *v.* Wilson (1866), 14 W. R. 1011 145
Portarlington (Lord) *v.* Soulby (1834), 3 My. & K. 104 48, 67
Porter *v.* Bowerman, *Re* Bowerman. *See* Bowerman, *Re*, Porter *v.* Bowerman.
——— *v.* Lopes (1877), 7 Ch. D. 358 ; 37 L. T. 824 41
——— *v.* Moore, [1904] 2 Ch. 367 ; 73 L. J. (CH.) 729 ; 91 L. T. 484 ; 52 W. R. 619 381
Porter's Trusts, *Re* (1856), 25 L. J. (CH.) 688 ; 2 Jur. (N. S.) 349 ; 4 W. R. 443 . 536
Portland (Duke) *v.* Hill (1866), L. R. 2 Eq. 765 ; 35 L. J. (CH.) 439 ; 12 Jur. (N. S.) 286 ; 15 W. R. 38 469, 539, 540
Portsea Island Building Society *v.* Barclay, [1895] 2 Ch. 298 ; 64 L. J. (CH.) 579 ; 72 L. T. 744 ; 12 R. 324, C. A. 70
Postlethwaite, *Re*, Postlethwaite *v.* Rickman (1887), 35 Ch. D. 722 ; 56 L. J. (CH.) 1077 ; 56 L. T. 733 ; 36 W. R. 563 572
——— *v.* Rickman, *Re* Rickman. *See* Rickman, *Re*, Postlethwaite *v.* Rickman.
Postmaster-General *v.* Green (1887), 51 J. P. 582 385
Potter *v.* Dudeney (1887), 56 L. T. 395 115
——— *v.* Edwards (1857), 26 L. J. (CH.) 468 91
——— *v.* Sanders (1846), 6 Hare, 1 100
Potts *v.* Nixon (1370), 5 I. R. C. L. 45 350
Poulett (Earl) *v.* Hood (1866), 35 Beav. 234 281
——— Peerage, The, [1903] A. C. 395 ; 72 L. J. (K. B.) 924 ; 19 T. L. R. 644 . 427
Poulter *v.* Sheckel, *Re* Briant. *See* Briant, *Re*, Poulter *v.* Sheckel.
Poulton *v.* Adjustable Cover and Boiler Block Co., [1908] 2 Ch. 430 ; 77 L. J. (CH.) 780 ; 24 T. L. R. 782 ; 52 Sol. Jo. 639 ; 25 R. P. C. 661, C. A. . 326, 328, 338, 347, 361
Pound *v.* Wilson (1865), 4 F. & F. 301 600
Powdrell *v.* Jones (1854), 2 Sm. & G. 335 ; 23 L. J. (CH.) 606 ; 18 Jur. 1048 ; 2 W. R. 361 ; 2 Eq. Rep. 624. 141
Powel *v.* Cleaver (1789), 2 Bro. C. C. 499 129, 131, 132
Powell, *Ex parte*, *Re* Matthews. *See* Matthews, *Re*, *Ex parte* Powell.
——— *v.* Brodhurst, [1901] 2 Ch. 160 ; 70 L. J. (CH.) 587 ; 84 L. T. 620 ; 49 W. R. 532 ; 17 T. L. R. 501 64
——— *v.* Browne (1907), 24 T. L. R. 71, C. A. 372
——— *v.* Edmunds (1810), 12 East, 6 566
——— *v.* Ford (1817), 2 Stark. 164 607
——— *v.* Helmsley, [1909] 2 Ch. 252 ; 78 L. J. (CH.) 741 ; 101 L. T. 262 ; 25 T. L. R. 649, C. A. 101
——— *v.* M'Glynn and Bradlaw, [1902] 2 I. R. 154 435
——— *v.* Powell (1889), 14 P. D. 177 ; 61 L. T. 436 ; 53 J. P. 519 569

PAGE
Powell *v.* Powell, [1900] 1 Ch. 243 ; 69 L. J. (CH.) 164 ; 82 L. T. 84 . . . 18
——— *v.* Smith (1872), L. R. 14 Eq. 85 ; 41 L. J. (CH.) 734 ; 20 W. R. 602 . 23
——— *v.* Thomas (1848), 6 Hare, 300 168
Power, *Re*, Power *v.* Howell (1898), 47 W. R. 183 221
———, *Re*, *Re* Stone, Acworth *v.* Stone, [1901] 2 Ch. 659 ; 70 L. J. (CH.) 778 ; 85 L. T. 400 ; 49 W. R. 678 ; 17 T. L. R. 709 220
——— *v.* Power (1884), 13 L. R. Ir. 281. 156
Powis (Marquis) *v.* Maynard (1747), 3 Atk. 519 152
Powys *v.* Mansfield (1837), 3 My. & Cr. 359; 7 L. J. (CH.) 9 ; 1 Jur. 861 . 131, 133
Poyser *v.* Minors (1881), 7 Q. B. D. 329 ; 50 L. J. (Q. B.) 555 ; 45 L. T. 33 ; 29 W. R. 773, C. A. 64
Practice Note, [1876] W. N. 59 626
Prance, *Re*, *Re* Gregg. *See* Gregg, *Re*, *Re* Prance.
Pratt *v.* Pratt (1882), 51 L. J. (CH.) 838; 47 L. T. 249; 30 W. R. 837 . . 581
Preece *v.* Corrie (1828), 5 Bing. 24 ; 2 Moo. & R. 57 406
Prees *v.* Coke (1871), 6 Ch. App. 645 22
Premier Industrial Bank, Ltd. *v.* Carlton Manufacturing Co., Ltd. and Crabtree, Ltd., [1909] 1 K. B. 106 ; 78 L. J. (K. B.) 103; 99 L. T. 810 ; 25 T. L. R. 17 ; 16 Mans. 22 381, 390
Prendergast *v.* Turton (1841), 1 Y. & C. Ch. Cas. 98 ; (1843), 13 L. J. (CH.) 268 ; 8 Jur. 205, C. A. 173, 395
Prescott, *Ex parte* (1753), 1 Atk. 230 162
Prested Miners Co., Ltd. *v.* Garner, Ltd., [1910] 2 K. B. 776 ; 103 L. T. 223 ; 26 T. L. R. 644 ; 54 Sol. Jo. 750. 425
Preston *v.* Dania (1872), L. R. 8 Exch. 19 ; 42 L. J. (EX.) 33 ; 27 L. T. 612; 21 W. R. 128 151
——— *v.* Luck (1884), 27 Ch. D. 497, C. A. 23
Price, *Re*, Price *v.* Price (1879), 11 Ch. D. 163 ; 48 L. J. (CH.) 478 ; 40 L. T. 668; 27 W. R. 698, C. A. 163
——— *v.* Berrington (1850), 3 Mac. & G. 486; 15 Jur. 999 16
——— *v.* Blakemore (1843), 6 Beav. 507 159, 170
——— *v.* Dewhurst (1838), 4 My. & Cr. 76 ; 8 L. J. (CH.) 57 ; 2 Jur. 1006 . 13, 354
——— *v.* Dyer (1811), 17 Ves. 356 165
——— *v.* Groom (1848), 2 Exch. 542; 17 L. J. (EX.) 346 379
——— *v.* Harwood (1811), 3 Camp. 108 390
——— *v.* Hollis (1813), 1 M. & S. 105 462, 525
——— *v.* Manning (1889), 42 Ch. D. 372; 58 L. J. (CH.) 649; 61 L. T. 537 ; 37 W. R. 785, C. A. 600
——— *v.* Torrington (Earl) (1703), 1 Salk. 285 ; Holt (K. B.), 300 465
——— *v.* Worwood (1859), 4 H. & N. 512 ; 28 L. J. (EX.) 329 ; 5 Jur. (N. S.) 472 ; 7 W. R. 506 441
Pridie *v.* Field (1854), 19 Beav. 497 241
Priestley *v.* Fernie (1865), 3 H. & C. 977 ; 11 Jur. (N. S.) 813 ; 13 W. R. 1089 . 336
Priestly *v.* Wilkinson (1790), 1 Ves. 214 72
Priestman *v.* Thomas (1884), 9 P. D. 210; 53 L. J. (P.) 109 ; 51 L. T. 843 ; 32 W. R. 842, C. A. 331, 338, 352, 361, 542, 553
Primrose *v.* Bromley (1739), 1 Atk. 89 30
Prince *v.* Blackburn (1802), 2 East, 250 605
——— *v.* Samo (1838), 7 Ad. & El. 627 ; 3 Nev. & P. (Q. B.) 139 ; 1 Will. Woll. & H. 132 ; 7 L. J. (Q. B.) 123 ; 2 Jur. 323 458, 599
"Prince George," The, Smith *v.* Gould. *See* Smith *v.* Gould, The "Prince George."
Pringle *v.* Gloag (1879), 10 Ch. D. 676; 48 L. J. (CH.) 380 ; 40 L. T. 512 ; 27 W. R. 574 163
Prinsep and East India Co. *v.* Dyce Sombre (1856), 10 Moo. P. C. C. 232 . . 530
Printing, Telegraph and Construction Co. of the Agence Havas, *Re*, *Ex parte* Cammell, [1894] 1 Ch. 528 ; 70 L. T. 74 449
Printing Telegraph and Construction Co. of the Agence Havas, Ltd. *v.* Drucker, [1894] 2 Q. B. 801 ; 64 L. J. (Q. B.) 58 ; 71 L. T. 172 ; 42 W. R. 674 ; 9 R. 677, C. A. 548
Prison Commissioners *v.* Middlesex (Clerk of the Peace) (1882), 9 Q. B. D. 506 ; 51 L. J. (Q. B.) 433 ; 46 L. T. 864 ; 30 W. R. 881, C. A. 566
Pritchard *v.* Bagshawe (1851), 11 C. B. 459 ; 20 L. J. (C. P.) 161 544
——— *v.* Hitchcock, (1843) 6 Man. & G. 151 ; 6 Scott (N. R.), 851 ; 12 L. J. (C. P.) 322 347
——— *v.* Quinchant (1752), Amb. 147 566
——— *v.* Walker (1827), 3 C. & P. 212 443
Pritt *v.* Fairclough (1812), 3 Camp. 305 465, 466, 556

PAGE
Proctor *v.* Bennis (1887), 36 Ch. D. 740; 57 L. J. (CH.) 11; 57 L. T. 662; 36 W. R. 456, C. A. 168, 395, 396
——— *v.* Lainson (1836), 7 C. & P. 629 547
——— *v.* Smiles (1886), 55 L. J. (Q. B.) 527, C. A. 427, 570
Professional Life Assurance Co., *Re* (1867), L. R. 3 Eq. 668; 36 L. J. (CH.) 442; 15 W. R. 544 143
Prole *v.* Wiggins (1836), 3 Bing. (N. C.) 230; 3 Scott, 607; 2 Hodg. 204; 6 L. J. (C. P.) 2 370
Prosser *v.* Bank of England (1872), L. R. 13 Eq. 611; 41 L. J. (CH.) 327; 26 L. T. 60; 20 W. R. 362 503
——— *v.* Edmonds (1835), 1 Y. & C. (EX.) 481 90
——— *v.* Lancashire and Yorkshire Accident Insurance Co. (1890), 6 T. L. R. 285, C. A. 562
——— *v.* Rice (1859), 28 Beav. 68 84
Protector Loan Co. *v.* Grice (1880), 5 Q. B. D. 592; 49 L. J. (Q. B.) 812; 43 L. T. 564; 45 J. P. 172, C. A. 151, 152
Provincial Insurance Co. of Canada *v.* Leduc (1874), L. R. 6 P. C. 224; 43 L. J. (P. C.) 49; 31 L. T. 142; 22 W. R. 929 395, 397
Prowse *v.* European and American Steam Shipping Co., The Peerless (1860), 13 Moo. P. C. C. 484 489
Prudential Assurance Co. *v.* Edmonds (1877), 2 App. Cas. 487 500
——————— *v.* Thomas (1867), 3 Ch. App. 74; 37 L. J. (CH.) 202; 16 W. R. 470 48
Pryor *v.* Petre, [1894] 2 Ch. 11; 63 L. J. (CH.) 531; 70 L. T. 331; 42 W. R. 435; 7 R. 424, C. A. 568
Pugh *v.* Drew (1869), 17 W. R. 988 95
—— *v.* Heath (1882), 7 App. Cas. 235; 51 L. J. (Q. B.) 367; 46 L. T. 321; 30 W. R. 553 61, 64
—— *v.* Robinson (1786), 1 Term Rep. 116 427, 486
—— and Sharman's Case (1872), L. R. 13 Eq. 566; 41 L. J. (CH.) 580; 26 L. T. 274 387
Pulbrook *v.* Richmond Consolidated Mining Co. (1878), 9 Ch. D. 610; 48 L. J. (CH.) 65; 27 W. R. 377 97
Pullen, *Re*, Parker *v.* Pullen, [1910] 1 Ch. 564; 79 L. J. (CH.) 303; 102 L. T. 453; 54 Sol. Jo. 341 37, 219, 316
——— *v.* Ready (1743), 2 Atk. 587 25
Pulman *v.* Meadows [1901] 1 Ch. 233; 70 L. J. (CH.) 97; 84 L. T. 26 . . . 37
Pulteney *v.* Darlington (Earl) (1783), 1 Bro. C. C. 223; (1796), 7 Bro. Parl. Cas. 530 115, 116
——— *v.* ——— (Lord) (1776), 3 Ves. 529 121
——— *v.* Warren (1801), 6 Ves. 72 42, 49
Pumfery *v.* Fryer, *Re* Heather. *See* Heather, *Re*, Pumfery *v.* Fryer.
Purcell *v.* M'Namara (1806), 14 Ves. 91 170
——— *v.* Macnamara (1808), 9 East, 361 542
Purcell's Case, *Re* Hampshire Co-operative Milk Co. *See* Hampshire Co-operative Milk Co., *Re*, Purcell's Case.
Pusey *v.* Desbouvrie (1734), 3 P. Wms. 315; 2 Eq. Cas. Abr. 270 . 124, 125, 166
—— *v.* Pusey (1684), 1 Vern. 273 13
Pye, *Ex parte*, *Ex parte* Dubost (1811), 18 Ves. 140 . . 128, 129, 130, 131, 132
—— *Re*, Pyle *v.* Pyle, [1895] 1 Ch. 724; 64 L. J. (CH.) 477; 72 L. T. 327; 43 W. R. 420; 13 R. 396 111
—— *v.* Butterfield (1864), 5 B. & S. 829; 34 L. J. (Q. B.) 17; 11 L. T. 448; 11 Jur. (N. S.) 220; 13 W. R. 178 574
—— *v.* Pye, [1885] W. N. 174 619
Pyke *v.* Crouch (1696), 1 Ld. Raym. 730 544, 547
Pyle Works, *Re* (No. 2), [1891] 1 Ch. 173; 60 L. J. (CH.) 114; 63 L. T. 628; 39 W. R. 235; 2 Meg. 327 555
Pym *v.* Campbell (1856), 6 E. & B. 370; 25 L. J. (Q. B.) 277; 2 Jur. (N. S.) 641; 4 W. R. 528 567
—— *v.* Lockyer (1841), 5 My. & Cr. 29; 10 L. J. (CH.) 153; 5 Jur. 34 . 128, 130

Q.

QUANTOCK *v.* Bullen (1820), 5 Madd. 81 546
Quarrell *v.* Beckford (1807), 13 Ves. 377 55
Quarrier *v.* Colston (1842), 1 Ph. 147 73

PAGE
Quartz Hill Consolidated Gold Mining Co. *v.* Beall (1882), 20 Ch. D. 501; 51 L. J. (CH.) 874; 46 L. T. 746; 30 W. R. 583, C. A. 626
Quartz Hill, etc. Co., *Re, Ex parte* Young (1882), 21 Ch. D. 642; 51 L. J. (CH.) 940; 31 W. R. 173, C. A. 597, 622
Queen's Case, The (1820), 2 Brod. & Bing. 284 599, 602
Queen's Proctor *v.* Fry (1879), 4 P. D. 230; 48 L. J. (P.) 68; 41 L. T. 530 . . 535
Queensland Land and Coal Co., *Re,* Davis *v.* Martin [1894] 3 Ch. 181; 63 L. J. (CH.) 810; 71 L. T. 115; 42 W. R. 600; 8 R. 476 74
Quilter *v.* Jorss (1863), 14 C. B. (N. S.) 747; 11 W. R. 888 429, 519
Quinn *v.* Leathem, [1901] A. C. 495; 70 L. J. (P. C.) 76; 85 L. T. 289; 65 J. P. 708; 17 T. L. R. 749 449

R.

R. *v.* Abergavenny Union (1880), 6 Q. B. D. 31; 50 L. J. (M. C.) 1; 43 L. T. 602; 44 J. P. 780 603
— *v.* Adey (1831), 1 Mood. & R. 94 570, 575
— *v.* All Saints, Worcester (Inhabitants) (1817), 6 M. & S. 194 574
— *v.* Althausen (1893), 17 Cox, C. C. 630 446
— *v.* Ambergate, Nottingham, and Boston, and Eastern Junction Rail. Co. (1853), 1 E. & B. 372; 22 L. J. (Q. B.) 191; 17 Jur. 668 . . 325, 383
— *v.* Anderson (1680), 7 State Tr. 811 592
— *v.* Antrim County Justices, [1901] 2 I. R. 133 570
— *v.* Arundel (Countess) (1616), Hob. 109 26
— *v.* Austin (1856), 25 L. J. (M. C.) 48; 2 Jur. (N. S.) 95; 4 W. R. 237; Dears. C. C. 612; 7 Cox, C. C. 55 547
— *v.* Avery (1838), 8 C. & P. 596 573, 582
— *v.* Baines, [1909] 1 K. B. 258; 78 L. J. (K. B.) 119; 100 L. T. 76; 72 J. P. 524; 25 T. L. R. 79; 53 Sol. Jo. 101 578
— *v.* Baker, [1895] 1 Q. B. 797; 64 L. J. (M. C.) 177; 72 L. T. 631; 43 W. R. 654; 15 R. 346 602
— *v.* Ball (1839), 8 C. & P. 745 600
— *v.* Barnard, *Ex parte* Gower (Lord R.) (1879), 43 J. P. 127 482
— *v.* Barnett (1829), 3 C. & P. 600 510
— *v.* Bartlett (1837), 7 C. & P. 832 574
— *v.* Bathwick (Inhabitants) (1831), 2 B. & Ad. 639 505, 513
— *v.* Baylis (1849), 4 Cox, C. C. 23 569
— *v.* Bedingfield (1879), 14 Cox, C. C. 341 438
— *v.* Benson (1810), 2 Camp. 508 627
— *v.* Berenger (1814), 3 M. & S. 67 594
— *v.* Berger, [1894] 1 Q. B. 823; 63 L. J. (Q. B.) 529; 70 L. T. 807; 58 J. P. 416; 10 R. 245; 17 Cox, C. C. 761 564
— *v.* Bernard (1858), 1 F. & F. 240 452, 601
— *v.* Birmingham Overseers (1861), 1 B. & S. 763; 8 Jur (N. S.) 37; 31 L. J. (M. C.) 63 463
— *v.* Birmingham (or Aston) (Inhabitants) (1829), 8 L. J. (O. S.) (M. C.) 41 . 537
— *v.* Blakemore (1852), 2 Den. 410; 21 L. J. (M. C.) 60; 16 Jur. 154 . . 346
— *v.* Blandy (1752), 18 State Tr. 1187 439
— *v.* Bliss (1837), 7 Ad. & El. 550; 2 Nev. & P. (Q. B.) 464; Will. Woll. & Dav. 624; 7 L. J. (Q. B.) 4 468
— *v.* Bloxham (Inhabitants) (1844), 2 Dow & Cl. 168; 6 Q. B. 528; 14 L. J. (Q. B.) 13; 8 Jur. 1117; 1 New Sess. Cas. 370 626
— *v.* Boaler (1892), 67 L. T. 354; 56 J. P. 792; 17 Cox, C. C. 569 . . . 443
— *v.* Boyes (1861), 1 B. & S. 311; 30 L. J. (Q. B.) 301; 9 Cox, C. C. 32 . . 575
— *v.* Braintree (Inhabitants) (1858), 1 E. & E. 51; 28 L. J. (M. C.) 1; 4 Jur. (N. S.) 1238; 7 W. R. 48 519
— *v.* Brakenridge (1884), 48 J. P. 293 331
— *v.* Brazier (1779), 1 Leach, 199; 1 East, P. C. 443 569, 591, 593
— *v.* Brenan (1847), 10 Q. B. 49; 16 L. J. (Q. B.) 289; 11 Jur. 775 . . . 488
— *v.* Brewer (1834), 6 C. & P. 363 571, 572
— *v.* Brightside Bierlow (Inhabitants) (1849), 13 Q. B. 933; 19 L. J. (M. C.) 50; 14 Jur. 174; 4 New Sess. Cas. 47 452
— *v.* Brixton Prison (Governor), *Ex parte* Percival, [1907] 1 K. B. 696; 71 J. P. 148; 76 L. J. (K. B.) 619; 96 L. T. 545; 23 T. L. R. 238 . . 488, 492, 527
— *v.* Bromhead (1906), 71 J. P. 103 459
— *v.* Brook (1819), 2 Stark. 472 597
— *v.* Brown (1828), Mood. & M. 163 492

PAGE
R. *v.* Brown (1862), 9 Cox, C. C. 281 572, 582
— *v.* ——— and Hedley (1867), L. R. 1 C. C. R. 70; 36 L. J. (M. C.) 59; 16 L. T. 364; 15 W. R. 795; 10 Cox, C. C. 453 602
— *v.* Brownell (1834), 1 Ad. & El. 598; 3 L. J. (M. C.) 118 590
— *v.* Buckley (1873), 13 Cox, C. C. 293 447, 467, 546
— *v.* Budd (1805), 5 Esp. 230 440
— *v.* Burdett (1820), 4 B. & Ald. 95 441, 499
— *v.* Burridge (1735), 3 P. Wms. 439 494
— *v.* Butterton (Inhabitants) (1796), 6 Term Rep. 554 166
— *v.* Buttery (1818), Russ. & Ry. 242 342
— *v.* Cambrian Rail. Co. (1869), L. R. 4 Q. B. 320; 38 L. J. (Q. B.) 198; 20 L. T. 437; 17 W. R. 667 545
— *v.* Carey (1845), 7 Q. B. 126; 2 New Sess. Cas. 105; 9 Jur. 1009; 14 L. J. (M. C.) 190 589
— *v.* Carlile (1831), 2 B. & Ad. 362 325, 354
— *v.* Castro (1873), Shorthand Notes, Vol. I., 1002 576
— *v.* Catterall (Township) (1817), 6 Moo. & S. 83 328, 340
— *v.* Cavendish (1873), 8 I. R. C. L. 178 435, 499
— *v.* Charlesworth (1860), 2 F. & F. 326 575
— *v.* ——— (1861), 1 B. & S. 460; 31 L. J. (M. C.) 25; 5 L. T. 150; 9 W. R. 842; 8 Jur. (N. S.) 1091; 9 Cox, C. C. 44 359
— *v.* Cherry (1871), 12 Cox, C. C. 32 576
— *v.* Christian (1842), Car. & M. 388 524, 549
— *v.* Clapham (1829), 4 C. & P. 29 537
— *v.* Clarke (1817), 2 Stark. 241 603
— *v.* Clement (1821), 4 B. & Ald. 218 590
— *v.* Clewes (1830), 4 C. & P. 221 447
— *v.* Cliburn (1898), 62 J. P. 232 599
— *v.* Clint (Inhabitants) (1841), 11 Ad. & El. 624, n. 349
— *v.* Cliviger (Inhabitants) (1788), 2 Term Rep. 263 574
— *v.* Cole (1810), cited 1 Phillipps & Arnold, Law of Evidence, 10th ed., 508 . 454
— *v.* Colley and Sweet (1827), Mood. & M. 329 594
— *v.* Cooke (1824), 1 C. & P. 321 584
— *v.* ——— (1838), 8 C. & P. 582 571
— *v.* Cooper (1849), 3 Cox, C. C. 547 453
— *v.* Coote (1873), L. R. 4 P. C. 599; 9 Moo. P. C. C. (N. S.) 463; 42 L. J. (P. C.) 45; 29 L. T. 111; 21 W. R. 553; 12 Cox, C. C. 557 499, 575
— *v.* Cope (1837), 7 C. & P. 720; 6 Ad. & El. 226; 1 Nev. & P. (K. B.) 515; 6 L. J. (M. C.) 81 465
— *v.* Corsham (Inhabitants) (1809), 11 East, 388 328
— *v.* Cotton (1813), 3 Camp. 444 545
— *v.* ——— (1873), 12 Cox, C. C. 400 453
— *v.* Cousens (1843), 2 Russell on Crimes and Misdemeanours, 7th ed. 2258 . 584
— *v.* Cox (1898), 62 J. P. 89 569
— *v.* ——, [1898] 1 Q. B. 179; 67 L. J. (Q. B.) 293; 77 L. T. 534; 14 T. L. R. 122; 18 Cox, C. C. 672 483, 508
— *v.* —— and Railton (1884), 14 Q. B. D. 153; 54 L. J. (M. C.) 41 . . 572, 582
— *v.* Crediton (Inhabitants) (1858), E. B. & E. 231; 27 L. J. (M. C.) 265; 4 Jur. (N. S.) 926; 6 W. R. 517 537
— *v.* Cresswell (1876), 1 Q. B. D. 446; 45 L. J. (M. C.) 77; 33 L. T. 760; 24 W. R. 281; 13 Cox, C. C. 126 506
— *v.* Cross and Leyland (1856), 7 Cox, C. C. 226 576
— *v.* Crouch (1850), 4 Cox, C. C. 163 482, 607
— *v.* Crowhurst (1844), 1 Car. & Kir. 370 448
— *v.* Dale (1836), 7 C. & P. 352 608
— *v.* Day (1852), 6 Cox, C. C. 55 547
— *v.* Daye, [1908] 2 K. B. 333; 77 L. J. (K. B.) 659; 99 L. T. 165; 72 J. P. 269...579, 580, 589
— *v.* Debenham (Inhabitants) (1818), 2 B. & Ald. 185 474
— *v.* De Berenger (1814), 3 M. & S. 67 473, 493
— *v.* Denis (1827), 7 B. & C. 620; 1 Man. & Ry. (K. B.) 294 519
— *v.* Dexter, Laidler *v.* Coates (1899), 19 Cox, C. C. 361 596
— *v.* Dilmore (1852), 6 Cox, C. C. 52 546
— *v.* Doran (1791), 1 Esp. 127 520
— *v.* ——- (1838), 2 Mood. C. C. 37; 2 Lew. C. C. 27 592
— *v.* Douglas (1842), 2 Dowl. (N. S.) 416; 7 Jur. 305 614
— *v.* ———- (1845), 1 Car. & Kir. 670 618
— *v.* ———- (1846), 16 L. J. (Q. B.) 417 614

PAGE
R. *v.* Downer (1880), 43 L. T. 445 ; 45 J. P. 52 ; 14 Cox, C. C. 486 . 571, 572, 582
— *v.* Dukinfield (Inhabitants) (1848), 11 Q. B. 678; 3 New Sess. Cas. 126 ; 12 Jur. 674 466
— *v.* Duncombe (1838), 8 C. & P. 369 597
— *v.* Dyer (1703), 6 Mod. Rep. 41 ; 1 Salk. 181 ; Holt (K. B.), 157 492
— *v.* Dyson, [1894] 2 Q. B. 176 ; 1 Mans. 283 ; 63 L. J. (M. C.) 124 ; 70 L. T. 877 ; 58 J. P. 528 ; 42 W. R. 526 ; 10 R. 230 449
— *v.* Ellis (1826), 6 B. & C. 145 ; 9 Dow. & Ry. (K. B.) 174 ; 5 L. J. (O. S.) (M. C.) 1 429
— *v.* ——, [1910] 2 K. B. 746 ; 99 L. J. (K. B.) 841 ; 102 L. T. 922 ; 74 J. P. 388 ; 26 T. L. R. 525, C. A. 454
— *v.* Elworthy (1867), L. R. 1 C. C. R. 103 ; 37 L. J. (M. C.) 3 ; 17 L. T. 293 ; 16 W. R. 207 ; 10 Cox, C. C. 579 521
— *v.* Entrehman (1842), Car. & M. 248 591
— *v.* Erdheim, [1896] 2 Q. B. 260 ; 3 Mans. 142 ; 65 L. J. (M. C.) 176 ; 74 L. T. 734 ; 44 W. R. 607, C. C. R. 424
— *v.* Eriswell (Inhabitants) (1790), 3 Term Rep. 707 547
— *v.* Esop (1836), 7 C. & P. 456 499
— *v.* Evenwood and Barony (Inhabitants) (1843), 3 Q. B. 370 ; 3 Gal. & Dav. 145 ; 12 L. J. (M. C.) 101 ; 7 Jur. 697 333, 349
— *v.* Exeter Guardians (1869), L. R. 4 Q. B. 341 ; 10 B. & S. 433 ; 38 L. J. (M. C.) 126 ; 20 L. T. 693 ; 17 W. R. 850 463
— *v.* Farley (1846), 2 Car. & Kir. 313 ; 1 Den. 197 ; 2 Cox, C. C. 82 . . 571, 572
— *v.* Farringdon (Inhabitants) (1788), 2 Term Rep. 466 505, 512
— *v.* Fenn (1835), 3 Dowl. 546 ; 1 Har. & W. 200 597, 589, 590
— *v.* Fisher, [1910] 1 K. B. 149 ; 79 L. J. (K. B.) 187 ; 102 L. T. 111 ; 74 J. P. 104 ; 26 T. L. R. 122, C. A. 454
— *v.* Fitzgerald (1884), Taylor on Evidence, 10th ed., p. 959 569
— *v.* Five Popish Lords (1678), 7 State Tr. 1218 570, 602
— *v.* Flannagan (1884), 15 Cox, C. C. 403 452
— *v.* Ford (1851), 5 Cox, C. C. 184 ; 2 Den. 245 ; 3 Car. & Kir. 113 ; T. & M. 573 ; 20 L. J. (M. C.) 171 ; 15 Jur. 406 595
— *v.* Fordingbridge (Inhabitants) (1858), E. B. & E. 678 ; 27 L. J. (M. C.) 290 ; 4 Jur. (N. S.) 951 ; 6 W. R. 649 444, 605
— *v.* Foster (1855), 24 L. J. (M. C.) 134 ; Dears. C. C. 456 ; 1 Jur. (N. S.) 407 ; 3 C. L. R. 681 453
— *v.* Fox Maule (1839), 7 Dowl. 693 ; 3 Jur. 604 579, 589
— *v.* Francis (1874), L. R. 2 C. C. R. 128 ; 43 L. J. (M. C.) 97 ; 30 L. T. 503 ; 22 W. R. 663 ; 12 Cox, C. C. 612 453
— *v.* Francklin (1731), 17 State Tr. 626 473
— *v.* Freind (1686), 13 State Tr. 16 574
— *v.* Frost (1839), 9 C. & P. 129 510
— *v.* Galway Justices (1897), 31 L. T. 160 570
— *v.* Ganz (1882), 9 Q. B. D. 93 ; 51 L. J. (Q. B.) 419 ; 46 L. T. 592 . . 527
— *v.* Garbett (1847), 1 Den. 236 ; 2 Car. & Kir. 474 ; 2 Cox, C. C. 448 . . 575
— *v.* Garner (1864), 3 F. & F. 681 453
— *v.* ——- (1890), 54 J. P. 424 599
— *v.* Gazard (1838), 8 C. & P. 595 571
— *v.* Geering (1849), 18 L. J. (M. C.) 215 452, 458
— *v.* Gibson (1887), 18 Q. B. D. 537 ; 56 L. J. (M. C.) 49 ; 56 L. T. 367 ; 35 W. R. 411 ; 51 J. P. 742 ; 16 Cox, C. C. 181 428
— *v.* Gilham (1795), 1 Esp. 285 591
— *v.* Gloster (1888), 16 Cox, C. C. 471 439
— *v.* Goddard (1882), 15 Cox, C. C. 7 438
— *v.* Gompertz (1843), 9 Q. B. 824 ; 16 L. J. (Q. B.) 121 ; 11 Jur. 204 ; 9 Cox, C. C. 516 517
— *v.* Gray (1904), 68 J. P. 327 508
— *v.* Greenaway (1845), 7 Q. B. 126 ; 14 L. J. (M. C.) 190 ; 9 Jur. 1009 ; 2 New Sess. Cas. 103 581, 590
— *v.* Greene (1837), 6 Ad. & El. 548 ; 1 Nev. & P. (K. B.) 631 ; Will. Woll. & Dav. 291 473
— *v.* Greenwich County Court (Registrar) (1885), 15 Q. B. D. 54 ; 54 L. J. (Q. B.) 392 ; 53 L. T. 902 ; 33 W. R. 671 ; 2 Morr. 175, C. A. 462
— *v.* Gregory (1846), 15 L. J. (M. C.) 38 531
— *v.* Grimes (1770), 5 Burr. 2601 345
— *v.* Grimwood (1815), 1 Price, 369 541
— *v.* Grundon (1775), 1 Cowp. 315 328, 342, 362, 363
— *v.* Gunnell (1886), 55 L. T. 786 ; 51 J. P. 279 ; 16 Cox, C. C. 154 439

PAGE
R. *v.* Guttridge (1840), 9 C. & P. 471 439, 547
— *v.* Hacker (1660), Kel. 12; 5 State Tr. 947 570
— *v.* Haden (1909), 2 Cr. App. Rep. 148 450
— *v.* Hadwen, [1902] 1 K. B. 882; 71 L. J. (K. B.) 581; 86 L. T. 601; 66 J. P. 456; 50 W. R. 589; 18 T. L. R. 555; 20 Cox, C. C. 206 598
— *v.* Hagan (1837), 8 Car. & P. 167 547
— *v.* Haines (1858), 1 F. & F. 86 456
— *v.* Hains (1695), Comb. 337; Holt (K. B.), 289; Carth. 320; Skin. 583 . . 551
— *v.* Hall (1866), L. R. 1 Q. B. 632; 35 L. J. (M. C.) 251; 12 Jur. (N. S.) 892 . 531
— *v.* —— (1887), 5 New Zealand Law Reports, 93, C. A. 453
— *v.* Hankins (1849), 2 Car. & Kir. 823 582
— *v.* Harborne (Inhabitants) (1835), 2 Ad. & El. 540; 4 Nev. & M. (K. B.) 341; 1 Har. & W. 36; 4 L. J. (M. C.) 49 502
— *v.* Hardy (1794), 24 State Tr. 199 456, 573, 598
— *v.* Harringworth (Inhabitants) (1815), 4 M. & S. 353 605
— *v.* Hartington Middle Quarter (Inhabitants) (1855), 4 E. & B. 780; 3 C. L. R. 554; 24 L. J. (M. C.) 98; 1 Jur. (N. S.) 586; 3 W. R. 285...323, 328, 340
— *v.* Harvey (1858), 8 Cox, C. C. 99 571
— *v.* Haslingfield (Inhabitants) (1814), 2 M. & S. 558 552
— *v.* Haughton (Inhabitants) (1853), 1 E. & B. 501; 22 L. J. (M. C.) 89; 17 Jur. 455; 1 W. R. 164 328
— *v.* Hausmann, [1909] W. N. 198; 73 J. P. 516; 26 T. L. R. 3, C. C. A. . . 343
— *v.* Hawes (1847), 1 Den. 270 534
— *v.* Hay (1767), 1 Wm. Bl. 640; 4 Burr. 2295 440
— *v.* Hayward (1846), 2 Car. & Kir. 234; 2 Cox. C. C. 23 572, 582
— *v.* Heath (1744), 18 State Tr. 123 570
— *v.* Hebden (1738), Andr. 388 344
— *v.* Hendy (1850), 4 Cox, C. C. 243 482
— *v.* Hensey (1758), 1 Burr. 643; 2 Keny. 366 607
— *v.* Heseltine (1873), 12 Cox, C. C. 404 481
— *v.* Hill (1851), 2 Den. 254; T. & M. 582; 15 Jur. 470; 5 Cox, C. C. 259 . . 569
— *v.* Hillam (1872), 12 Cox, C. C. 174 576
— *v.* Hinckley (Overseers) (1863), 3 B. & S. 885; 32 L. J. (M. C.) 158; 8 L. T. 270; 9 Jur. 1054; 11 W. R. 663 519
— *v.* Hobson (1823), 1 Lew. C. C. 261 499
— *v.* Hodgson (1812), Russ. & Ry. 211 601
— *v.* Hogg (1833), 6 C. & P. 176 547
— *v.* Holborn Union Guardians (1856), 6 E. & B. 715; 25 L. J. (M. C.) 110; 2 Jur. (N. S.) 571; 4 W. R. 606 494
— *v.* Holloway (1901) 65 J. P. 712 627
— *v.* Holmes (1861), 2 F. & F. 788 569, 593
— *v.* ——— (1871), L. R. 1 C. C. R. 334; 41 L. J. (M. C.) 12; 25 L. T. 669; 20 W. R. 122; 12 Cox, C. C. 137 601
— *v.* Holt (1793), 5 Term Rep. 436 473
— *v.* Howard (1832), 1 Mood. & R. 187 444
— *v.* Howe (1694), Comb. 295 359
— *v.* Hucks (1816), 1 Stark. 521 430
— *v.* Hughes (1839), 1 Craw. & D. 13 524
— *v.* ——— (1844), 1 Car. & Kir. 519 571
— *v.* Hunt (1820), 3 B. & Ald. 566 520
— *v.* Hutchings (1881), 6 Q. B. D. 300; 50 L. J. (M. C.) 35; 44 L. T. 364; 45 J. P. 504; 29 W. R. 724, C. A. . . 323, 328, 329, 339, 340, 353, 361, 542, 551
— *v.* Hutchins (1880), 5 Q. B. D. 353; 49 L. J. (M. C.) 64; 42 L. T. 716; 28 W. R. 595; 44 J. P. 521 551
— *v.* Ingrey (1900), 64 J. P. 106 447
— *v.* Isle of Ely (Inhabitants) (1850), 15 Q. B. 827; 19 L. J. (M. C.) 223; 14 Jur. 956; 4 New Sess. Cas. 222 494
— *v.* Jameson (1896), Stephen, Digest of the Law of Evidence, art. 35 . . 479
— *v.* Jefferies (1721), 1 Stra. 446 525
— *v.* Johnson (1847), 2 Car. & Kir. 354 439
— *v.* ——— (Hon. R.) (1805), 7 East, 65 556
— *v.* Jolliffe (1791), 4 Term Rep. 285 544
— *v.* Jones (1806), 8 East, 31 614
— *v.* —— (1809), 2 Camp. 131 443, 492, 497
— *v.* —— (1846), 1 Den. 166 572, 582
— *v.* —— (1883), 15 Cox, C. C. 284 441, 500, 501
— *v.* —— (1885), 49 J. P. 728 547
— *v.* —— and Hayes (1877), 14 Cox, C. C. 3 454

PAGE
R. *v.* Kenilworth (Inhabitants) (1788), 2 Term Rep. 598 542
— *v.* ——————— (1845), 7 Q. B. 642; 14 L. J. (M. C.) 160; 9 Jur. 898; 2 New Sess. Cas. 66 519
— *v.* King, [1897] 1 Q. B. 214; 66 L. J. (Q. B.) 87; 75 L. T. 392; 61 J. P. 329; 18 Cox, C. C. 447 608
— *v.* Kinghorn, [1908] 2 K. B. 949; 72 J. P. 478 554
— *v.* Kinglake (1870), 22 L. T. 335; 18 W. R. 805; 11 Cox, C. C. 499 . 570, 575
— *v.* Kirkham, [1909] W. N. 141; 73 J. P. 406; 25 T. L. R. 656 . . . 448
— *v.* Knaptoft (Inhabitants) (1824), 4 Dow. & Ry. (K. B.) 469 544
— *v.* Langton (1876), 2 Q. B. D. 296; 46 L. J. (M. C.) 136; 35 L. T. 527; 13 Cox, C. C. 345 596
— *v.* Lawson, [1905] 1 K. B. 541; 74 L. J. (K. B.) 296; 92 L. T. 301; 69 J. P. 122; 53 W. R. 459; 21 T. L. R. 231; 20 Cox, C. C. 812 . . 443, 444
— *v.* Leatham (1861), 3 E. & E. 658; 30 L. J. (Q. B.) 205; 3 L. T. 504; 7 Jur. (N. S.) 674; 9 W. R. 33; 8 Cox, C. C. 498 520
— *v.* Ledbetter (1850), 3 Car. & Kir. 108 546
— *v.* Lee (1864), 4 F. & F. 63 546
— *v.* Leigh (1839), 10 Ad. & El. 398; 2 Per. & Dav. 357 364, 529
— *v.* Lillyman, [1896] 2 Q. B. 167; 65 L. J. (M. C.) 195; 74 L. T. 730; 60 J. P. 536; 44 W. R. 654; 18 Cox, C. C. 346 446, 599
— *v.* London and North Western Rail. Co. (1854), 3 E. & B. 443; 18 Jur. 993; 23 L. J. (Q. B.) 185 353
— *v.* London County Council, *Ex parte* Commercial Gas Co. (1895), 11 T. L. R. 337 546
— *v.* Long Buckby (Inhabitants) (1805), 7 East, 45 516
— *v.* Lordsmere District (Inhabitants) (1886), 54 L. T. 766; 51 J. P. 86; 16 Cox, C. C. 65 543
— *v.* Love (1651), 5 State Tr. 43 591
— *v.* Lubbenham (Inhabitants) (1834), 5 B. & Ad. 968; 3 Nev. & M. (K. B.) 37; 3 L. J. (M. C.) 50 537
— *v.* Luffe (1807), 8 East, 193 495, 504
— *v.* Lumley (1869), L. R. 1 C. C. R. 196; 38 L. J. (M. C.) 86; 20 L. T. 454; 17 W. R. 685; 11 Cox, C. C. 274 441, 500
— *v.* Lushington, *Ex parte* Otto, [1894] 1 Q. B. 420; 70 L. T. 412; 58 J. P. 282; 42 W. R. 411; 17 Cox, C. C. 754; 10 R. 418 510
— *v.* Macclesfield (Earl) (1725), 16 State Tr. 1252 570
— *v.* McDonald (1841), Arm. M. & O. 112 524
— *v.* McGrath and McKevitt (1881), 14 Cox, C. C. 598 452
— *v.* Mann (1885), 49 J. P. 743 548
— *v.* Mansfield (Inhabitants) (1841), 1 Q. B. 444; 1 Gal. & Dav. 7; 5 Jur. 505 . 504
— *v.* Manwaring (1856), Dears. & B. 132; 26 L. J. (M. C.) 10; 2 Jur. (N. S.) 1236; 5 W. R. 119; 7 Cox, C. C. 192 524
— *v.* Marsh (1837), 6 Ad. & El. 236; 1 Nev. & P. (K. B.) 187; 2 Har. & W. 366; 6 L. J. (M. C.) 153 571
— *v.* Marshall (1841), Car. & M. 147 547
— *v.* Martin (1809), 2 Camp. 100 474
— *v.* ——— (1834), 6 C. & P. 562 601
— *v.* ——— and Webb (1872), 12 Cox, C. C. 204 509, 510
— *v.* Matthews (1797), cited 5 Price, 202, n. 328, 343
— *v.* Mawbey (Bart.) (1796), 6 Term Rep. 634 477
— *v.* May (1880), 5 Q. B. D. 382; 49 L. J. (M. C.) 67; 42 L. T. 772; 28 W. R. 918 350, 359
— *v.* Middlezoy (Inhabitants) (1787), 2 Term Rep. 41 606
— *v.* Mildrone (1786), 1 Leach, 412 592
— *v.* Milton (Inhabitants) (1843), 1 Car. & Kir. 58 564
— *v.* Mitchell (1818), cited 2 Story on Criminal Evidence, 307, n. 443
— *v.* ——— (1892), 17 Cox, C. C. 503 459
— *v.* Moore (1892), 61 L. J. (M. C.) 80; 66 L. T. 125; 66 J. P. 345; 40 W. R. 304; 17 Cox, C. C. 458 591
— *v.* Moors (1801), 6 East, 419, n. 521
— *v.* Morgan (1764), 1 Leach, 54 591
— *v.* Mothersell (1718), 1 Stra. 93 478
— *v.* Mullins (1848), 3 Cox, C. C. 526 595, 596
— *v.* Murphy (1753), 19 State Tr. 694 602
— *v.* ——— (1795), 1 Leach, 430, n. 569, 593
— *v.* ——— (1837), 8 C. & P. 297 443, 593, 600, 607
— *v.* Murray, [1906], 2 K. B. 385; 75 L. J. (K. B.) 593; 95 L. T. 295; 70 J. P. 295; 22 T. L. R. 596 441

PAGE
R. *v.* Netherthong (Inhabitants) (1814), 2 M. & S. 337 505, 513
— *v.* Newman (1852), 3 Car. & Kir. 252 593
— *v.* Newton (1844), 1 Car. & Kir. 469 443
— *v.* Nicholas (1846), 2 Car. & Kir. 246 439, 569, 593
— *v.* Norfolk County Council (1910), 26 T. L. R. 269 . 469, 479, 514, 530, 532, 564
— *v.* Norreys (1852), 2 I. C. L. R. 114 236
— *v.* North Eastern Rail. Co. (1901), 70 L. J. (K. B.) 548; 84 L. T. 502; 49 W. R. 524; 19 Cox, C. C. 682 350
— *v.* North Petherton (1826), 5 B. & C. 508; 8 Dow. & Ry. (K. B.) 325; 4 L. J. (O. S.) (K. B.) 213 537
— *v.* Norton, [1910] 2 K. B. 496 459
— *v.* O'Connell (1844), Armstrong & Trevor's Reports, 163 595
— *v.* Ollis, [1900] 2 Q. B. 758; 69 L. J. (Q. B.) 918; 83 L. T. 251; 49 W. R. 76; 16 T. L. R. 477 453, 454
— *v.* Orton (1873), Stephen, Digest of the Law of Evidence, 5th ed., art. 35 . 479
— *v.* Osborne, [1905] 1 K. B. 551; 74 L. J. (K. B.) 311; 92 L. T. 393; 69 J. P. 189; 53 W. R. 494; 21 T. L. R. 288, C. C. R. 446, 447
— *v.* Parker (1783), 3 Doug. (K. B.) 242 603
— *v.* Parsons (1866), L. R. 1 C. C. R. 24; 35 L. J. (M. C.) 167; 14 L. T. 450; 12 Jur. (N. S.) 436; 14 W. R. 662; 10 Cox, C. C. 243 . . 525, 550, 602
— *v.* Partridge (1836), 7 C. & P. 551 448
— *v.* Patch (1806), Wills' Circumstantial Evidence, 5th ed., p. 165, n. . . 447
— *v.* Pegler (1833), 5 C. & P. 521 574
— *v.* Pember (1735), Lee *temp.* Hard. 112 360
— *v.* Pembridge (Inhabitants) (1841), Car. & M. 157 566
— *v.* Perkins (1840), 2 Mood. C. C. 135 539, 569
— *v.* Perry, [1909] 2 K. B. 697; 78 L. J. (K. B.) 1034; 101 L. T. 127; 73 J. P. 456; 25 T. L. R. 667; 53 Sol. Jo. 810, C. C. A. 471
— *v.* Petcherini (1856), 7 Cox, C. C. 79 456
— *v.* Phillips (1733), Barnes, 429 360
— *v.* Piddlehinton (Inhabitants) (1832), 3 B. & Ad. 460; 1 L. J. (M. C.) 43 . 519
— *v.* Pike (1829), 3 C. & P. 598 569, 593
— *v.* Pitcher (1823), 1 C. & P. 86 575
— *v.* Poolman (1909), 3 Cr. App. Rep. 36 448
— *v.* Povey (1852), Dears. C. C. 32; 22 L. J. (M. C.) 19; 17 Jur. 120; 1 W. R. 40; 6 Cox, C. C. 83 488
— *v.* Powell, *Ex parte* Williams, [1899] 1 Q. B. 396; 68 L. J. (Q. B.) 274; 80 L. T. 184; 63 J. P. 84; 15 T. L. R. 157 514
— *v.* Price (1884), 12 Q. B. D. 247; 53 L. J. (M. C.) 51; 33 W. R. 45, n.; 15 Cox, C. C. 389 210
— *v.* Pringle (1840), 2 Mood. & R. 276 492
— *v.* Ramsden (1827), 2 C. & P. 603 597
— *v.* Randall (1662), 1 Keb. 256 477
— *v.* Rawder (Inhabitants) (1834), 2 Ad. & El. 156; 4 Nev. & M. (K. B.) 97 . 519
— *v.* Regan (1887), 16 Cox, C. C. 203 559
— *v.* Remnant (1807), Russ. & Ry. 136 599
— *v.* Rhodes, [1899] 1 Q. B. 77; 68 L. J. (Q. B.) 83; 79 L. T. 360; 62 J. P. 774; 47 W. R. 121; 15 T. L. R. 37; 19 Cox, C. C. 182, C. C. R. . . 453
— *v.* Richardson (1787), Wills, Circumstantial Evidence, 5th ed., p. 165, n. . 447
— *v.* ———— (1863), 3 F. & F. 693 573
— *v.* Riley (1887), 18 Q. B. D. 481; 56 L. J. (M. C.) 52; 56 L. T. 371; 35 W. R. 382; 16 Cox, C. C. 191 602
— *v.* Ring (1800), 8 Term Rep. 585 590
— *v.* Roberts (1878), 14 Cox, C. C. 101 443, 444, 550
— *v.* Roddam (1777), 2 Cowp. 672 580
— *v.* Room (1834), 3 Nev. & M. (K. B.) 725 590
— *v.* Rosser (1836), 7 C. & P. 648 570, 592
— *v.* Rowland, [1910] 1 K. B. 458; 79 L. J. (K. B.) 327; 102 L. T. 112; 74 J. P. 144; 26 T. L. R. 202, C. C. A. 576
— *v.* Rowton (1865), Le. & Ca. 520; 34 L. J. (M. C.) 57; 11 L. T. 745; 11 Jur. (N. S.) 325; 13 W. R. 436; 10 Cox, C. C. 25 454
— *v.* Rush (1896), 60 J. P. 777 447
— *v.* Russell (Lord John), R. *v.* Fox Maule (1839), 7 Dowl. 693; 3 Jur. 604...579, 589
— *v.* Ruston (1786), 1 Leach, 408 569
— *v.* Ryton (Inhabitants) (1793), 5 Term Rep. 259 505, 513
— *v.* Saffron Hill (Inhabitants) (1852), 1 E. & B. 93; 22 L. J. (M. C.) 22; 16 Jur. 1139 519
— *v.* St. George (1840), 9 C. & P. 483 599

PAGE

R. *v.* St. George, Bloomsbury, (Inhabitants) (1855), 4 E. & B. 520 ; 1 Jur. (N. S.) 231 ; 24 L. J. (M. C.) 249 494
— *v.* St. Giles, Camberwell (Inhabitants) (1853), 1 E. & B. 642 ; 22 L. J. (M. C.) 54 ; 17 Jur. 164 ; 1 W. R. 181 605
— *v.* St. Katherine (Parish or Precinct) (1831), 5 B. & Ad. 970, n. 537
— *v.* St. Martin's, Leicester (Inhabitants) (1834), 2 Ad. & El. 210 ; 4 Nev. & M. (K. B.) 202 ; 4 L. J. (M. C.) 25 596
— *v.* St. Mary, Lambeth (Inhabitants) (1796), 6 Term Rep. 615 340
— *v.* St. Mary, Warwick (Inhabitants) (1853), 1 E. & B. 816 ; 22 L. J. (M. C.) 109 ; 17 Jur. 551 465
— *v.* St. Mary's, Islington (1852), 1 W. R. 34 519
— *v.* St. Maurice (Inhabitants) (1851), 16 Q. B. 908 ; 20 L. J. (M. C.) 221 ; 15 Jur. 559 494
— *v.* St. Pancras (Inhabitants) (1794), Peake, 286 . . . 327, 328, 338, 483, 544
— *v.* Saunders, [1899] 1 Q. B. 490 ; 68 L. J. (Q. B.) 296 ; 80 L. T. 28 ; 63 J. P. 150 ; 15 T. L. R. 186 428
— *v.* Savage (1831), 5 C. & P. 143 547
— *v.* ——— (1876), 13 Cox, C. C. 178 488
— *v.* Scaife (1851), 2 Den. 281 ; 17 Q. B. 238 ; 20 L. J. (M. C.) 229 ; 15 Jur. 607 ; 5 Cox, C. C. 243 547
— *v.* Scammonden (Inhabitants) (1789), 3 Term Rep. 474 567
— *v.* Scott (1877), 2 Q. B. D. 415 ; 46 L. J. (M. C.) 259 ; 36 L. T. 476 ; 25 W. R. 697 ; 13 Cox, C. C. 594 549
— *v.* Sharman, *Ex parte* Denton, [1898] 1 Q. B. 578 ; 67 L. J. (Q. B.) 460 ; 78 L. T. 320 ; 62 J. P. 296 ; 46 W. R. 367 ; 14 T. L. R. 269 419
— *v.* Sharpe (1838), 8 C. & P. 436 494
— *v.* Shaw (1888), 16 Cox, C. C. 503 602
— *v.* Shellard (1840), 9 C. & P. 277 602
— *v.* Silverlock, [1894] 2 Q. B. 766 ; 63 L. J. (M. C.) 233 ; 72 L. T. 298 ; 58 J. P. 788 ; 43 W. R. 14 ; 18 Cox, C. C. 104 ; 10 R. 431 481
— *v.* Simmonds (1850), 4 Cox, C. C. 277 543
— *v.* Simons (1834) 6 C. & P. 540 574
— *v.* Simpson (1883), 15 Cox, C. C. 323 446
— *v.* Slaney (1832), 5 C. & P. 213 574, 607
— *v.* Sloggett (1856), 25 L. J. (M. C.) 93 ; 2 Jur. (N. S.) 476 ; 4 W. R. 487 ; Dears. C. C. 656 ; 7 Cox, C. C. 139 576
— *v.* Sloman (1832), 1 Dowl. 618 579, 589
— *v.* Smith (1817), Russ. & Ry. 339 546
— *v.* ——— (1828), 8 B. & C. 341 ; 6 L. J. (O. S.) (M. C.) 99 548, 550
— *v.* ——— (1838), 2 Mood. & R. 109 492
— *v.* ——— (1897), 18 Cox, C. C. 470 ; 61 J. P. 120 459
— *v.* ——— (1905), 92 L. T. 208 ; 69 J. P. 51 ; 20 Cox, C. C. 804 . . . 453, 454
— *v.* Smithies (1832), 5 C. & P. 332 574
— *v.* Sourton (Inhabitants) (1836), 5 Ad. & El. 180 ; 6 Nev. & M. (K. B.) 575 ; 2 Har. & W. 209 ; 5 L. J. (M. C.) 100 544
— *v.* South Eastern Rail. Co. (1909), 7 L. G. R. 1171 ; (1910) 8 L. G. R. 401, C. A. 377, 378
— *v.* Stamps Commissioners (1844), 6 Q. B. 657 244
— *v.* Stamps and Taxes Commissioners (1849), 18 L. J. (Q. B.) 201 ; 13 Jur. 624 . 314
— *v.* Stephenson (1862), Le & Ca. 165 613
— *v.* Stoddart (1909), 73 J. P. 348 ; 25 T. L. R. 612 ; 53 Sol. Jo. 578 . 433, 434
— *v.* Stoke-upon-Trent (Inhabitants) (1843), 5 Q. B. 303 ; 13 L. J. (Q. B.) 41 ; 8 Jur. 34 ; Dav. & Mer. 357 444
— *v.* Stourbridge (Inhabitants) (1828), 8 B. & C. 96 ; 2 Man. & Ry. (K. B.) 43 ; 6 L. J. (O. S.) (M. C.) 65 519
— *v.* Stretch (1835), 3 Ad. & El. 503 ; 6 Dowl. 368 589, 590
— *v.* Suddis (1801), 1 East, 306 363
— *v.* Sutton (1816), 4 M. & S. 532 473, 485
— *v.* Sympson (1724), 2 Ld. Raym. 1379 ; 1 Stra. 609 494
— *v.* Tanner (1795), 1 Esp. 304 441
— *v.* Tate, [1908] 2 K. B. 680 ; 77 L. J. (K. B.) 1043 ; 99 L. T. 620 ; 72 J. P. 391 ; 52 Sol. Jo. 699 459
— *v.* Tewkesbury Corporation (1868), L. R. 3 Q. B. 629 ; 37 L. J. (Q. B.) 288 ; 18 L. T. 851 ; 16 W. R. 1200 499
— *v.* Thomas (1870), 11 Cox, C. C. 535 551
— *v.* Thompson, [1893] 2 Q. B. 12 ; 62 L. J. (M. C.) 93 ; 69 L. T. 22 ; 57 J. P. 312 ; 41 W. R. 525 ; 5 R. 392 ; 17 Cox, C. C. 641 435
— *v.* Tolson (1864), 4 F. & F. 103 565, 607

PAGE
R. *v.* Tuffs (1848), 1 Den. 319 ; 18 L. J. (M. C.) 38 ; 2 Cox, C. C. 72 . . . 582
— *v.* Turner (1816), 5 M. & S. 206 435
— *v.* ——— (1832), 1 Moo. P. C. C. 347 459
— *v.* ——— (1909), 3 Cr. App. Rep. 103 508
— *v.* ——— [1910] 1 K. B. 346 ; 79 L. J. (K. B.) 176 ; 74 J. P. 81 ; 102 L. T. 367 ; 26 T. L. R. 112 ; 54 Sol. Jo. 164 451, 497
— *v.* Twyning, Gloucestershire (Inhabitants) (1819), 2 B. & Ald. 386 . 501, 502
— *v.* Tyler and International Commercial Co., [1891] 2 Q. B. 588 ; 61 L. J. (M. C.) 38 ; 65 L. T. 662 ; 56 J. P. 118, C. A. 515
— *v.* United Kingdom Electric Telegraph Co. (1862), 3 F. & F. 73 . . . 565
— *v.* Upper Boddington (Inhabitants) (1826), 8 Dow. & Ry. (K. B.) 726 . . 574
— *v.* Upton St. Leonards (1847), 10 Q. B. 827 ; 16 L. J. (M. C.) 84 ; 11 Jur. 306 ; 2 New Sess. Cas. 582 611
— *v.* Verelst (1813), 3 Camp. 432 443
— *v.* Viasani (1866), 30 J. P. 758 508
— *v.* Vickery (1848), 12 Q. B. 478 ; 17 L. J. (M. C.) 129 ; 12 Jur. 581 ; 3 New Sess. Cas. 193 590
— *v.* Vincent (1721), 1 Stra. 481 342
— *v.* W. de L. (1364), Y. B. 38, Edw. 3, fo. 31 344
— *v.* Wade (1825), 1 Mood. C. C. 86 569, 593
— *v.* Walford (1907), 71 J. P. 215 453, 554
— *v.* Walker (1788), 1 Leach, 498 592
— *v.* ——— (1844), 1 Cox, C. C. 99 543
— *v.* Watson (1788), 2 Term Rep. 201 520
— *v.* ——— (1817), 32 State Tr. 1 571, 573
— *v.* ——— (1817), 2 Stark. 116 594, 601
— *v.* ——— (1834). 6 C. & P. 653 599
— *v.* Watt (1905), 79 J. P. 29 ; 20 Cox, C. C. 852 446
— *v.* Weaver (1873), L. R. 2 C. C. R. 85 ; 43 L. J (M. C.) 13 ; 29 L. T. 544 ; 22 W. R. 190 ; 12 Cox, C. C. 527 533, 534
— *v.* Webb (1867), 11 Cox, C. C. 133 569
— *v.* Whalley (1847), 2 Car. & Kir. 376 509
— *v.* Whelan (1881), 8 L. R. Ir. 314 ; 14 Cox, C. C. 595 602
— *v.* White (1865), 4 F. & F. 383 499
— *v.* Whitehead (1848), 3 Car. & Kir. 202 451
— *v.* ——— (1866), L. R. 1 C. C. R. 33 ; 35 L. J. (M. C.) 186 ; 14 L. T. 489 ; 14 W. R. 677 ; 10 Cox, C. C. 234 569, 570
— *v.* Whittles (1849), 13 Q. B. 248 ; 18 L. J. (M. C.) 96 ; 13 Jur. 403 ; 3 New Sess. Cas. 397 494
— *v.* Wick St. Lawrence (Inhabitants) (1833), 5 B. & Ad. 526 ; 2 Nev. & M. (K. B.) 289 ; 3 L. J. (M. C.) 12 328, 329, 333, 338, 349, 483
— *v.* Wigley (1835), 7 C. & P. 4 587
— *v.* Wilbain and Ryan (1863), 9 Cox, C. C. 448 508
— *v.* Wilde (1670), 1 Lev. 296 ; 2 Keb. 686 ; T. Raym. 181 493
— *v.* Wilkinson (1867), 10 Cox, C. C. 537 562
— *v.* Williams (1835), 7 C. & P. 320 569, 593
— *v.* ——— (1853), 6 Cox, C. C. 343 595
— *v.* ——— (1871), 12 Cox, C. C. 101 546
— *v.* Willshire (1881), 6 Q. B. D. 366 ; 50 L. J. (M. C.) 57 ; 44 L. T. 222 ; 45 J. P. 375 ; 29 W. R. 473 ; 14 Cox, C. C. 541, C. C. R. . 440, 498, 500, 501
— *v.* Wilshaw (1841), Car. & M. 145 547
— *v.* Wood (1832), 1 Dowl. 509 578
— *v.* Woodcock (1789), 1 Leach, 539 471
— *v.* Worth (Inhabitants) (1843), 12 L. J. (M. C.) 47 ; 4 Q. B. 132 ; 3 Gal. & Dav. 376 ; 12 L. J. (Q. B.) 144 ; 7 Jur. 172 424, 464, 466
— *v.* Wright (1821), Russ. & Ry. 456 480
— *v.* Wyatt, [1904] 1 K. B. 188 ; 73 L. J. (K. B.) 15 ; 68 J. P. 31 ; 52 W. R. 285 ; 20 T. L. R. 68 ; 20 Cox, C. C. 462 453, 454
— *v.* Wye (Inhabitants) (1838), 7 Ad. & El. 761 ; 3 Nev. & P. (Q. B.) 6 ; 7 L. J. (M. C.) 18 340, 355
— *v.* Yeoveley (Inhabitants) (1838), 8 Ad. & El. 806 ; 1 Per. & Dav. 60 ; 1 Will. Woll. & H. 614 551
— *v.* Yewin (1811), 2 Camp. 638, n. 601
— *v.* York Corporation (1792), 5 Term Rep. 66 345
R.'s Trusts, *Re* (1870), L. R. 10 Eq. 41 ; 39 L. J. (CH.) 192 505
Rabey *v.* Birch (1908), 72 J. P. 106 592
Rabone *v.* Williams (1785), 7 Term Rep. 360, n. 395

PAGE
Radcliffe, *Re*, European Assurance Society *v.* Radcliffe (1878), 7 Ch. D. 733; 26 W. R. 417 36
——— *v.* Pacific Steam Navigation Co., [1910] 1 K. B. 685; 79 L. J. (K. B.) 429; 102 L. T. 206; 26 T. L. R. 319; 54 Sol. Jo. 404; 3 B. W. C. C. 185, C. A. 333, 355
Radnor (Countess) *v.* Vandebendy (1697), Show. Parl. Cas. 69; 2 Cas. in Ch. 172; 1 Vern. 356; 1 Eq. Cas. Abr. 219 42
Raffety *v.* Schofield, [1897] 1 Ch. 937; 66 L. J. (CH.) 448; 76 L. T. 648; 45 W. R. 460 99
Raffles *v.* Wichelhaus (1864), 2 H. & C. 906; 33 L. J. (EX.) 160 567
Railway Time Tables Publishing Co., *Re*, *Ex parte* Sandys (1889), 42 Ch. D. 98; 58 L. J. (CH.) 504; 61 L. T. 94; 37 W. R. 531; 1 Meg. 208, C. A. . 411
Raine, *Ex parte* (1816), 19 Ves. 588 519
Rainford *v.* Keith (James) and Blackman Co., Ltd., [1905] 1 Ch. 296; reversed, [1905] 2 Ch. 147; 74 L. J. (CH.) 531; 92 L. T. 786; 54 W. R. 189; 12 Mans. 162, C. A. 409
Rains *v.* Buxton (1880), 14 Ch. D. 537; 49 L. J. (CH.) 473; 43 L. T. 88; 28 W. R. 954 170
Rainsford *v.* Smith (1561), Dyer, 196 a 366, 372
Rajah Venkata Sveta *v.* Inuganti Bhavayammi Garu (1899), 15 T. L. R. 475 . 516
Ralph *v.* Carrick (1877), 5 Ch. D. 984; (1879), 11 Ch. D. 873; 48 L. J. (CH.) 801; 40 L. T. 505, C. A. 106
Rambert *v.* Cohen (1802), 4 Esp. 213 515, 595
Ramsay *v.* Margrett, [1894] 2 Q. B. 18; 70 L. T. 788; 9 R. 407; 1 Mans. 184 . 442
Ramsay's Settlement, *Re* (1861), 30 Beav. 75 269
Ramsden *v.* Dyson (1866), L. R. 1 H. L. 129; 12 Jur. (N. S.) 506; 14 W. R. 936...71, 167, 168, 397
——— *v.* Hylton (1751), 2 Ves. Sen. 304 166
——— *v.* Jackson (1737), 1 Atk. 292 331
Rancliffe (Lord) *v.* Parkyns (Lady) (1818), 6 Dow, 149 . . 117, 121, 123, 144
Randal *v.* Cockran (1748), 1 Ves. Sen. 98 149
Randall *v.* Errington (1805), 10 Ves. 423 157
——— *v.* Gurney (1819), 3 B. & Ald. 252; 1 Chit. 679 586, 588
——— *v.* Lynch (1810), 2 Camp. 357 606
——— *v.* Randall (1835), 7 Sim. 271; 4 L. J. (CH.) 187 39
——— *v.* Russell (1817), 3 Mer. 190 96
Ranelaugh *v.* Hayes (1683), 1 Vern. 189; 2 Cas. in Ch. 146; 1 Eq. Cas. Abr. 17. 51
Rankin's Settlement Trusts, *Re* (1868), L. R. 6 Eq. 601 317
Rann *v.* Hughes (1778), 4 Bro. Parl. Cas. 27; 7 Term Rep. 350, n. 425
Raphael *v.* Bank of England (1855), 17 C. B. 161; 25 L. J. (C. P.) 33; 4 W. R. 10...571
Rapid Road Transit Co., *Re*, [1909] 1 Ch. 96; 78 L. J. (CH.) 132; 99 L. T. 774; 53 Sol. Jo. 83 581
Rashdall *v.* Ford (1866), L. R. 2 Eq. 750; 35 L. J. (CH.) 769; 14 W. R. 950 . 378, 379
Rashleigh, *Ex parte*, *Ex parte* Butterfill, *Re* Dingle. *See* Dingle, *Re*, *Ex parte* Butterfill, *Ex parte* Rashleigh.
——— *v.* Master (1790), 1 Ves. 201 107
Ratcliff *v.* Ratcliff and Anderson (1859), 1 Sw. & Tr. 467; 5 Jur. (N. S.) 714; 7 W. R. 726 534
Rattenberry, *Re*, Ray *v.* Grant, [1906] 1 Ch. 667; 75 L. J. (CH.) 304; 94 L. T. 475; 54 W. R. 311; 22 T. L. R. 249 136, 138
Rattenbury *v.* Fenton (1833), Coop. *temp.* Brough. 60 346
Ravenga *v.* Mackintosh (1824), 2 B. & C. 693; 4 Dow. & Ry. (K. B.) 107; 1 C. & P. 204 450, 455
Ravenscroft *v.* Workman, *Re* Arnold. *See* Arnold, *Re*, Ravenscroft *v.* Workman.
Ravenshaw *v.* Hollier (1834), 7 Sim. 3 93
Raw, *Re*, Morris *v.* Griffiths (1884), 26 Ch. D. 601; 53 L. J. (CH.) 1051; 51 L. T. 282; 32 W. R. 986 108
Rawe *v.* Chichester (1773), Amb. 715 155
Rawley *v.* Rawley (1876), 1 Q. B. D. 460; 45 L. J. (Q. B.) 675; 35 L. T. 191; 24 W. R. 995, C. A. 163
Rawlin's Case (1587), Jenk. 254; 4 Co. Rep. 72, a.; 4 Leon. 116 . . 373, 402
Rawlins *v.* Powel (1715), 1 P. Wms. 297; 2 Eq. Cas. Abr. 438 138
——— *v.* Richards (1860), 28 Beav. 370 466
——— *v.* Wickham (1858), 4 Jur. (N. S.) 990; affirmed, 3 De G. & J. 304; 28 L. J. (CH.) 188; 5 Jur. (N. S.) 278; 7 W. R. 145 . . 15, 171, 610, 611, 614
Rawlinson *v.* Scholes (1898), 79 L. T. 350 604

PAGE
Rawson *v.* Samuel (1841), Cr. & Ph. 161 162
Ray *v.* Grant, *Re* Rattenberry. *See* Rattenberry, *Re*, Ray *v.* Grant.
Rayer, *Re*, Rayer *v.* Rayer, [1903] 1 Ch. 685 ; 72 L. J. (CH.) 230 ; 87 L. T. 712 ; 51 W. R. 538 222, 281
Raymond *v.* Tapson (1882), 22 Ch. D. 430 ; 48 L. T. 403 ; 31 W. R. 394, C. A. . 578
Rayner *v.* Preston (1881), 18 Ch. D. 1 ; 50 L. J. (CH.) 472 ; 44 L. T. 787 ; 29 W. R. 546, C. A. 99
Rayson *v.* Adcock (1863), 7 L. T. 747 ; 9 Jur. (N. S.) 800 367
Read *v.* Brookman (1789), 3 Term Rep. 151 26
—— *v.* Gamble (1835), 5 Nev. & M. (K. B.) 433 ; 10 Ad. & El. 597, n. . . . 521
—— *v.* Lincoln (Bishop), [1892] A. C. 644 ; 62 L. J. (P. C.) 1 ; 67 L. T. 128 ; 56 J. P. 725 479, 563
—— *v.* Price, [1909] 2 K. B. 724 ; 78 L. J. (K. B.) 1137 ; 100 L. T. 60 ; 25 T. L. R. 701, C. A. 430, 518
—— *v.* Victoria Station and Pimlico Rail. Co. (1863), 1 H. & C. 826 ; 32 L. J. (EX.) 167 ; 9 Jur. (N. S.) 1061 ; 11 W. R. 1032 353
Reade *v.* Reade (1881), 9 L. R. Ir. 409, C. A. 139
Reay's Estate, *Re* (1855), 3 Eq. Rep. 512 ; 1 Jur. (N. S.) 222 ; 3 W. R. 312...512, 604
"Recepta," The (1889), 14 P. D. 131 ; 58 L. J. (ADM.) 70 ; 61 L. T. 698 ; 6 Asp. M. L. C. 433 474
—— [1893] P. 255 ; 62 L. J. (P.) 118 ; 69 L. T. 252 ; 41 W. R. 561 ; 7 Asp. M. L. C. 359 ; 1 R. 644 62
Reddaway *v.* Banham, [1896] A. C. 199 ; 65 L. J. (Q. B.) 381 ; 74 L. T. 289 ; 44 W. R. 638 15
Redfern *v.* Redfern, [1891] P. 139 ; 60 L. J. (P.) 9 ; 64 L. T. 68 ; 55 J. P. 37 ; 39 W. R. 212, C. A. 576
Redgrave *v.* Hurd (1881), 20 Ch. D. 1 ; 51 L. J. (CH.) 113 ; 45 L. T. 485, C. A. . 15
Redman *v.* Redman (1685), 1 Vern. 348 20
Reed *v.* Fairless (1863), 3 F. & F. 958 ; 8 L. T. 853 584
—— *v.* Jackson (1801), 1 East, 355 343, 344, 544
—— *v.* James (1815), 1 Stark. 132 597
—— *v.* King (1879), 30 L. T. 299 600
—— *v.* Nutt (1890), 24 Q. B. D. 669 ; 59 L. J. (Q. B.) 311 ; 62 L. T. 635 ; 54 J. P. 599 ; 38 W. R. 621 353
—— *v.* Passer (1795), Peake, Add. Cas. 303. 538, 539
Rees *v.* De Bernardy, [1896] 2 Ch. 437 ; 65 L. J. (CH.) 656 ; 74 L. T. 585 . 22, 170
—— *v.* Walters (1838), 3 M. & W. 527 ; 7 L. J. (EX.) 138 ; 2 Jur. 378 . 428, 513
—— *v.* Williams (1847), 1 De G. & Sm. 314 605
Reeve *v.* Berridge (1888), 20 Q. B. D. 523 ; 57 L. J. (Q. B.) 265 ; 58 L. T. 836 ; 52 J. P. 549 ; 36 W. R. 517, C. A. 101
—— *v.* Bird (1834), 1 Cr. M. & R. 31 ; 4 Tyr. 612 ; 3 L. J. (EX.) 282 . . 376
—— *v.* Jennings, [1910] W. N. 171 ; 26 T. L. R. 576 426
—— *v.* Lisle, [1902] A. C. 461 ; 71 L. J. (CH.) 768 ; 87 L. T. 308 ; 51 W. R. 576 ; 18 T. L. R. 767 92
Reeves *v.* Slater (1827), 7 B. & C. 486 ; 1 Man. & Ry. (K. B.) 265 ; 6 L. J. (O. S.) (K. B.) 77 390
Regan *v.* Regan (1892), 67 L. T. 720 ; 1 R. 493 535
Regent's Canal Co. *v.* Ware (1857), 23 Beav. 575 ; 26 L. J. (CH.) 566 ; 3 Jur. (N. S.) 924 ; 5 W. R. 617 110
Reichel *v.* Magrath (1889), 14 App. Cas. 665 ; 59 L. J. (Q. B.) 159 ; 54 J. P. 196 . 344
Reid *v.* Bickerstaff, [1909] 2 Ch. 305 ; 78 L. J. (CH.) 753 ; 100 L. T. 952, C. A. 101, 102
—— *v.* Margison (1808), 1 Camp. 469 524, 549
Reidpath's Case (1870), L. R. 11 Eq. 86 ; 40 L. J. (CH.) 39 ; 23 L. T. 834 ; 19 W. R. 219 556
Remmett *v.* Lawrence (1850), 15 Q. B. 1004 ; 20 L. J. (Q. B.) 25 ; 14 Jur. 1067...360, 361
Remon *v.* Hayward (1835), 2 Ad. & El. 666 430
Renals *v.* Cowlishaw (1878), 9 Ch. D. 125 ; 58 L. T. 503 ; 26 W. R. 754 ; affirmed (1879), 11 Ch. D. 866 ; 48 L. J. (CH.) 830 ; 41 L. T. 116 ; 28 W. R. 9, C. A....101, 102
Rendall *v.* Rendall (1841), 1 Hare, 152 ; 11 L. J. (CH.) 93 55
Rendell *v.* Grundy, [1895] 1 Q. B. 16 ; 64 L. J. (Q. B.) 135 ; 71 L. T. 564 ; 43 W. R. 50 ; 14 R. 19, C. A. 582
Rennie *v.* Clark (1850), 5 Exch. 292 ; 19 L. J. (EX.) 278 478
—— *v.* Robinson (1823), 1 Bing. 147 ; 7 Moore (C. P.), 539 ; 1 L. J. (O. S.) (C. P.) 30 405
—— *v.* Young (1858), 2 De G. & J. 136 ; 27 L. J. (CH.) 753, C. A. . . 167

PAGE
Repington, *Re*, Wodehouse *v.* Scobell, [1904] 1 Ch. 811; 73 L. J. (CH.) 533; 90 L. T. 663; 52 W. R. 522 257
Revell, *Ex parte*, *Re* Tollemache. *See* Tollemache, *Re*, *Ex parte* Revell.
Reversionary Interest Society, *Re*, A.-G. *v.* Walker (1896), *Times*, May 14th . 196
Revill, *Re*, Leigh *v.* Rumney (1886), 55 L. T. 542 623
Reynard *v.* Spence (1841), 4 Beav. 103 126
Reynolds, *Re* (1876), 3 Ch. D. 61; 35 L. T. 293; 24 W. R. 991, C. A. . . . 114
———, *Re*, *Ex parte* Reynolds (1882), 20 Ch. D. 294; 51 L. J. (CH.) 756; 46 L. T. 508; 46 J. P. 533; 30 W. R. 651, C. A. 575
——— *v.* Fenton (1846), 3 C. B. 187; 16 L. J. (C. P.) 15; 10 Jur. 668 . . 354
——— *v.* Godlee. *See* Head *v.* Godlee, Reynolds *v.* Godlee.
——— *v.* Pitt (1812), 19 Ves. 134 153
Rhodes, *Re*, Fraser *v.* Renton (1873), 28 L. T. 392 503
———, *Re*, Rhodes *v.* Rhodes (1887), 36 Ch. D. 586; 56 L. J. (CH.) 825; 57 L. T. 652 500, 501
———, *Re*, ——— *v.* ——— (1890), 44 Ch. D. 94; 59 L. J. (CH.) 298; 62 L. T. 342; 38 W. R. 385, C. A. 16
——— *v.* Airedale Drainage Commissioners (1876), 1 C. P. D. 402; 45 L. J. (Q. B.) 861; 35 L. T. 46; 24 W. R. 1053, C. A. 545
——— *v.* Bate (1866), 1 Ch. App. 252; 35 L. J. (CH.) 267; 13 L. T. 778; 12 Jur. (N. S.) 178; 14 W. R. 292 19
——— *v.* Wish, *Re* Seaman. *See* Seaman, *Re*, Rhodes *v.* Wish.
Rice, *Re* (1886), 32 Ch. D. 35; 55 L. J. (CH.) 799; 54 L. T. 589; 34 W. R. 747, C. A. 512, 604
——— *v.* Howard (1886), 16 Q. B. D. 681; 55 L. J. (Q. B.) 311; 34 W. R. 532 . 600
——— *v.* Rice (1854), 2 Drew. 73 79, 371, 387
Rich *v.* Cockell, Rich *v.* Hull (1804), 9 Ves. 369 120
——— *v.* Jackson (1794). *See* Townshend (Marquis) *v.* Stangroom.
——— *v.* Sydenham (1671), 1 Cas. in Ch. 202; 3 Rep. Ch. 74; 1 Eq. Cas. Abr. 88 16, 72
——— *v.* Whitfield (1866), L. R. 2 Eq. 583; 14 W. R. 907 116
Richards, *Re*, Humber *v.* Richards (1890), 45 Ch. D. 589; 59 L. J. (CH.) 728; 63 L. T. 451 80
——— *v.* Bassett (1830), 10 B. & C. 657; 8 L. J. (O. S.) (K. B.) 289 . . 539, 540
——— *v.* Delbridge (1874), L. R. 18 Eq. 11; 43 L. J. (CH.) 459; 22 W. R. 584. 98
——— *v.* Gellatly (1872), L. R. 7 C. P. 127; 26 L. T. 425; 1 Asp. M. L. C. 277 459
——— *v.* Jenkins (1887), 18 Q. B. D. 451; 56 L. J. (Q. B.) 293; 56 L. T. 591; 35 W. R. 355, C. A. 345, 373
——— *v.* Johnston (1859), 4 H. & N. 660; 1 F. & F. 447; 28 L. J. (EX.) 322; 5 Jur. (N. S.) 520 343, 345, 373, 386, 396
——— *v.* Morgan (1863), 4 B. & S. 641; 33 L. J. (Q. B.) 114; 9 L. T. 662; 10 Jur. (N. S.) 559; 12 W. R. 162 458, 544
——— *v.* Richards (1731), 15 East, 294, n. 504
——— *v.* Syms (1740), Barn. (CH.) 90 187
———, Tweedy & Co. *v.* Hough (1882), 51 L. J. (Q. B.) 361; 30 W. R. 676 . 618
Richardson, *Re*, Shillito *v.* Hobson (1885), 30 Ch. D. 396; 55 L. J. (CH.) 741; 53 L. T. 746; 34 W. R. 286, C. A. 98
——— *v.* Elphinstone (1794), 2 Ves. 463 138
——— *v.* Greese (1743), 3 Atk. 65 137
——— *v.* Inland Revenue Commissioners, [1909] 2 I. R. 597 192
——— *v.* Peto (1840), 1 Man. & G. 896; 9 Dowl. 73 462
——— *v.* Willis (1873), L. R. 8 Exch. 69; 42 L. J. (EX.) 68; 28 L. T. 71; 12 Cox, C. C. 351 525, 550
———, Spence & Co. and "Lord Gough" Steamship Co. *v.* Rowntree, [1894] A. C. 217; 63 L. J. (Q. B.) 283; 70 L. T. 817; 58 J. P. 493; 6 R. 95; 7 Asp. M. L. C. 482 448
Richerson, *Re*, Scales *v.* Heyhoe, [1892] 1 Ch. 379; 61 L. J. (CH.) 202; 66 L. T. 174; 40 W. R. 233 109, 307
Richmond *v.* White (1879), 12 Ch. D. 361; 48 L. J. (CH.) 798; 41 L. T. 570; 27 W. R. 878, C. A. 37
Rickard *v.* Barrett (1857), 3 K. & J. 289 145
Ricketts *v.* Gurney (1819), 7 Price, 699; 1 Chit. 682 587
Rickman, *Re*, Postlethwaite *v.* Rickman (1887), 35 Ch. D. 722; 56 L. J. (CH.) 1077; 56 L. T. 733; 36 W. R. 565 572
Rideal *v.* Great Western Rail. Co. (1859), 1 F. & F. 706 562
Ridges *v.* Morrison (1784), 1 Bro. C. C. 389 129

PAGE

Ridgway *v.* Newstead (1861), 3 De G. F. & J. 474 ; 30 L. J. (CH.) 889 ; 4 L. T. 86 ; 7 Jur. (N. S.) 451 ; 9 W. R. 401 173
Ridler *v.* Ridler (1729), 1 Eq. Cas. Abr. 279 16
Ridsdale *v.* Clifton (1877), 2 P. D. 276 ; 46 L. J. (P. C.) 27 ; 36 L. T. 865 . 479, 563
Rigby *v.* Great Western Rail. Co. (1846), 2 Ph. 44 43, 50
Rigden *v.* Vallier (1751), 2 Ves. Sen. 252 70
Rigg *v.* Manchester, Sheffield and Lincolnshire Rail. Co. (1866), 12 Jur. (N. S.) 525 ; 14 W. R. 834 437
Rigge *v.* Burbidge (1846), 15 M. & W. 598 ; 15 L. J. (EX.) 309 355, 358
Right d. Jefferys *v.* Bucknell (1831), 2 B. & Ad. 278 365, 366, 367
Rimmer *v.* Webster, [1902] 2 Ch. 163 ; 71 L. J. (CH.) 561 ; 86 L. T. 491 ; 50 W. R. 517 ; 18 T. L. R. 548 81, 372, 387, 394, 398, 399
Ring *v.* Jarman (1872), L. R. 14 Eq. 357 ; 41 L. J. (CH.) 535 ; 26 L. T. 690 ; 20 W. R. 744 184, 266
Ripley *v.* Waterworth (1802), 7 Ves. 425 110
Rippiner *v.* Wright (1819), 2 B. & Ald. 478 516
Riseley *v.* Shepherd (1873), 21 W. R. 782 533
Rishton *v.* Nisbett (1834), 1 Mood. & R. 347 586
Ritchie *v.* Malcolm, [1902] 2 I. R. 403 338, 342
River Ribble Joint Committee *v.* Croston Urban District Council, [1897] 1 Q. B. 251 ; 66 L. J. (Q. B.) 384 ; 45 W. R. 348 354
River Steamer Co., *Re*, Mitchell's Claim (1871), 6 Ch. App. 822 ; 25 L. T. 319 ; 19 W. R. 1130 557, 558, 559
Robarts *v.* Tucker (1851), 16 Q. B. 560 ; 15 Jur. 987 ; 20 L. J. (Q. B.) 270 . . . 395
Robb *v.* Green, [1895] 2 Q. B. 315 ; 64 L. J. (Q. B.) 593 ; 73 L. T. 15 ; 59 J. P. 695 ; 44 W. R. 25 ; 14 R. 580, C. A. 156
Robbins *v.* Alexander, *Re* Samson. *See* Samson, *Re*, Robbins *v.* Alexander.
Roberdeau *v.* Rous (1738), 1 Atk. 543 66
Roberts, *Re*, Roberts *v.* Parry (1902), 50 W. R. 469 138
——— *Re*, ——— *v.* Roberts, [1902] 2 Ch. 834 ; 72 L. J. (CH.) 38 ; 87 L. T. 523 ; 51 W. R. 89 37, 145
——— *Re*, ——— *v.* ———, [1905] 1 Ch. 704 ; 74 L. J. (CH.) 483 ; 93 L. T. 253, C. A. 24
——— *v.* Allatt (1828), Mood. & M. 192 575
——— *v.* Berry (1853), 3 De G. M. & G. 284 ; 22 L. J. (CH.) 398, C. A. . . 154
——— *v.* Cooper, [1891] 2 Ch. 335 ; 60 L. J. (CH.) 377 ; 64 L. T. 584, C. A. . 72
——— *v.* Eastern Counties Rail. Co. (1859), 1 F. & F. 460 562
——— *v.* Gordon, *Re* Gordon. *See* Gordon, *Re*, Roberts *v.* Gordon.
——— *v.* Karr (1809), 1 Taunt. 495 370
——— *v.* Maddocks (1843), 13 Sim. 549 365
——— *v.* Ogilby (1821), 9 Price, 269 407
——— *v.* Roberts (1730), 3 P. Wms. 66 20
——— *v.* Security Co., Ltd. (1896), 13 T. L. R. 79, C. A. 366
——— *v.* Tunstall (1845), 4 Hare, 257 170, 173
——— *v.* Walker (1830), 1 Russ. & M. 752 108
Robertson *v.* Morris (1858), 1 Giff. 421 173
——— *v.* Skelton (1849), 12 Beav. 260 ; 19 L. J. (CH.) 140 ; 14 Jur. 323 . 99
"Robin," The, [1892] P. 95 ; 7 Asp. M. L. C. 194 ; 67 L. T. 298 480
Robins, *Re*, Nelson *v.* Robins (1888), 58 L. T. 382 240, 241
——— *v.* Bridge (1837), 3 M. & W. 114 ; 6 Dowl. 140 ; Murp. & H. 357 ; 7 L. J. (EX.) 49 579, 584
Robins' Estate, *Re* (1879), 27 W. R. 705 114
Robinson *v.* Brown (1846), 3 C. B. 754 ; 16 L. J. (C. P.) 46 521
——— *v.* Buccleuch and Queensberry (Duke) (1887), 3 T. L. R. 472, C. A. . 537
——— *v.* Byron (Lord) (1788), 2 Cox, Eq. Cas. 4 43
——— *v.* Collingwood (1865), 17 C. B. (N. S.) 777 ; 34 L. J. (C. P.) 18 ; 11 L. T. 313 ; 10 Jur. (N. S.) 1080 ; 13 W. R. 84 443
——— *v.* Davies (1879), 5 Q. B. D. 26 ; 49 L. J. (Q. B.) 218 ; 24 W. R. 255 . 616
——— *v.* Duleep Singh (1879), 11 Ch. D. 798 ; 48 L. J. (CH.) 758 ; 39 L. T. 313 ; 27 W. R. 21, C. A. 326, 356
——— *v.* Gee (1749), 1 Ves. Sen. 251 566
——— *v.* Gregory, [1905] 1 K. B. 534 ; 74 L. J. (K. B.) 367 ; 92 L. T. 171 ; 69 J. P. 161 ; 3 L. G. R. 308 ; 20 Cox, C. C. 781 526
——— *v.* Jenkins (1890), 24 Q. B. D. 275 ; 59 L. J. (Q. B.) 147 ; 62 L. T. 439 ; 38 W. R. 360, C. A. 407
——— *v.* Jones (1879), 4 L. R. Ir. 391 495
——— *v.* London Hospital (Governors) (1853), 10 Hare, 19 ; 22 L. J. (CH.) 754 105

PAGE
Robinson *v.* Markis (1841), 2 Mood. & R. 375 547, 618
——— *v.* Mollett (1875), L. R. 7 H. L. 802 445
——— *v.* Montgomeryshire Brewery Co., [1896] 2 Ch. 841; 65 L. J. (CH.) 915; 3 Mans. 279 381, 394
——— *v.* Pett (1734), 3 P. Wms. 249; 2 Eq. Cas. Abr. 454 158
——— *v.* Robinson (1854), 19 Beav. 494 108, 114
——— *v.* ——— (1877), 2 P. D. 75; 46 L. J. (P.) 47; 36 L. T. 414; 25 W. R. 376 350
——— *v.* Rosher (1841), 1 Y. & C. Ch. Cas. 7; 5 Jur. 1006 97
——— *v.* Taylor (1789), 2 Bro. C. C. 589 108
——— *v.* Wheelwright (1855), 21 Beav. 214 126
——— *v.* Woodward (1851), 4 De G. & Sm. 562 86
Robinson's Case (1603), 5 Co. Rep. 32, b.; Cro. Jac. 15; 2 Leon. 32 346
Robson *v.* A.-G. (1843), 10 Cl. & Fin. 471 561
Roch *v.* Callen (1848), 6 Hare, 531 129
Rochdale Canal Co. *v.* King (1851), 2 Sim. (N. S.) 78; 20 L. J. (CH.) 675 . 167, 168
Roche *v.* O'Brien (1810), 1 Ball & B. 330 20, 166, 171
Roche's Estate, *Re* (1889), 23 L. R. Ir. 230 229
Rochefoucauld *v.* Boustead, [1897] 1 Ch. 196; 66 L. J. (CH.) 74; 75 L. T. 502; 45 W. R. 272, C. A. 75, 169, 172, 567, 572
Rochester Corporation *v.* Lee (1849), 1 Mac. & G. 467 359
Roddy's Estate, *Re* (1861), 11 I. Ch. R. 369 143
Rodgers *v.* Houston, *Re* Houston. *See* Houston, *Re*, Rodgers *v.* Houston.
Rodick *v.* Gandell (1852), 1 De G. M. & G. 763; 12 Beav. 325; 19 L. J. (CH.) 113; 13 Jur. 1087 103
Roe d. Berkeley (Earl) *v.* York (Archbishop) (1805), 6 East, 86 375
—— d. Pellatt *v.* Ferrars (1801), 2 Bos. & P. 542 546
—— d. Trimlestown (Lord) *v.* Kemmis (1842), 9 Cl. & Fin. 749 543
—— *v.* Birch, *Re* Birch. *See* Birch, *Re*, Roe *v.* Birch.
—— *v.* Davies (1876), 2 Ch. D. 729; 23 W. R. 606 621
—— *v.* Mutual Loan Fund (1887), 19 Q. B. D. 347; 56 L. J. (Q. B.) 541; 35 W. R. 723, C. A. 364
—— *v.* Nix, [1893] P. 55; 62 L. J. (P.) 36; 68 L. T. 26; 1 R. 472 546
Rogers *v.* Allen (1808), 1 Camp. 309 515, 540
——— *v.* Hadley (1862), 2 H. & C. 227; 32 L. J. (EX.) 241; 9 L. T. 292; 9 Jur. (N. S.) 898; 11 W. R. 1074 567
——— *v.* Hosegood, [1900] 2 Ch. 388; 69 L. J. (CH.) 652; 83 L. T. 186; 48 W. R. 659; 16 T. L. R. 489, C. A. 101, 102
——— *v.* Ingham (1876), 3 Ch. D. 351, C. A. 22
——— *v.* James (1816), 2 Marsh. 425 305
——— *v.* Jones (1876), 3 Ch. D. 688; 24 W. R. 1059 123, 126
——— *v.* ——— (1877), 7 Ch. D. 345; 38 L. T. 17 123
——— *v.* Pitcher (1815), 6 Taunt. 202 405
——— *v.* Powell (1869), 38 L. J. (EX.) 648; 18 W. R. 282 604
——— *v.* Seale (1681), Freem. (CH.) 84; 2 Eq. Cas. Abr. 70 77
——— *v.* Wood (1831), 2 B. & Ad. 245 353, 362, 468
———, Sons & Co. *v.* Lambert & Co., [1891] 1 Q. B. 318; 60 L. J. (Q. B.) 187; 64 L. T. 406; 55 J. P. 452; 39 W. R. 114, C. A. 406, 407
Rolf *v.* Dart (1809), 2 Taunt. 51 524, 549
Rolfe *v.* Gregory (1864), 4 De G. J. & Sm. 576; 34 L. J. (CH.) 274; 12 L. T. 162; 11 Jur. (N. S.) 98; 13 W. R. 355 170
Rolland *v.* Hart (1871), 6 Ch. App. 678; 40 L. J. (CH.) 701; 25 L. T. 191; 19 W. R. 962 84, 85
Rolleston *v.* Morton (1842), 1 Dr. & War. 171; 1 Con. & Law. 252; 4 I. Eq. R. 149 93
Rolt *v.* Somerville (Lord) (1737), 2 Eq. Cas. Abr. 759 90
Romford Canal Co., *Re*, Pocock's Claim, Trickett's Claim, Carew's Claim (1883), 24 Ch. D. 85; 52 L. J. (CH.) 729; 49 L. T. 118 371, 381
Roome *v.* Roome (1744), 3 Atk. 181 129, 132
Root *v.* French (1835), 13 Wendell (New York), 570 399
Roper *v.* Williams (1822), Turn. & R. 18 102
——— *v.* Castell and Brown, Ltd., *Re* Castell and Brown, Ltd. *See* Castell and Brown, Ltd., *Re*, Roper *v.* Castell and Brown, Ltd.
Rorke's Estate, *Re* (1865), 15 I. Ch. R. 316 144
Roscommon's (Earl) Claim (1828), 6 Cl. & Fin. 97 534, 536
Rose *v.* Clarke (1842), 1 Y. & C. Ch. Cas. 534 516
—— *v.* Watson (1864), 10 H. L. Cas. 672; 33 L. J. (CH.) 385; 3 New Rep. 673; 10 L. T. 106; 10 Jur. (N. S.) 297; 12 W. R. 585 99

PAGE
Rosenberg *v.* Northumberland Building Society (1889), 22 Q. B. D. 373; 60 L. T. 558; 37 W. R. 368, C. A. 477
Ross *v.* Edwards (1895), 73 L. T. 100 406, 408
—— *v.* Ross's Trustees (1901), 9 Scots Law Times, 340 222
—— *v.* Woodford, [1894] 1 Ch. 38; 63 L. J. (CH.) 191; 70 L. T. 22; 42 W. R. 188; 8 R. 20 612, 614
Rossmore (Lord) *v.* Mowatt (1850), 15 Jur. 238 565
Roswell *v.* Hardwick, *Re* Hardwick. *See* Hardwick, *Re*, Roswell *v.* Hardwick.
"Rothbury," The (1893), 10 T. L. R. 60 436
Rotherham *v.* Fanshaw (1748), 3 Atk. 628 48
Rouch *v.* Great Western Rail. Co. (1841), 1 Q. B. 51; 4 Per. & Dav. 686; 2 Ry. & Can. Cas. 505; 5 Jur. 826 420, 437, 438
Roundel *v.* Currer (1786), 2 Bro. C. C. 67 125
Routledge *v.* Hislop (1860), 2 E. & E. 549; 29 L. J. (M. C.) 90; 2 L. T. 53; 6 Jur. (N. S.) 398; 8 W. R. 363 331, 334, 357
———— *v.* Ramsay (1838), 8 Ad. & El. 221; 3 Nev. & P. (Q. B.) 319; 1 Will. Woll. & H. 232; 7 L. J. (Q. B.) 156; 2 Jur. 719 432
Rowbotham *v.* Wilson (1857), 8 E. & B. 123; 3 Jur. (N. S.) 297; 27 L. J. (Q. B.) 61 374
———— *v.* —— (1861), 8 H. L. Cas. 348; 30 L. J. (Q. B.) 49; 2 L. T. 642; 6 Jur. (N. S.) 965 442
Rowcroft *v.* Bassett (1802), Peake, Add. Cas. 199 465
Rowe *v.* Bant (1751), 1 Dick. 150 94
—— *v.* Brenton (1828), 8 B. & C. 737; 3 Man. & Ry. (K. B.) 133...442, 464, 528, 530, 539, 594
—— *v.* Grenfell (1824), Ry. & M. 396 442
—— *v.* Rowe (1848), 2 De G. & Sm. 294; 17 L. J. (CH.) 357; 12 Jur. 909...137, 138
—— *v.* Wood (1822), 2 Jac. & W. 553 55
Rowe's Trustee's Claim, *Re* West Coast Gold Fields, Ltd. *See* West Coast Gold Fields, Ltd., *Re*, Rowe's Trustee's Claim.
Rowell *v.* Satchell, [1903] 2 Ch. 212; 73 L. J. (CH.) 20; 89 L. T. 267 . . 101
Rowland's Case, *Re* Newport and South Wales Shipowners' Co. *See* Newport and South Wales Shipowners' Co., *Re*, Rowland's Case.
Rowlands *v.* De Vecchi (1828), Cab. & El. 10 465
Rowley *v.* London and North Western Rail. Co. (1873), L. R. 8 Exch. 221; 42 L. J. (EX.) 153; 29 L. T. 180; 21 W. R. 869 . . . 479, 480, 481
———— *v.* Rowley (1854), 23 L. J. (CH.) 275 604
Roxburghe *v.* Cox (1881), 17 Ch. D. 520; 50 L. J. (CH.) 772; 45 L. T. 225; 30 W. R. 74, C. A. 104, 164
Roy *v.* Beaufort (Duke) (1741), 2 Atk. 190 19
Royal Bank of India's Case (1869), 4 Ch. App. 252 97
Royal Bristol Permanent Building Society *v.* Bomash (1887), 35 Ch. D. 390; 56 L. J. (CH.) 840; 57 L. T. 179 99
Royal British Bank *v.* Turquand (1856), 6 E. & B. 327; 24 L. J. (Q. B.) 327; 1 Jur. (N. S.) 1086 86, 381
Royal Exchange Assurance Corporation *v.* Sjoforsakrings Aktiebologet Vega, [1902] 2 K. B. 384; 71 L. J. (K. B.) 739; 87 L. T. 356; 50 W. R. 694; 18 T. L. R. 714; 5 Com. Cas. 205; 9 Asp. M. L. C. 326, C. A. 487
Ruben *v.* Great Fingall Consolidated, [1906] A. C. 439; 75 L. J. (CH.) 843; 95 L. T. 214; 22 T. L. R. 712; 13 Mans. 248 369, 381, 382, 385
Ruck *v.* Ruck, [1896] P. 152; 65 L. J. (P.) 87 356, 543
Rule *v.* Jewell (1881), 18 Ch. D. 660; 29 W. R. 755 173, 395
Rumball *v.* Metropolitan Bank (1877), 2 Q. B. D. 194; 46 L. J. (Q. B.) 346; 36 L. T. 240; 25 W. R. 366 393
Rundle *v.* Beaumont (1828), 1 Moo. & P. 396; 6 L. J. (O. S.) (C. P.) 91; 4 Bing. 537...547
Rusden *v.* Pope (1868), L. R. 3 Exch. 269; 37 L. J. (EX.) 137; 18 L. T. 651; 16 W. R. 1122 57
Rush *v.* Smith (1834), 1 Cr. M. & R. 94; 2 Dowl. 687; 4 Tyr. 675; 3 L. J. (EX.) 355 597
Rushmer *v.* Polsue and Alfieri, [1906] 1 Ch. 234; 75 L. J. (CH.) 79; 93 L. T. 823; 54 W. R. 161; 22 T. L. R. 139, C. A. 50
Rushworth *v.* Pembroke (Countess) (1667), Hard. 472 546
Russel *v.* Langstaffe (1780), 2 Doug. (K. B.) 514 392, 402
——— *v.* Russel (1783), 1 Bro. C. C. 269 92
Russell *v.* Jackson (1851), 21 L. J. (CH.) 146; 15 Jur. 117; 9 Hare, 387 . . 572
——— *v.* ——— (1852), 10 Hare, 204 76
——— *v.* Rider (1834), 6 C. & P. 416 597
——— *v.* Waterford and Limerick Rail. Co. (1885), 16 L. R. Ir. 314 . . 332

PAGE
Russell *v.* Watts (1883), 25 Ch. D. 559; 50 L. T. 673; 32 W. R. 626, C. A. . 167
Russo-Chinese Bank *v.* Li Yau Sam, [1910] A. C. 174; 79 L. J. (P. C.) 60; 101 L. T. 689; 26 T. L. R. 203 383, 390
Rutter *v.* Maclean (1799), 4 Ves. 531 121
Rutty *v.* Benthall (1867), L. R. 2 C. P. 488; 36 L. J. (C. P.) 194; 16 L. T. 287; 15 W. R. 744 516
Ryan *v.* Ring (1889), 25 L. R. Ir. 184 465, 537
—— *v.* Mackmath (1789), 3 Bro. C. C. 15 53
Ryder *v.* Wombwell (1868), L. R. 4 Exch. 32; 38 L. J. (EX.) 8; 19 L. T. 491; 17 W. R. 167 429, 432
Ryle *v.* Haggie (1820), 1 Jac. & W. 234 43
Ryley *v.* Brown (1890), 62 L. T. 458 331

S.

S. *v.* B. (falsely called S.) (1905), 21 T. L. R. 219 508
Sackville-West *v.* Holmesdale (Viscount) (1870), L. R. 4 H. L. 543; 39 L. J. (CH.) 505 94
Sadgrove *v.* Hole, [1901] 2 K. B. 1; 70 L. J. (K. B.) 455; 84 L. T. 647; 49 W. R. 473; 17 T. L. R. 332, C. A. 495
Sadler *v.* Worley, [1894] 2 Ch. 170; 63 L. J. (CH.) 551; 70 L. T. 494; 42 W. R. 476; 8 R. 194 93
Sadlier *v.* Butler (1867), 1 I. R. Eq. 415 122
Sagitary *v.* Hyde (1637), 1 Vern. 455; 1 Eq. Cas. Abr. 142 144, 146
Sainsbury *v.* Jones (1839), 5 My. & Cr. 1; 4 Jur. 499 12, 67
St. Albans (Duke), *Re*, Loder *v.* St. Albans (Duke), [1900] 2 Ch. 873; 69 L. J. (CH.) 863; 49 W. R. 74 230, 231
St. Aubyn *v.* Smart (1867), L. R. 5 Eq. 183; 17 L. T. 439; 16 W. R. 394; affirmed 3 Ch. App. 646; 19 L. T. 192; 16 W. R. 1095 13
St. George's Steam Packet Co., *Re*, Maguire's Case (1894), 3 De G. & Sm. 31; 18 L. J. (CH.) 256; 13 Jur. 673 389
St. John *v.* Holford (1668), 1 Cas. in Ch. 97; 1 Eq. Cas. Abr. 324 . . . 71
—— (Lord) *v.* St. John (Lady) (1805), 11 Ves. 526 54
St. Katherine's Hospital Case (1671), 1 Vent. 149; T. Jo. 176; Skin. 2 . . 563
St. Leonards (Lord) *v.* Ashburner (1869), 21 L. T. 595 442
St. Luke's, Old Street *v.* St. Leonard's, Shoreditch (1779), 1 Bro. C. C. 40; 2 Dick. 550; 2 Anst. 395 39
St. Paul's (Minor Canons) *v.* Crickett (1810), Wight. 30 355
Sainter *v.* Ferguson (1849), 7 C. B. 716; 18 L. J. (C. P.) 217; 13 Jur. 828 . . 432
Salisbury *v.* Salisbury (1848), 6 Hare, 526 141
Salouci *v.* Woodmass (1784), 2 Park on Marine Insurance (ed. 1842), 727 . 341
Salt, *Re*, Brothwood *v.* Keeling, [1895] 2 Ch. 203; 64 L. J. (CH.) 494; 43 W. R. 500 37, 145
—— *v.* Cooper (1880), 16 Ch. D. 544; 50 L. J. (CH.) 529; 43 L. T. 682; 29 W. R. 553, C. A. 56, 61, 62
—— *v.* Locker, *Re*, Parker-Jervis. *See* Parker-Jervis, *Re*, Salt *v.* Locker.
—— *v.* Northampton (Marquis), [1892] A. C. 1; 61 L. J. (CH.) 49; 65 L. T. 765; 40 W. R. 529 91, 92
—— Union *v.* Brunner, Mond & Co., [1906] 2 K. B. 822; 76 L. J. (K. B.) 55; 95 L. T. 647; 22 T. L. R. 835 449
Salter *v.* Bradshaw (1858), 26 Beav. 161 173
—— *v.* Cavanagh (1838), 1 Dr. & Wal. 668 155
—— *v.* Kidley (1689), 1 Show. 58; Carth. 76; Holt (K.B.), 210 . . 366, 367
Saltern *v.* Melhuish (1754), Amb. 247 518
Salting, *Ex parte*, *Re* Stratton. *See* Stratton, *Re*, *Ex parte* Salting.
Saltoun (Lord) *v.* Advocate-General (1860), 3 Macq. 659; 1 Pater. App. 970; 32 Sc. Jur. 641 262, 267, 268, 271
Salts *v.* Battersby (1910), 102 L. T. 730; [1910] 2 K. B. 155 29
Salusbury *v.* Denton (1857), 3 K. & J. 529; 26 L. J. (CH.) 856; 3 Jur. (N. S.) 740 70
Salvidge *v.* Tutton (1869), 20 L. T. 300 625
Sammon, *Re* (1838), 3 M. & W. 381 252, 255
Sammons *v.* Baily (1890), 24 Q. B. D. 727; 59 L. J. (Q. B.) 342; 38 W. R. 605...575
Sampson *v.* Pattison (1842), 1 Hare, 533 91
Samson, *Re*, Robbins *v.* Alexander, [1906] 2 Ch. 584; 76 L. J. (CH.) 21; 95 L. T. 633, C. A. 36

PAGE

Samuel *v.* Jarrah Timber and Wood Paving Corporation, [1904] A. C. 323; 73 L. J. (CH.) 526; 90 L. T. 731; 52 W. R. 673; 20 T. L. R. 536; 11 Mans. 276 92
——— *v.* Ward (1856), 22 Beav. 347 129
Sandby, *Ex parte* (1745), 1 Atk. 149 28
Sanders, *Re*, *Ex parte* Wagstaff (1844), 13 L. J. (CH.) 161 596
——— *v.* Hamilton (1907), 96 L. T. 679; 23 T. L. R. 389 335, 358
——— *v.* Kiddell (1835), 7 Sim. 536; 5 L. J. (CH.) 29 241
——— *v.* Maclean (1883), 11 Q. B. D. 327; 52 L. J. (Q. B.) 481; 49 L. T. 462; 31 W. R. 698; 5 Asp. M. L. C. 160, C. A. 486
——— *v.* Pope (1806), 12 Ves. 282 153
Sanderson *v.* Collman (1842), 4 Man. & G. 209; 4 Scott (N. R.), 638; 11 L. J. (C. P.) 270 394
Sandilands, *Re* (1871), L. R. 6 C. P. 411; *sub nom. Re* Mayer, 40 L. J. (C. P.) 291; 24 L. T. 273; 19 W. R. 641 505
Sands *v.* Thompson (1883), 22 Ch. D. 614; 52 L. J. (CH.) 406; 48 L. T. 210; 31 W. R. 397 154
Sandwich Corporation *v.* R. (1847), 10 Q. B. 571 358
Sandys, *Ex parte*, *Re* Railway Time Tables Publishing Co. *See* Railway Time Tables Publishing Co., *Re*, *Ex parte* Sandys.
Santley *v.* Wilde, [1899] 2 Ch. 474; 68 L. J. (CH.) 681; 81 L. T. 893; 48 W. R. 90; 15 T. L. R. 528, C. A. 91
Sarat Chunder Dey *v.* Gopal Chunder Lala (1892), 56 J. P. 741 382
Sastry Velaider Aronegary *v.* Sembecutty Vaigalie (1881), 6 App. Cas. 364; 50 L. J. (P. C.) 21; 44 L. T. 895 444, 504
Satterthwaite *v.* Powell (1838), 1 Curt. 705 503
Saunders, *Re*, Saunders *v.* Gore, [1898] 1 Ch. 17; 67 L. J. (CH.) 55; 77 L. T. 450; 46 W. R. 180, C. A. 240, 281
——— *v.* Dehew (1692), 2 Vern. 271 83
——— *v.* Merryweather (1865), 3 H. & C. 902; 35 L. J. (EX.) 115; 11 Jur. (N. S.) 665; 13 W. R. 814 367
——— *v.* Vautier (1841), Cr. & Ph. 240; 10 L. J. (CH.) 354 356
Savage *v.* Foster (1723), 9 Mod. Rep. 35 72, 167, 168, 380, 397
Savery *v.* King (1856), 5 H. L. Cas. 627; 25 L. J. (CH.) 482; 2 Jur. (N. S.) 503; 4 W. R. 471 166
Savigny's Case, *Re* Central Klondyke Gold Mining and Trading Co. *See* Central Klondyke Gold Mining and Trading Co., *Re*, Savigny's Case.
Savile *v.* Jackson (1824), 13 Price, 715 335
Savory *v.* Dyer (1749), Amb. 70 49
Savoy Overseers *v.* Art Union of London, [1896] A. C. 296; 65 L. J. (M. C.) 161; 74 L. T. 497; 50 J. P. 660; 45 W. R. 34 191
Saxby *v.* Easterbrook (1878), 3 C. P. D. 339; 27 W. R. 188 431
Saxlehner *v.* Apollinaris Co., [1897] 1 Ch. 893; 66 L. J. (CH.) 533; 76 L. T. 617 449
Saxon Life Assurance Society, *Re* (1862), 2 John. & H. 408; affirmed 32 L. J. (CH.) 206; 7 L. T. 404; 11 W. R. 59 22
Sayer *v.* Glossop (1848), 2 Exch. 409; 2 Car. & Kir. 694; 12 Jur. 465 . 538, 607
——— *v.* Wagstaff (1842), 5 Beav. 462; 12 L. J. (CH.) 35 611
——— *v.* ——— (1844), 6 Beav. 415; 13 L. J. (CH.) 161; 3 Jur. 1083; affirmed 14 L. J. (CH.) 116 596
Sayers *v.* Collyer (1884), 28 Ch. D. 103; 54 L. J. (CH.) 1; 51 L. T. 723; 49 J. P. 244; 33 W. R. 91, C. A. 51, 102
Scales *v.* Collins (1852), 9 Hare, 656 145
——— *v.* Heyhoe, *Re* Richerson. *See* Richerson, *Re*, Scales *v.* Heyhoe.
Scard *v.* Jackson (1875), 24 W. R. 159 608
Scarf *v.* Jardine (1882), 7 App. Cas. 345; 51 L. J. (Q. B.) 612; 47 L. T. 258; 30 W. R. 893 325, 336, 365, 391
Scarfe *v.* Halifax (1840), 7 M. & W. 288; 10 L. J. (EX.) 332 . . . 360, 361, 379
Schneider *v.* Batt & Co. (1881), 8 Q. B. D. 701; 50 L. J. (Q. B.) 525; 45 L. T. 371; 30 W. R. 420, C. A. 487
Schofield, *Ex parte*, *Re* Firth. *See* Firth, *Re*, *Ex parte* Schofield.
——— *v.* Heap (1858), 27 Beav. 93 130, 133
Scholefield *v.* Lockwood (1863), 4 De G. J. & Sm. 22; 33 L. J. (CH.) 106; 9 L. T. 1258; 12 W. R. 114 370
Scholes *v.* Hilton (1842), 10 M. & W. 15; 2 Dowl. (N. S.) 229; 11 L. J. (EX.) 332 589
Scholey *v.* Ramsbottom (1810), 2 Camp. 485 402

PAGE
Scholfield *v.* Londesborough (Earl), [1896] A. C. 514 ; 65 L. J. (Q. B.) 593 ; 75 L. T. 254 ; 45 W. R. 124 392, 393, 398, 400, 401
Schroder *v.* Schroder (1854), Kay, 578; 23 L. J. (CH.) 916 ; 18 Jur. 621 ; 2 W. R. 462 120, 123
Schultz *v.* Astley (1836), 2 Bing. (N. C.) 544 ; 2 Scott, 815 ; 1 Hodg. 542 ; 7 C. & P. 99 ; 5 L. J. (C. P.) 130 392, 402
" Schwalbe," The (1859), Sw. 521. 437, 462
Scott, *Re*, [1901] 1 K. B. 228 ; 70 L. J. (K. B.) 66 ; 83 L. T. 613 ; 65 J. P. 84 ; 49 W. R. 178 ; 17 T. L. R. 148, C. A. 186, 204, 237
——— *Re*, Langton *v.* Scott, [1903] 1 Ch. 1 ; 72 L. J. (CH.) 20 ; 87 L. T. 574 : 51 W. R. 182, C. A. 129, 130, 136
——— *v.* Brown, Doering, McNab & Co., [1892] 2 Q. B. 724 ; 61 L. J. (Q. B.) 736 ; 67 L. T. 782 ; 57 J. P. 213 ; 41 W. R. 116 ; 4 R. 42, C. A. . . . 487
——— *v.* Jones (1813), 4 Taunt. 865 521
——— *v.* Lowe, (1902), 86 L. T. 421 329, 353
——— *v.* Nesbitt (1808), 14 Ves. 438 66
——— *v.* Pilkington (1862), 2 B. & S. 11 ; 31 L. J. (Q. B.) 81 ; 6 L. T. 21 ; 8 Jur. (N. S.) 557 326, 542
——— *v.* Pitt Rivers, *Re* Pitt Rivers. *See* Pitt Rivers, *Re*, Scott *v.* Pitt Rivers.
——— *v.* Rayment (1868), L. R. 7 Eq. 112 ; 38 L. J. (CH.) 48 ; 19 L. T. 481 . 88
——— *v.* Sampson (1882), 8 Q. B. D. 491 ; 51 L. J. (Q. B.) 380 ; 46 L. T. 412 ; 46 J. P. 498 ; 30 W. R. 541 454
——— *v.* Scott (1847), 11 I. Eq. R. 74 19
——— *v.* ——— (1882), 9 L. R. Ir. 367 112
——— *v.* Shearman (1775), 2 Wm. Bl. 977 328, 340, 343
——— *v.* Van Sandau (1845), 6 Q. B. 237 ; 8 Jur. 1114 547
——— and Alvarez's Contract, *Re*, Scott *v.* Alvarez, [1895] 1 Ch. 596 ; 64 L. J. (CH.) 376 ; 72 L. T. 455 334
Scottish Petroleum Co., *Re* (1883) 23 Ch. D. 413 ; 49 L. T. 348 ; 31 W. R. 846, C. A.. 174, 175
Scudamore *v.* Scudamore (1720), Prec. Ch. 543 107
Seagram *v.* Tuck (1881), 18 Ch. D. 296 ; 50 L. J. (CH.) 572 ; 44 L. T. 800 ; 29 W. R. 784. 156
Seal *v.* Claridge (1881), 7 Q. B. D. 516 ; 50 L. J. (Q. B.) 316 ; 44 L. T. 501 ; 29 W. R. 598, C. A. 511
Sealy, *Re*, Tomkins *v.* Tucker (1901), 85 L. T. 451 241
Seaman, *Re*, Rhodes *v.* Wish (1881), 20 Ch. D. 230 ; 51 L. J. (CH.) 315 ; 45 L. T. 658 ; 30 W. R. 858, C. A.. 168
——— *v.* Netherclift (1876), 2 C. P. D. 53 ; 46 L. J. (C. P.) 128 ; 35 L. T. 784 ; 25 W. R. 159, C. A. 588, 601
Searle, *Re*, Searle *v.* Baker, [1900] 2 Ch. 829 ; 69 L. J. (CH.) 712 ; 49 W. R. 44 . 108
——— *v.* Lane (1688), 2 Vern. 88 ; 1 Eq. Cas. Abr. 332 35
Seaton, *Ex parte*, *Re* Deerhurst. *See* Deerhurst, *Re*, *Ex parte* Seaton.
——— *v.* Seaton (1888), 13 App. Cas. 61 ; 57 L. J. (CH.) 661 ; 58 L. T. 565 ; 36 W. R. 865 127
Secretary of State for Foreign Affairs *v.* Charlesworth, Pilling & Co., [1901] A. C. 373 ; 70 L. J. (P. C.) 25 ; 84 L. T. 212 ; 17 T. L. R. 265 485
Seddon *v.* Tutop (1790), 6 Term Rep. 607 332, 356
——— and London Salt Co., Ltd. *v.* North Eastern Salt Co., Ltd., [1905] 1 Ch. 326 ; 74 L. J. (CH.) 199 ; 91 L. T. 793 ; 53 W. R. 232 ; 21 T. L. R. 118 . 174
Seed *v.* Bradford (1750), 1 Ves. Sen. 501 139
——— *v.* Higgins (1860), 8 H. L. Cas. 550 437
Seeley *v.* Jago (1717), 1 P. Wms. 389 113, 114
Sefton (Earl), *Re*, [1898] 2 Ch. 378 ; 67 L. J. (CH.) 518 ; 78 L. T. 765 ; 47 W. R. 49 ; 14 T. L. R. 466, C. A. 127
Selby *v.* Harris (1698), 1 Ld. Raym. 745 551
——— *v.* Hills (1832), 1 Dowl. 257 ; 1 Moo. & S. 253 ; 1 L. J. (C. P.) 55 ; 8 Bing. 166 587, 588
——— *v.* Jackson (1843), 6 Beav. 192 ; affirmed (1844), 13 L. J. (CH.) 249 . . 16
——— *v.* Selby (1828), 4 Russ. 336 142
Selfe *v.* Isaacson (1858), 1 F. & F. 194 593
Sells *v.* Hoare (1822), 3 Brod. & Bing. 232 ; 7 Moore (C. P.), 36 591
Selot's Trust, *Re*, [1902] 1 Ch. 488 ; 71 L. J. (CH.) 192 338
Selwyn, *In the Goods of* (1831), 3 Hag. Ecc. 748 503
——— (G. M.), *Re* (1779), 2 Dick. 563 611
——— *v.* Garfit (1888), 38 Ch. D. 273 ; 57 L. J. (CH.) 609 ; 59 L. T. 233 ; 36 W. R. 513, C. A. 165
Semple *v.* Pink (1847), 1 Exch. 74 ; 16 L. J. (EX.) 237 425

PAGE
Senhouse *v.* Christian (undated), cited 19 Ves. 159 174
Sergeson *v.* Sealey (1742), 2 Atk. 412; 9 Mod. Rep. 370 16, 342
Serjeant *v.* Nash, Field & Co., [1903] 2 K. B. 304; 72 L. J. (K. B.) 630; 89 L. T. 112; 19 T. L. R. 510, C. A. 373, 402, 403, 404, 405
Serrao *v.* Noel (1885), 15 Q. B. D. 549, C. A. 335
Seton *v.* Lafone (1887), 19 Q. B. D. 68; 56 L. J. (Q. B.) 415; 57 L. T. 547; 35 W. R. 749, C. A. 324, 382, 386, 399, 400, 408
—— *v.* Slade (1802), 7 Ves. 265 151, 152, 154
Sewell *v.* Corp (1824), 1 C. & P. 392 444
—— *v.* Musson (1683), 1 Vern. 210; 1 Eq. Cas. Abr. 28 152
Sewer Krop, *Re*, *Ex parte* Clarke (1832), 2 Deac. & Ch. 99 586, 588
Sewers Commissioners (City of London) *v.* Gellatly (1876), 3 Ch. D. 610; 45 L. J. (CH.) 788; 24 W. R. 346 . 348
—— *v.* Glasse (1872), 7 Ch. App. 456; 41 L. J. (CH.) 129; 26 L. T. 647; 20 W. R. 515 58
Seymour *v.* Franco (1828), 7 L. J. (O. S.) (K. B.) 18 405
—— *v.* Nosworthy (1670), 1 Cas. in Ch. 155; 3 Rep. Ch. 40; Nels. 135 . 359
Shadbolt *v.* Vanderplank (1861), 29 Beav. 405 139
Shaftesbury (Lady) *v.* Arrowsmith (1798), 4 Ves. 66 44
—— (Earl) *v.* —— (1802), 7 Ves. 480 119, 158
—— (Earl) *v.* Marlborough (Duke) (1835), 7 Sim. 237 241
Shaftsbury's (Earl) Case (1677), 1 Mod. Rep. 144; 3 Keb. 792 485
Shand *v.* Kidd, *Re* Todd. *See* Todd, *Re*, Shand *v.* Kidd.
Shannon *v.* Bradstreet (1803), 1 Sch. & Lef. 52 168
Sharman, *Re*, Wright *v.* Sharman, [1901] 2 Ch. 280; 70 L. J. (CH.) 671; 84 L. T. 859; 49 W. R. 555 220
Sharp, *Re*, *Ex parte* Sharp (1893), 10 Morr. 114 546
—— *v.* St. Sauveur (1871), 7 Ch. App. 343; 41 L. J. (CH.) 576; 26 L. T. 142; 20 W. R. 269 114, 115
Sharpe, *Re*, *Re* Bennett, Masonic and General Life Assurance Co. *v.* Sharpe, [1892] 1 Ch. 154; 61 L. J. (CH.) 193; 65 L. T. 806; 40 W. R. 241, C. A.. 156, 169, 172
—— *v.* Foy (1868), 4 Ch. App. 35; 19 L. T. 541; 17 W. R. 65 168
—— *v.* Hodgson, *Re* Pimm. *See* Pimm, *Re*, Sharpe *v.* Hodgson.
—— *v.* Jackson (1904), 39 L. J. 400 628
—— *v.* Lamb (1840), 11 Ad. & El. 806; 3 Per. & Dav. 454; 9 L. J. (Q. B.) 185; 4 Jur. 965 520
Sharpley *v.* South and East Coast Rail. Co. (1876), 2 Ch. D. 663; 46 L. J. (CH.) 259; 35 L. T. 71, C. A. 174
Shaw, *Re*, Tucket *v.* Shaw, [1895] 1 Ch. 343; 64 L. J. (CH.) 283; 71 L. T. 873; 43 W. R. 315; 13 R. 185 222
—— *v.* Foster (1872), L. R. 5 H. L. 321; 42 L. J. (CH.) 49; 27 L. T. 281; 20 W. R. 907 93, 99
—— *v.* Gould (1868), L. R. 3 H. L. 55; 37 L. J. (CH.) 433; 18 L. T. 833 . 338
—— *v.* Jones Ford, *Re* Stringer's Estate. *See* Stringer's Estate, *Re*, Shaw *v.* Jones Ford.
—— *v.* Picton (1825), 4 B. & C. 715; 7 Dow. & Ry. (K. B.) 291 388
—— *v.* Turbett (1862), 14 I. Ch. R. 476, C. A. 259
—— and Ronaldson, *Re*, [1892] 1 Q. B. 91; 61 L. J. (Q. B.) 141 609
Shea *v.* Green (1886), 2 T. L. R. 533 619
Shearman *v.* Robinson, *Re* Johnson. *See* Johnson, *Re*, Shearman *v.* Robinson.
Shedden *v.* A.-G. (1860), 30 L. J. (P. M. & A.) 217; 2 Sw. & Tr. 170; 3 L. T. 592; 6 Jur. (N. S.) 1163; 9 W. R. 285 . . . 349, 468, 470, 480
—— *v.* Patrick (1854), 1 Macq. 535 351, 352
Sheddon *v.* Goodrich (1803), 8 Ves. 481 117, 120
Sheffield (Earl) *v.* London Joint Stock Bank, Ltd. (1888), 13 App. Cas. 333; 57 L. J. (CH.) 986; 58 L. T. 735; 37 W. R. 33 413
Sheffield, Ashton-under-Lyne and Manchester Rail. Co. *v.* Woodcock (1841), 7 M. & W. 574 382, 412
Sheffield Corporation *v.* Barclay, [1905] A. C. 392; 74 L. J. (K. B.) 747; 93 L. T. 83; 69 J. P. 385; 54 W. R. 49; 21 T. L. R. 642; 10 Com. Cas. 287; 12 Mans. 248; 3 L. G. R. 992 369, 382, 410
Sheffield Waterworks *v.* Yeoman (1866), 2 Ch. App. 8; 15 L. T. 342; 15 W. R. 76. 58
Shelburne *v.* Inchiquin (1784), 1 Bro. C. C. 338; affirmed *sub nom.* Inchiquin *v.* Fitzmaurice (1785), 5 Bro. Parl. Cas. 166 22
Shelbury *v.* Scotsford (1602), Yelv. 22 406
Sheldon *v.* Cox (1764), 2 Eden, 224 84

PAGE

Shelfer *v.* City of London Electric Lighting Co., Meux's Brewery Co. *v.* City of London Electric Lighting Co., [1895] 1 Ch. 287 ; 64 L. J. (CH.) 216 ; 72 L. T. 34 ; 43 W. R. 238 ; 12 R. 112, C. A. 50, 51
Shelley *v.* Wright (1737), Willes, 9 366, 372
Shelley's Case (1581), 1 Co. Rep. 93 b. ; 1 And. 69 ; Moore (K. B.), 136 ; Jenk. 249 94
Shelling *v.* Farmer (1725), 1 Stra. 646 545
Shelly *v.* Nash (1818), 3 Madd. 232 21
Shepard *v.* Brown (1862), 4 Giff. 208 28
Shephard, *Re*, Atkins *v.* Shephard (1889), 43 Ch. D. 131 ; 59 L. J. (CH.) 83 ; 62 L. T. 337 ; 38 W. R. 133, C. A. 56
——, *Re*, George *v.* Thyer, [1904] 1 Ch. 456 ; 73 L. J. (CH.) 401 ; 90 L. T. 249. 444, 504
—— *v.* Brown and Gregory, Ltd., Andrews *v.* Brown and Gregory, Ltd., *Re* Brown and Gregory, Ltd. *See* Brown and Gregory, Ltd., *Re*, Shephard *v.* Brown and Gregory, Ltd., Andrews *v.* Brown and Gregory, Ltd.
—— *v.* Lutwidge (1802), 8 Ves. 26 34
Shepheard *v.* Beetham (1877), 6 Ch. D. 597 ; 46 L. J. (CH.) 763 ; 36 L. T. 909 ; 25 W. R. 764 316
—— *v.* Bray, [1906] 2 Ch. 235 ; 75 L. J. (CH.) 633 ; 95 L. T. 414 ; 54 W. R. 556 ; 22 T. L. R. 625 ; 13 Mans. 279 ; reversed, [1907] 2 Ch. 571 ; 76 L. J. (CH.) 692 ; 24 T. L. R. 17, C. A. 475
—— *v.* Walker (1875), L. R. 20 Eq. 659 ; 44 L. J. (CH.) 648 ; 33 L. T. 47 ; 23 W. R. 903 174
Sheppard *v.* Dalbiac (1885), 30 Sol. Jo. 46 612, 613
—— *v.* Wilson (1845), 4 Hare, 392 ; 9 Jur. 920 29
—— *v.* Wright (1693), Show. Parl. Cas. 18 ; 1 Eq. Cas. Abr. 114 . . 70
Sheridan *v.* Barrett (1879), 4 L. R. Ir. 223 397
—— *v.* New Quay Co. (1858), 4 C. B. (N. S.) 618 ; 28 L. J. (C. P.) 58 ; 5 Jur. (N. S.) 248 395, 406
Sherrard *v.* Sherrard (1747), 3 Atk. 502 29
Sherwin *v.* Shakspear (1854), 5 De G. M. & G. 517 ; 2 Eq. Rep. 957 ; 18 Jur. 843 ; 2 W. R. 668, C. A. 99
Shirley *v.* Ferrers (Earl) (1842), 1 Ph. 167 264
—— *v.* Martin (1779). *See* Roche *v.* O'Brien.
—— *v.* Watts (1744), 3 Atk. 200 56
Shish *v.* Foster (1748), 1 Ves. Sen. 88 71
Shoe Machinery Co. *v.* Cutlan, [1896] 1 Ch. 667 ; 65 L. J. (CH.) 314 ; 74 L. T. 166 356
Short *v.* Lee (1821), 2 Jac. & W. 464 444, 528
—— *v.* Wood (1718), 1 P. Wms. 470 113
Shortt *v.* Robinson (1899), 68 L. J. (Q. B.) 352 ; 80 L. T. 261 ; 63 J. P. 295 ; 19 Cox, C. C. 243 532
Shrapnel *v.* Gamgee (1891), 8 T. L. R. 9 628
Shrewsbury (Countess) *v.* Shrewsbury (Earl) (1790), 3 Bro. C. C. 120 . . 147
Shrewsbury and Talbot Cab and Noiseless Tyre Co. *v.* Shaw (1890), 89 L. T. Jo. 274 63
Shrewsbury Mercers etc. (Warden etc.) *v.* Hart (1823), 1 C. & P. 113 . . . 478
Shrewsbury Peerage, The (1858), 7 H. L. Cas. 1 . . 470, 532, 533, 543, 560, 565
Shropshire Union Railways and Canal Co. *v.* R. (1875), L. R. 7 H. L. 496 ; 45 L. J. (Q. B.) 31 ; 32 L. T. 283 ; 23 W. R. 709 81, 394, 409
Shudal *v.* Jekyll (1742), 2 Atk. 516 132
Shurrock *v.* Lillie (1888), 4 T. L. R. 355 582, 616
Shuttleworth *v.* Greaves (1838), 4 My. & Cr. 35 ; 8 L. J. (CH.) 7 ; 2 Jur. 957 . 122
—— *v.* Laycock (1684), 1 Vern. 245 : 2 Cas. in Ch. 164 71
Sibbering *v.* Balcarra (Earl) (1850), 3 De G. & Sm. 735 ; 19 L. J. (CH.) 252 ; 14 Jur. 753 173
Siddons *v.* Short (1877), 2 C. P. D. 572 ; 46 L. J. (C. P.) 795 ; 37 L. T. 230 . 52
Sidebottom *v.* Adkins (1857), 3 Jur. (N. S.) 631 ; 5 W. R. 743 575
—— *v.* Fielden (1891), 8 R. P. C. 266 509
Sidgier *v.* Birch (1803), 9 Ves. 69 586
Sieveking *v.* Behrens (1837), 2 My. & Cr. 581 57
Silk *v.* Prime (1768), 1 Bro. C. C. 138, n. ; 1 Dick. 384 34
Silkstone and Haigh Moor Coal Co. *v.* Edey, [1900] 1 Ch. 167 : 69 L. J. (CH.) 73 ; 48 W. R. 137 157
—— *v.* ——, [1901] 2 Ch. 652 ; 70 L. J. (CH.) 774 ; 85 L. T. 300, C. A. 6

PAGE
Sillick *v.* Booth (1841), 1 Y. & C. Ch. Cas. 117 ; 11 L.J. (CH.) 41 . . . 440, 501
Sills *v.* Brown (1840), 9 C. & P. 601 481, 547
Simm *v.* Anglo-American Telegraph Co., Anglo-American Telegraph Co. *v.* Spurling (1879), 5 Q. B. D. 188 ; 49 L. J. (Q. B.) 392 ; 42 L. T. 37 ; 44 J. P. 280 ; 28 W. R. 290, C. A. 322, 366, 381, 384, 409, 410
Simmons *v.* London Joint Stock Bank (1890), 62 L. T. 427 . . 458, 461, 544
——— *v.* Mitchell (1880), 6 App. Cas. 156 ; 50 L. J. (P. C.) 11 ; 43 L. T. 710 ; 45 J. P. 237 ; 29 W. R. 401 607
——— *v.* Pitt (1873), 8 Ch. App. 978 ; 29 L. T. 320 108
——— *v.* Rose, Weeks *v.* Ward, *Re* Ward. *See* Ward, *Re*, Simmons *v.* Rose, Weeks *v.* Ward.
Simms *v.* Henderson (1848), 11 Q. B. 1015; 12 Jur. 773 ; 17 L. J. (Q. B.) 209 . 618
Simonin *v.* Mallac (1860), 2 Sw. & Tr. 67 ; 29 L. J. (P. M. & A.) 97 ; 2 L. T. 327 ; 6 Jur. (N. S.) 561 339
Simpson, *Re*, *Ex parte* Morgan (1876), 2 Ch. D. 72; 45 L. J. (BCY.) 36 ; 34 L. T. 329 ; 24 W. R. 414, C. A. 370, 371, 372
——— *v.* Ashworth (1843), 6 Beav. 412 ; 7 Jur. 410 105
——— *v.* A.-G., [1904] A. C. 476 ; 74 L. J. (CH.) 1 ; 91 L. T. 610 ; 69 J. P. 85 ; 20 T. L. R. 761 ; 3 L. G. R. 190 506
——— *v.* Fogo (1860), 1 John. & H. 18 542
——— *v.* —— (1863), 1 Hem. & M. 195 ; 29 L. J. (CH.) 657 ; 32 L.J. (CH.) 249 ; 8 L. T. 61 ; 9 Jur. (N. S.) 403 ; 11 W. R. 418. . . . 328, 330
——— *v.* Hazard, [1887] W. N. 115 631
——— *v.* Howden (Lord) (1837), 2 My. & Cr. 97 ; 1 Jur. 703 53, 73
——— *v.* Molsons' Bank, [1895] A. C. 270 ; 64 L. J. (P. C.) 51 ; 11 R. 427 . 84
——— *v.* Pickering (1834), 1 Cr. M. & R. 527 346
——— *v.* Thomson (1877), 3 App. Cas. 279 ; 38 L. T. 1 ; 3 Asp. M. L. C. 567 . 149
Sims *v.* Marryat (1851), 17 Q. B. 281 ; 20 L. J. (Q. B.) 454 485
——— *v.* Ridge (1817), 3 Mer. 458 32
Simultaneous Colour Printing Syndicate *v.* Foweraker, [1901] 1 K. B. 771 ; 70 L. J. (K. B.) 453 ; 17 T. L. R. 361 ; 8 Mans. 307 63
Sinclair *v.* Stevenson (1824), 1 C. & P. 582 521, 596, 597
"Singapore," The (1866), L. R. 1 P. C. 378 ; 4 Moo. P. C. C. (N. S.) 271 . . 546
Singer *v.* Audsley (1871), 6 R. 13 Eq. 401 ; 41 L. J. (CH.) 229 ; 26 L. T. 238 ; 20 W. R. 438 618
Sintzenick *v.* Lucas (1793), 1 Esp. 43 356
Siordet *v.* Kuczynski (1855), 17 C. B. 251 ; 25 L. J. (C. P.) 2 ; 4 W. R. 153 . 515
Sisson *v.* Giles (1863), 3 De G. J. & Sm. 614 ; 32 L. J. (CH.) 606 ; 8 L. T. 233 . 113
Sitwell, *Ex parte*, *Re* Drury Lowe's Marriage Settlement. *See* Drury Lowe's Marriage Settlement, *Re*, *Ex parte* Sitwell.
Six Clerks, *Ex parte* (1798), 3 Ves. 589 6
Skaife *v.* Jackson (1824), 3 B. & C. 421 ; 5 Dow. & Ry. (K. B.) 290 . . 371, 383, 461, 562
Skelton's Case, *Re* Snyder Dynamite Projectile Co., Ltd. *See* Snyder Dynamite Projectile Co., Ltd., Skelton's Case.
Skiggs, *Re*, Marriage *v.* Skiggs (1859), 4 De G. & J. 4 ; 28 L. J. (CH.) 433 ; 5 Jur. (N. S.) 325 ; 7 W. R. 320, C. A. 33
Skilbeck *v.* Garbett (1845), 7 Q. B. 846 ; 14 L. J. (Q. B.) 338 ; 9 Jur. 939 . . 556
Skip *v.* Harwood (1747), 3 Atk. 564 55
Skipper *v.* Wade, *Re* Turnbull. *See* Turnbull, *Re*, Skipper *v.* Wade.
——— and Tucker *v.* Holloway (1909), 79 L. J. (K. B.) 91 103
Skipwith *v.* Green (1724), 8 Mod. Rep. 311 370
Skottowe *v.* Young (1871), L. R. 11 Eq. 474 ; 40 L. J. (CH.) 366 ; 24 L. T. 220 ; 19 W. R. 583 243
Skrine *v.* Powell (1845), 15 Sim. 81 ; 9 Jur. 1054 45
Skyring *v.* Greenwood (1825), 4 B. & C. 281 ; 6 Dow. & Ry. (K. B.) 401 ; 1 C. & P. 517 388, 396
Slade *v.* Tucker (1880), 14 Ch. D. 824 ; 49 L. J. (CH.) 644 ; 43 L. T. 49 ; 28 W. R. 807 572
Slane Peerage, The (1835), 5 Cl. & Fin. 23 524, 530, 533, 560
Slaney *v.* Wade (1836), 1 My. & Cr. 338 ; 7 Sim. 595 560, 565
Slater *v.* Buck (1730), Mos. 256 29
——— *v.* Hodgson (1846), 9 Q. B. 727 ; 2 New Sess. Cas. 488 514
Slaughter and May *v.* Brown, Doering, McNab & Co., [1892] 2 Q. B. 724 ; 61 L. J. (Q. B.) 738 ; 67 L. T. 782 ; 57 J. P. 213 ; 41 W. R. 116 ; 4 R. 42. C. A. 487
Sleeman *v.* Wilson (1871), L. R. 13 Eq. 36 172
Slide and Spur Gold Mining Co., *Ex parte*, Elder *v.* Carter. *See* Elder *v.* Carter, *Ex parte* Slide and Spur Gold Mining Co.

PAGE
Slie *v.* Finch (1618), 2 Roll. Rep. 57; Cro. Jac. 514; Godb. 276 360
Slinn, *In the Goods of* (1890), 15 P. D. 156; 59 L. J. (P.) 82; 63 L. T. 229; 39 W. R. 175 472
Sloane *v.* Britain Steamship Co., [1897] 1 Q. B. 185; 66 L. J. (Q. B.) 72; 75 L. T. 542; 45 W. R. 203, C. A. 619
Sloman *v.* Walter (1784), 1 Bro. C. C. 418 151
Sloper *v.* Oliver, *Re* Batchelor. *See* Batchelor, *Re*, Sloper *v.* Oliver.
Small *v.* Brackley (1707), 2 Vern. 602; 1 Eq. Cas. Abr. 28 72
——— *v.* Nairne (1849), 13 Q. B. 840 546
Smart *v.* Nokes (1844), 6 Man. & G. 911; 7 Scott (N. R.), 786; 13 L. J. (C. P.) 79; 8 Jur. 44 517
Smartle *v.* Williams (1694), 3 Lev. 387; 1 Salk. 246, 280; Comb. 247; Holt (K. B.), 478 606
Smith, *In the Goods of* (1861), 2 Sw. & Tr. 508; 31 L. J. (P) 182; 7 L. T. 193; 10 W. R. 586 500
——————— [1903] P. 114; 73 L. J. (P) 28; 90 L. T. 169; 20 T. L. R. 119 553
Smith, *Re* (1833), 2 Deac. & Ch. 230 576
———, *Re*, Smith *v.* Smith, [1899] 1 Ch. 365; 68 L. J. (CH.) 333; 80 L. T. 113; 47 W. R. 223 145
———, *Re*, Williams *v.* Frere, [1891] 1 Ch. 323; 60 L. J. (CH.) 328; 64 L. T. 253 582
——— *v.* Adams (1854), 5 De G. M. & G. 712; 24 L. J. (CH.) 258; 18 Jur. 968; 2 W. R. 698, C. A. 96
——— *v.* Allison (1765), Buller, Nisi Prius 27 455
——— *v.* Alterly (1648), Freem. (CH.) 136; *sub nom.* Smith *v.* Atterby, 3 Rep Ch. 93 149
——— *v.* Anderson (1828), 4 Russ. 352; 6 L. J. (O. S.) (CH.) 105 240
——— *v.* Andrews, [1891] 2 Ch. 678; 65 L. T. 175 512, 541
——— *v.* A.-G. (1777), cited 6 Ves. 260; 15 Ves. 133 45
——— *v.* Baker (1842), 1 Y. & C. Ch. Cas. 223 374
——— *v.* ——— (1873), L. R. 8 C. P. 350; 42 L. J. (C. P.) 155; 28 L. T. 637 335, 365
——— *v.* Beadnell (1807), 1 Camp. 30 575
——— *v.* Betty, [1903] 2 K. B. 317; 72 L. J. (K. B.) 853; 89 L. T. 258; 52 W. R. 137; 19 T. L. R. 602, C. A. 163
——— *v.* Blakey (1867), L. R. 2 Q. B. 326; 8 B. & S. 157; 36 L. J. (Q. B.) 156; 15 W. R. 492 433, 465, 467
——— *v.* Blandy (1825), Ry. & M. 257 458
——— *v.* Brown (1859), 27 Beav. 90 112
——— *v.* Brownlow (Earl) (1870), L. R. 9 Eq. 241; 21 L. T. 739; 18 W. R. 271 59, 528
——— *v.* Bruning (1700), 2 Vern. 392 20
——— *v.* Chadwick (1884), 9 App. Cas. 187; 53 L. J. (CH.) 873; 50 L. T. 697; 58 J. P. 644; 32 W. R. 687 14
——— *v.* Claxton (1820), 4 Madd. 484 109
——— *v.* Clay (1767), 3 Bro. C. C. 639, n. 168, 169, 175
——— *v.* Compton (1832), 3 B. & Ad. 407; 1 L. J. (K. B.) 146 347
——— *v.* Cowell (1880), 6 Q. B. D. 75; 50 L. J. (Q. B.) 38; 43 L. T. 528; 29 W. R. 227, C. A. 56
——— *v.* Cropper (1885), 10 App. Cas. 249; 55 L. J. (CH.) 12; 53 L. T. 330; 33 W. R. 753 349, 366, 413
——— *v.* Daniell (1874), L. R. 18 Eq. 649; 44 L. J. (CH.) 189; 30 L. T. 752; 22 W. R. 856 572
——— *v.* East India Co. (1841), 1 Ph. 50; 11 L. J. (CH.) 71 573
——— *v.* Egmont (Earl) (1877), 6 Ch. D. 469; 46 L. J. (CH.) 356 99
——— *v.* Gould, The "Prince George" (1842), 4 Moo. P. C. C. 21; 6 Jur. 543 . 488
——— *v.* Gumbleton (1909), 54 Sol. Jo. 181 115
——— *v.* Hammond (1833), 6 Sim. 10 58
——— *v.* Henley (1844), 1 Ph. 391; 13 L. J. (CH.) 221; 8 Jur. 434 516
——— *v.* Hughes (1871), L. R. 6 Q. B. 597; 43 L. J. (Q. B.) 221; 25 L. T. 329; 19 W. R. 1059 23
——— *v.* Kay (1859), 7 H. L. Cas. 750 14, 382
——— *v.* Kempson (1790), 2 Dick. 769 32
——— *v.* Levaux (1863), 2 De G. J. & Sm. 1; 2 New Rep. 18; 33 L. J. (CH.) 167; 9 L. T. 313; 9 Jur. (N. S.) 1140; 12 W. R. 31, C. A. . . . 28
——— *v.* Lister (1895), 64 L. J. (Q. B.) 154; 72 L. T. 20; 15 R. 226 . . . 469, 564
——— *v.* Low (1739), 1 Atk. 489 370

PAGE
Smith *v.* Lucas (1881), 18 Ch. D. 531 ; 45 L. T. 74 ; 33 W. R. 816 . 123, 126, 127
——— *v.* Lyon (1813), 3 Camp. 465 460
——— *v.* Malings (1607), Cro. Jac. 160 29
——— *v.* May, *Re* Morgan. *See* Morgan, *Re*, Smith *v.* May.
——— *v.* Midland Rail. Co. (1887), 57 L. T. 813 ; 52 J. P. 262 481
——— *v.* Morgan (1839), 2 Mood. & R. 257 595
——— *v.* Neale (1857), 2 C. B. (N. S.) 67 ; 26 L. J. (C. P.) 143 ; 3 Jur. (N. S.) 516 ; 5 W. R. 563 425
——— *v.* Osborne (1857), 6 H. L. Cas. 375 ; 3 Jur. (N. S.) 1181 ; 6 W. R. 21 . 104
——— *v.* Pincombe (1852), 3 Mac. & G. 653 ; 16 Jur. 205 24
——— *v.* Prosser, [1907] 2 K. B. 735 ; 97 L. T. 155 ; 23 T. L. R. 597, C. A. . 398, 400, 401
——— *v.* Sainsbury (1832), 5 C. & P. 196 607
——— *v.* Scott (1859), 6 C. B. (N. S.) 771 ; 28 L. J. (C. P.) 325 ; 5 Jur. (N. S.) 1356 413
——— *v.* Shann, [1898] 2 Q. B. 347 ; 67 L. J. (Q. B.) 819 ; 79 L. T. 77 ; 14 T. L. R. 443 334
——— *v.* Sibthorpe, *Re* Jackson. *See* Jackson, *Re*, Smith *v.* Sibthorpe.
——— *v.* Smith (1836), 3 Scott, 352 ; 2 Hodg. 130 ; 5 L. J. (C. P.) 305 ; 3 Bing. (N. C.) 29 459
——— *v.* ——— (1861), 3 Giff. 263 137, 138
——— *v.* Spence, *Re* Wheatley. *See* Wheatley, *Re*, Smith *v.* Spence.
——— *v.* Surridge (1801), 4 Esp. 25 351
——— *v.* Tebbitt (1867), L. R. 1 P. & D. 398 ; 36 L. J. (P. & M.) 97 ; 16 L. T. 841 ; 16 W. R. 18 440
——— *v.* Thompson (1849), 8 C. B. 44 ; 18 L. J. (C. P.) 314 430
——— *v.* Veale (1699), 1 Ld. Raym. 735 546
——— *v.* White (1866), L. R. 1 Eq. 626 ; 35 L. J. (CH.) 454 ; 14 L. T. 350 ; 14 W. R. 510 73
——— *v.* Wilson (1832), 3 B. & Ad. 728 ; 1 L. J. (K. B.) 194 568
——— & Co. *v.* Bedouin Steam Navigation Co., [1896] A. C. 70 ; 65 L. J. (P. C.) 8 387, 563
Smith's Trusts, *Re* (1864), 10 L. T. 598 275
Smithwick *v.* Smithwick (1861), 12 I. Ch. R. 181 105
Smyth, *Ex parte* (1818), 1 Swan. 337 29
———, *Re*, Leach *v.* Leach, [1898] 1 Ch. 89 ; 67 L. J. (CH.) 10 ; 77 L. T. 514 ; 14 T. L. R. 77 ; 46 W. R. 104 274, 311
——— *v.* Anderson (1849), 7 C. B. 21 ; 18 L. J. (C. P.) 109 ; 13 Jur. 211. . 424
Smythies, *Re*, Weyman *v.* Smythies, [1903] 1 Ch. 259 ; 72 L. J. (CH.) 216 ; 87 L. T. 742 ; 51 W. R. 284 129, 132
Snow d. Crawley *v.* Phillips (1664), 1 Sid. 220 ; 1 Keb. 780 543
Snowdon, *Re*, *Ex parte* Snowdon (1881), 17 Ch. D. 44 ; 50 L. J. (CH.) 540 ; 44 L. T. 830 ; 29 W. R. 654, C. A. 30
Snyder Dynamite Projectile Co., Ltd., *Re*, Skelton's Case (1893), 68 L. T. 210 ; 3 R. 289 175
Sobey *v.* Sobey (1873), L. R. 5 Eq. 200 ; 42 L. J. (CH.) 271 ; 27 L. T. 808 ; 41 W. R. 309 61
"Sociedade Feliz," The (1842), 1 Wm. Rob. 303 542
Société Générale *v.* Metropolitan Bank (1873), 27 L. T. 849 400
Société Générale de Paris *v.* Walker (1885), 11 App. Cas. 20 ; 55 L. J. (Q. B.) 169 ; 54 L. T. 389 ; 34 W. R. 662 408, 409
Solicitor, A, *Re* (1890), 25 Q. B. D. 17, C. A. 551
————, *Re* (1891), 36 Sol. Jo. 94 546
————, *Re*, *Ex parte* Hales, [1907] 2 K. B. 539 ; 76 L. J. (K. B.) 931 ; 97 L. T. 212 ; 23 T. L. R. 573 487
S.-G. *v.* Law Reversionary Interest Society (1873), L. R. 8 Exch. 233 ; 42 L. J. (EX.) 146 ; 28 L. T. 769 ; 21 W. R. 854 285, 286
Solley *v.* Gower (1688), 2 Vern. 62 ; 1 Eq. Cas. Abr. 275 36
"Solway," The (1885), 10 P. D. 137 ; 54 L. J. (P.) 83 ; 53 L. T. 680 ; 34 W. R. 232 ; 5 Asp. M. L. C. 482 462, 531
Somers-Cocks, *Re*, Wegg-Prosser *v.* Wegg-Prosser, [1895] 2 Ch. 449 ; 65 L. J. (CH.) 49 ; 73 L. T. 58 ; 44 W. R. 106 ; 13 R. 819 146
Somerset (Duke) *v.* Cookson (1735), 3 P. Wms. 390 ; 2 Eq. Cas. Abr. 164 . . 13
Sopwith *v.* Maughan (1861), 30 Beav. 235 126
——— *v.* Sopwith (1861), 2 Sw. & Tr. 160 ; 30 L. J. (P. M. & A.) 131 ; 4 L. T. 256 ; 7 Jur. (N. S.) 554 331, 356, 545
Sottomayor *v.* De Barros (1877), 3 P. D. 1 ; (1879) 5 P. D. 94 ; 49 L. J. (P.) 1 ; 41 L. T. 281 ; 27 W. R. 917, C.A. 339

PAGE
South *v.* Bloxam (1865), 2 Hem. & M. 457 ; 34 L. J. (CH.) 369 ; 11 L. T. 264 ; 11 Jur. (N. S.) 319 143
South American and Mexican Co., *Re*, *Ex parte* Bank of England, [1895] 1 Ch. 37 ; 71 L. T. 594 ; 43 W. R. 131 ; 12 R. 1, C. A. 327, 331, 356
South Eastern Rail. Co. *v.* Brogden (1850), 3 Mac. & G. 8 ; 14 Jur. 795 . . . 28
——— *v.* Watson (1861), 6 H. & N. 520 ; 31 L. J. (EX.) 515 . 372
South Essex Estuary Co., *Re*, *Ex parte* Chorley (1870), L. R. 11 Eq. 157 ; 40 L. J. (CH.) 153 ; 19 W. R. 430 327, 393
——— and Reclamation Co., *Re*, *Ex parte* Paine and Layton (1869), 4 Ch. App. 215 581
South Wales Atlantic Steamship Co., *Re* (1876), 2 Ch. D. 763 ; 46 L. J. (CH.) 177 ; 35 L. T. 294, C. A. 73
Southampton's (Lord) Estate, *Re*, Allen *v.* Southampton (Lord), Banfather's Claim (1880), 16 Ch. D. 178 ; 50 L. J. (CH.) 218 ; 43 L. T. 687 ; 29 W. R. 231... 85
Southcomb *v.* Exeter (Bishop) (1847), 6 Hare, 213 174
Southey *v.* Nash (1837), 7 C. & P. 632 593
Soward *v.* Leggatt (1836), 7 C. & P. 613 434
Sowden *v.* Sowden (1785), 1 Cox, Eq. Cas. 165 ; 1 Bro. C. C. 582 . . 139, 140
Spackman *r.* Timbrell (1837), 8 Sim. 253 ; 6 L. J. (CH.) 147 34
Spain *v.* Lejoindre, *Re* Leveridge. *See* Leveridge, *Re*, Spain *v.* Lejoindre.
Spain (King) *v.* Machado (1827), 4 Russ. 225 488
Sparkes *v.* Smith (1692), 2 Vern. 275 ; 1 Eq. Cas. Abr. 47 97
Sparks, *Ex parte*, *Re* Cooper's Trusts. *See* Cooper's Trusts, *Re*, *Ex parte* Sparks.
Sparrow *r.* Hardcastle (1754), Amb. 224 8
Speke *v.* Walrond (1598), Toth. 155 40
Spence *r.* Dodsworth, *Re* Dodsworth. *See* Dodsworth, *Re*, Spence *v.* Dodsworth.
——— *v.* Stuart (1802), 3 East, 89 586
Spenceley *v.* Willott (1806), 7 East, 109 ; 3 Smith, K. B. 289 601
Spencer *r.* Bailey (1892), 93 L. T. Jo. 223 625
——— *r.* Clarke (1878), 9 Ch. D. 137 ; 47 L. J. (CH.) 692 ; 27 W. R. 133 . 88
——— *v.* Newton (1837), 6 Ad. & El. 623 ; 1 Nev. & P. (K. B.) 818 ; 6 L. J. (K. B.) 119 ; 1 Jur. 52 587
——— (Earl) *v.* Peek (1867), L. R. 3 Eq. 415 ; 15 W. R. 478 45
——— *v.* Topham (1856), 22 Beav. 573 ; 2 Jur. (N. S.) 865 85
——— *v.* Williams (1871), L. R. 2 P. & D. 230 ; 40 L. J. (P. & M.) 45 ; 24 L. T. 513 ; 19 W. R. 703 343, 345
——— Cooper, *Re*, Poë *v.* Spencer Cooper, [1908] 1 Ch. 130 ; 77 L. J. (CH.) 64 ; 98 L. T. 344 220
Spencer's Case (1583), 5 Co. Rep. 16 a ; 1 Smith, L. C. 55 100, 372
Sperling *v.* Toll (1747), 1 Ves. Sen. 70 104
Spicer *v.* Martin (1888), 14 App. Cas. 12 ; 58 L. J. (CH.) 309 ; 60 L. T. 546 ; 53 J. P. 516 ; 37 W. R. 689 101, 567
Spittle *r.* Walton (1871), L. R. 11 Eq. 420 ; 40 L. J. (CH.) 368 ; 24 L. T. 18 ; 19 W. R. 405 569
Spokes *v.* Grosvenor Hotel Co., [1897] 2 Q. B. 124 ; 66 L. J. (Q. B.) 572 ; 76 L. T. 645 ; 18 W. R. 884, C. A. 575
Spooner *v.* Godfrey (1908), *Times*, October 16th, C. A. 603
——— *v.* Payne (1847), 4 C. B. 328 ; 16 L. J. (C. P.) 225 605
Spottiswoode *v.* Clarke (1846), 2 Ph. 154 ; 1 Coop. *temp.* Cott. 254 ; 10 Jur. 1043... 50
Sprange *v.* Lee, [1908] 1 Ch. 424 ; 77 L. J. (CH.) 275 ; 98 L. T. 400 . . . 170
Spread *v.* Morgan (1865), 11 H. L. Cas. 588 ; 6 New Rep. 269 ; 13 L. T. 164 ... 125, 126
Sprot's Trustees *v.* Lord Advocate (1903), 10 Scots Law Times, 452 . . 227, 228
Sproule *v.* Prior (1836), 8 Sim. 189 ; 6 L. J. (CH.) 1 144
Spyer *v.* Spyer (1631), Nels. 14 39
Squib *v.* Wyn (1717), 1 P. Wms. 378 103
Squire, *Ex parte*, *Re* Gouldwell. *See* Gouldwell, *Re*, *Ex parte* Squire.
Stace *v.* Griffith (1869), L. R. 2 P. C. 420 ; 6 Moo. P. C. C. (N. S.) 18 ; 20 L. T. 197 428, 431
Stackhouse *v.* Barnston (1805), 10 Ves. 453 165
——— *v.* Jersey (Countess) (1861), 1 John. & H. 721 ; 4 L. T. 204 ; 7 Jur. (N. S.) 359 ; 9 W. R. 453 78
Stag *v.* Punter (1744), 3 Atk. 119 210
Stainer *v.* Droitwich Corporation (1695), 1 Salk. 281 ; Skin. 623 ; 12 Mod. Rep. 85 ; Holt (K. B.), 290 479, 563
Stalworth *v.* Inns (1844), 13 M. & W. 466 ; 2 Dow. & L. 428 ; 14 L. J. (EX.) 81 ; 9 Jur. 285. 552
Stamford and Warrington (Earl), *Re*, Payne *v.* Grey, [1910] 2 Ch. 83 ; 26 T. L. R. 434 ; 54 Sol. Jo. 475 222

PAGE
Stammers *v.* Elliott (1868), 3 Ch. App. 195; 37 L. J. (CH.) 353; 18 L. T. 1; 16 W. R. 489 164
Stamps Commissioner *v.* Hope, [1891] A. C. 476; 60 L. J. (P. C.) 44; 66 L. T. 268 309
Stamps Minister *v.* Townend, [1909] A. C. 633; 101 L. T. 534 604
Standard Manufacturing Co., *Re*, [1891] 1 Ch. 627; 60 L. J. (CH.) 292; 64 L. T. 487; 39 W. R. 369; 2 Meg. 418, C. A. 63
Standering *v.* Hall (1879), 11 Ch. D. 652; 48 L. J. (CH.) 382; 27 W. R. 749 . 114
Standish *v.* Ross (1849), 3 Exch. 527; 19 L. J. (EX.) 185 360
Stanhope *v.* Manners (1763), 2 Eden, 197 152
——— *v.* Verney (Earl) (1761), 2 Eden, 81 81
Stanley *v.* Stanley (1878), 7 Ch. D. 589; 47 L. J. (CH.) 256; 37 L. T. 777; 26 W. R. 310 371
Stanton *v.* Lambert, *Re* Lambert's Estate. *See* Lambert's Estate, *Re*, Stanton *v.* Lambert.
——— *v.* Percival (1855), 5 H. L. Cas. 257; 24 L. J. (CH.) 369; 3 W. R. 391 . 457
Stapylton *v.* Clough (1853), 2 E. & B. 933; 2 C. L. R. 266; 23 L. J. (Q. B.) 5; 18 Jur. 60; 2 W. R. 60 467
Stark, *Ex parte*, *Re* Consort Deep Level Gold Mines, Ltd. *See* Consort Deep Level Gold Mines, Ltd., *Re*, *Ex parte* Stark.
Starkey *v.* Bank of England, [1903] A. C. 114; 72 L. J. (CH.) 402; 88 L. T. 244; 51 W. R. 513; 19 T. L. R. 312; 8 Com. Cas. 142 410
Stead *v.* Newdigate (1817), 2 Mer. 521 106, 107
Stearine Kaarsen Fabrick Gonda Co. *v.* Heintzmann (1864), 17 C. B. (N. S.) 56; 10 Jur. (N. S.) 881; 11 L. T. 272 490
Stebbings *v.* London and North Western Rail. Co. (1899), 63 J. P. 138 . . 602
Steed *v.* Preece (1874), L. R. 18 Eq. 192; 43 L. J. (CH.) 687; 22 W. R. 432 . 111
——— *v.* Whitaker (1740), Barn. (CH.) 220 168
Steeds *v.* Steeds (1889), 22 Q. B. D. 537; 58 L. J. (Q. B.) 302; 60 L. T. 318; 37 W. R. 378 63, 64, 70, 164
Steel, *Re*, Wappett *v.* Robinson, [1903] 1 Ch. 135; 72 L. J. (CH.) 42; 87 L. T. 548; 51 W. R. 252 480
——— *v.* Dixon (1881), 17 Ch. D. 825; 50 L. J. (CH.) 591; 45 L. T. 142; 29 W. R. 735 69
Steinkeller *v.* Newton (1838), 9 C. & P. 313; (1840) 1 Scott (N. R.), 148; 8 Dowl. 579; 6 Man. & G. 30, n.; 9 L. J. (C. P.) 262 422, 546, 547, 596
Stenning, *Re*, Wood *v.* Stenning, [1895] 2 Ch. 433; 73 L. T. 207; 13 R. 807 . 160
Stephens, *Ex parte*, (1805), 11 Ves. 24 162, 163
——— *v.* Green, [1895] 2 Ch. 148; 64 L. J. (CH.) 546; 72 L. T. 574; 43 W. R. 465; 12 R. 252, C. A. 155
——— *v.* Stephens (1857), 1 De G. & J. 62; 3 Jur. (N. S.) 525; 5 W. R. 416, C. A. 122
——— *v.* Wanklin, Stephens *v.* Salway (1854), 19 Beav. 585 618
Stephenson, *Re*, *Ex parte* Stephenson (1847), De G. 586; 17 L. J. (BCY.) 5; 12 Jur. 6 146
——— *v.* Garnett, [1898] 1 Q. B. 677; 67 L. J. (Q. B.) 447; 78 L. T. 371; 46 W. R. 410, C. A. 334
——— *v.* Tyne Improvement Commissioners (1869), 17 W. R. 590 . . 481
Stepney *v.* Lloyd (1598), Cro. Eliz. 647; 2 And. 122 5
Stern *v.* R., [1896] 1 Q. B. 211; 65 L. J. (Q. B.) 240; 73 L. T. 752; 44 W. R. 302 310
Sterne *v.* Beck (1863), 1 De G. J. & Sm. 595; 2 New Rep. 346; 32 L. J. (CH.) 682; 8 L. T. 588; 11 W. R. 791, C. A. 152
Steuart *v.* Gladstone (1877), 7 Ch. D. 394; 47 L. J. (CH.) 154; 37 L. T. 575; 26 W. R. 277 613
Stevens *v.* Foster (1833), 6 C. & P. 289 597
——— *v.* Lynch (1810), 12 East, 38; 2 Camp. 332 499
——— *v.* Mid-Hants Rail. Co., London Financial Association *v.* Stevens (1873), 8 Ch. App. 1064; 42 L. J. (CH.) 694; 29 L. T. 318; 21 W. R. 858 148
Stevenson *v.* Masson (1873), L. R. 17 Eq. 78; 43 L. J. (CH.) 134; 22 W. R. 150 134
Steward *v.* Gromett (1859), 7 C. B. (N. S.) 191; 29 L. J. (C. P.) 170; 6 Jur. (N. S.) 776 360
Stewart, *Re*, Stewart *v.* McLaughlin, [1908] 2 Ch. 251; 77 L. J. (CH.) 525; 99 L. T. 106; 24 T. L. R. 679 98

PAGE
Stewart *v.* Great Western Rail. Co. and Saunders (1865), 2 De G. J. & Sm. 319; 11 Jur. (N. S.) 627; 13 L. T. 79; 13 W. R. 907 562
——— *v.* Kennedy (1890), 15 App. Cas. 108 23
——— *v.* Stewart (1839), 6 Cl. & Fin. 911; Macl. & Rob. 401 . . . 24, 25
——— *v.* Todd (1846), 9 Q. B. 767; 11 Jur. 560; 16 L. J. (Q. B.) 327 . . . 334, 335
Stewart's Trustees *v.* Lord Advocate (1857), 20 Dunl. (Ct. of Sess.) 453 . . 239
Steyner *v.* Droitwich Corporation. *See* Stainer *v.* Droitwich Corporation.
Stickland *v.* Aldridge (1834), 9 Ves. 516 75
Stikeman *v.* Dawson (1847), 1 De G. & Sm. 90; 4 Ry. & Can. Cas. 585; 16 L. J. (CH.) 205; 11 Jur. 214 380
Stileman *v.* Ashdown (1743), 2 Atk. 608 94
Stiles *v.* Cowper (1748), 3 Atk. 692 168
Still *v.* Halford (1814), 4 Camp. 17 552
Stimson *v.* Farnham (1871), L. R. 7 Q. B. 175; 41 L. J. (Q. B.) 52; 25 L. T. 747; 20 W. R. 183 360
Stirling *v.* Forrester (1821), 3 Bli. 575 30
Stoate *v.* Stoate (1861), 2 Sw. & Tr. 223; 30 L. J. (P. & M.) 102; 3 L. T. 756 . 542, 545
Stobart *v.* Dryden (1836), 1 M. & W. 615; 2 Gale, 146; 5 L. J. (EX.) 218 . . 467
Stockdale *v.* Hansard (1839), 9 Ad. & El. 1; 2 Per. & Dav. 1; 8 L. J. (Q. B.) 294; 3 Jur. 905 485
Stocken *v.* Collin (1841), 7 M. & W. 515; 9 C. & P. 653; 10 L. J. (EX.) 227 . 556
——— *v.* Stocken (1831), 4 Sim. 152 137
Stockley *v.* Parsons, *Re* Parsons. *See* Parsons, *Re*, Stockley *v.* Parsons.
——— *v.* Stockley (1812), 1 Ves. & B. 23 24
Stoer, *Re* (1884), 9 P. D. 120; 51 L. T. 141; 32 W. R. 1005, C. A. . . . 46
Stokes, *Re*, Parsons *v.* Miller (1892), 67 L. T. 223 37, 145
———, *Re*, Stokes *v.* Ducroz (1890), 62 L. T. 176; 38 W. R. 535 . . 235, 238
——— *v.* Mason (1808), 9 East, 424 487
——— *v.* White (1834), 1 Cr. M. & R. 223; 4 Tyr. 786; 3 L. J. (EX.) 321 . . 588
Stokoe, *Re*, *Ex parte* Moore (1876), 2 Ch. D. 802; 35 L. T. 386; 44 W. R. 720, C. A. 165
Stonard *v.* Dunkin (1810), 2 Camp. 344 324, 408
Stone, *Re*, Acworth *v.* Stone, *Re* Power. *See* Power, *Re*, *Re* Stone, Acworth *v.* Stone.
——— *v.* Evans (1796), Peake, Add. Cas. 94 97
——— *v.* Godfrey (1854), 5 De G. M. & G. 76; 23 L. J. (CH.) 769; 18 Jur. 524...22, 170, 173
——— *v.* Whiting (1817), 2 Stark. 235 375
Stonehouse *v.* Stonehouse (1745), 1 Dick. 98 32
Stonor *v.* Fowle (1887), 13 App. Cas. 20; 57 L. J. (Q. B.) 387; 58 L. T. 1; 52 J. P. 228; 36 W. R. 742 550
Storey *v.* Waddle (1879), 4 Q. B. D. 289; 27 W. R. 833, C. A. 63
Story *v.* Johnson (1835), 1 Y. & C. (EX.) 538; (1837), 2 Y. & C. (EX.) 586 . 40, 41
——— *v.* Windsor (Lord) (1743), 2 Atk. 630 76
Stourton *v.* Burrell (1866), L. R. 1 Eq. 337; 35 L. J. (CH.) 371; 12 Jur. (N. S.) 199; 14 W. R. 412 90
Stow *v.* Davenport (1833), 5 B. & Ad. 359; 2 Nev. & M. (K. B.) 805 . 240, 264, 296
Stowe *v.* Querner (1870), L. R. 5 Exch. 155; 39 L. J. (EX.) 60; 22 L. T. 29; 18 W. R. 466 428
Strachan, *Re*, *Ex parte* Cooke (1876), 4 Ch. D. 123; 46 L. J. (BCY.) 52; 35 L. T. 649; 25 W. R. 171, C. A. 159
Straker *v.* Graham (1839), 4 M. & W. 721; 7 Dowl. 223; 1 Horn & H. 449; 8 L. J. (EX.) 86 571
——— *v.* Reynolds (1889), 22 Q. B. D. 262; 58 L. J. (Q. B.) 180; 60 L. T. 107; 37 W. R. 379 582
Strand Music Hall Co., *Re* (1865), 3 De G. J. & Sm. 147; 13 L. T. 177; 14 W. R. 6, C. A. 74
Stranger *v.* Searle (1793), 1 Esp. 14 482
Stratford *v.* Powell (1807), 1 Ball & B. 1 125
Stratford and Moreton Rail. Co. *v.* Stratton (1831), 2 B. & Ad. 519; 9 L. J. (O. S.) (K. B.) 268 370
Strathmore (Countess) *v.* Bowes (1789), 1 Ves. 22 20
——— *v.* Vane, *Re* Bowes. *See* Bowes, *Re*, Strathmore *v.* Vane.
Straton *v.* Rastall (1788), 2 Term Rep. 366 562
Stratton, *Re*, *Ex parte* Stirling (1883), 25 Ch. D. 148; 53 L. J. (CH.) 415; 49 L. T. 694; 30 W. R. 450, C. A. 146

PAGE
Stratton *v.* Best (1791), 1 Ves. 285 121
Strauss *v.* Goldschmidt (1892), 8 T. L. R. 239 619
Streatfield *v.* Streatfield (1735), Cas. *temp.* Talb. 176 117, 125, 128
Streeter *v.* Bartlett (1848), 5 C. B. 562; 17 L. J. (C. P.) 140 606
Strickland *v.* Strickland (1842), 6 Beav. 77 40, 42
——— *v.* ——— (1839), 10 Sim. 374; 9 L. J. (CH.) 60 145
Stringer's Estate, *Re*, Shaw *v.* Jones-Ford (1877), 6 Ch. D. 1; 46 L. J. (CH.) 633; 37 L. T. 233; 25 W. R. 815 374
Strode *v.* Blackburne (1796), 3 Ves. 222 76
——— *v.* Parker (1694), 2 Vern. 316 151
Strong *v.* Bird (1874), L. R. 18 Eq. 315; 43 L. J. (CH.) 814; 30 L. T. 745; 22 W. R. 788 98, 165
——— *v.* Dickinson (1836), 2 Gale, 83; 1 M. & W. 488; 1 Tyr. & Gr. 683; 5 Dowl. 99; 5 L. J. (EX.) 231 587
Stronge *v.* Hawkes (1853), 4 De G. M. & G. 186, C. A. 168
Strother *v.* Barr (1828), 2 Moo. & P. 207; 6 L. J. (O. S.) (C. P.) 245; 5 Bing. 136 . . . 421
——— *v.* Willan (1814), 4 Camp. 24 541
Stroud *v.* Stroud (1844), 7 Man. & G. 417; 8 Scott. (N. R.), 166 396
Stroughill *v.* Buck (1850), 14 Q. B. 781; 19 L. J. (Q. B.) 209; 14 Jur. 741 . 323, 369
Strowd *v.* Willis (1594), Cro. Eliz. 362; Moore (K. B.), 405; Poph. 114; Owen, 110 372
Strutt *v.* Bovingdon (1803), 5 Esp. 56 331, 343, 547
Stuart *v.* Balkis Co. (1884), 53 L. J. (CH.) 791; 50 L. T. 479; 32 W. R. 676 . 616
——— *v.* Bell, [1891] 2 Q. B. 341; 60 L. J. (Q. B.) 577; 64 L. T. 633; 39 W. R. 612, C. A. 431
——— *v.* Greenall (1821), 9 Price, 106 564
——— *v.* Welch (1839), 4 My. & Cr. 305; 3 Jur. 237 58
Stubbs' Estate, *Re*, Hanson *v.* Stubbs (1878), 8 Ch. D. 154; 47 L. J. (CH.) 671; 26 W. R. 736 33
Studdert, *Re*, [1900] 2 I. R. 281 193
Stumore *v.* Campbell & Co., [1892] 1 Q. B. 314; 61 L. J. (Q. B.) 463; 66 L. T. 218; 40 W. R. 101, C. A. 65
Stump *v.* Gaby (1852), 2 De G. M. & G. 623; 22 L. J. (CH.) 352; 17 Jur. 5; 1 W. R. 85 90
Sturge *v.* Buchanan (1839), 10 Ad. & El. 598; 2 Per. & Dav. 573; 2 Mood. & R. 90; 8 L. J. (Q. B.) 272 557
Sturgeon *v.* Wingfield (1846), 15 M. & W. 224; 15 L. J. (EX.) 212 405
Sturgis *v.* Champneys (1839), 5 My. & Cr. 97 71
Sturla *v.* Freccia (1879). *See* Polini *v.* Grey.
——— *v.* ——— (1880), 5 App. Cas. 623; 50 L. J. (CH.) 86; 43 L. T. 209; 44 J. P. 812; 29 W. R. 217. 467, 473, 475, 476, 528, 530, 532, 536
Sturt *v.* Blagg (1847), 10 Q. B. 899; 16 L. J. (Q. B.) 39; 11 Jur. 1011 . . . 431
Sudeley (Lord) *v.* A.-G., [1897] A. C. 11; 66 L. J. (Q. B.) 21; 75 L. T. 398; 61 J. P. 420; 45 W. R. 305 311
——— and Baines & Co., *Re*, [1894] 1 Ch. 334; 63 L. J. (CH.) 194; 70 L. T. 549; 42 W. R. 231 113
Sugden *v.* St. Leonards (Lord) (1876), 1 P. D. 154; 45 L. J. (P.) 49; 34 L. T. 372; 24 W. R. 860, C. A. 472, 518
Suisse *v.* Lowther (Lord) (1843), 2 Hare, 424 130, 131
Sullivan *v.* Creed, [1904] 2 I. R. 317, C. A. 495
——— *v.* Sullivan, [1903] 1 I. R. 102 75
Summer's Trusts, *Re* (1874), 30 L. T. 377; 22 W. R. 639 504
Summers *v.* Moorhouse (1884), 13 Q. B. D. 388; 53 L. J. (Q. B.) 564; 51 L. T. 290; 48 J. P. 424; 32 W. R. 826 568
——— *v.* Moseley (1834), 2 Cr. & M. 477; 4 Tyr. 158; 3 L. J. (EX.) 128 . 597
Sumner *v.* John Brown & Co. (1909), 25 T. L. R. 745 600
——— *v.* Schofield (1880), 43 L. T. 763 344
Surman *v.* Fitzgerald, *Re* Fitzgerald. *See* Fitzgerald, *Re*, Surman *v.* Fitzgerald.
Surr *v.* Walmsley (1866), L. R. 2 Eq. 439; 14 L. T. 621; 14 W. R. 888 . . 616
Surtees *v.* Hubbard (1802), 4 Esp. 203 521, 522
Sussex Peerage, The (1844), 11 Cl. & Fin. 85; 8 Jur. 793 . . 482, 488, 489, 560
Suter *v.* Burrell (1858), 2 H. & N. 867; 27 L. J. (EX.) 193 521
Sutton *v.* English and Colonial Produce Co., [1902] 2 Ch. 502; 71 L. J. (CH.) 685; 87 L. T. 438; 50 W. R. 571; 18 T. L. R. 647; 10 Mans. 101 . 97
——— *v.* Gregory (1797), Peake, Add. Cas. 150 465
——— *v.* Sadler (1857), 3 C. B. (N. S.) 87; 26 L. J. (C. P.) 284; 3 Jur. (N. S.) 1150; 5 W. R. 880 440

PAGE
Swabey *v.* Swabey (1848), 15 Sim. 502 235, 303
Swain *v.* Lewis (1835), 2 Cr. M. & R. 261 ; 4 Dowl. 261 ; 1 Gale, 182 ; 5 Tyr. 998 ; 4 L. J. (EX.) 249 521
—— *v.* Wall (1641), 1 Rep. Ch. 80 [149] 30, 70
Swaisland *v.* Dearsley (1861), 29 Beav. 430 ; 30 L. J. (CH.) 652 ; 4 L. T. 432 ; 9 W. R. 526 13
Swan, *Ex parte*, *Re* North British Australasian Co. *See* North British Australasian Co., *Re*, *Ex parte* Swan.
—— *v.* Holmes (1854), 19 Beav. 471 118, 122
—— *v.* North British Australasian Co. (1863), 2 H. & C. 175 ; 32 L. J. (EX.) 273 ; 10 Jur. (N. S.) 102 ; 11 W. R. 862 382, 383, 392, 393, 398, 399, 412
—— *v.* —— (1862), 7 H. & N. 603 . . 324, 369, 400
—— *v.* Swan (1819), 8 Price, 518 41
—— *v.* —— (1903), *Times*, March 24th 543
Sweetapple *v.* Bindon (1705), 2 Vern. 536 ; 1 Eq. Cas. Abr. 394 107
Sweeting *v.* Pearce (1861), 9 C. B. (N. S.) 536 ; 30 L. J. (C. P.) 109 ; 7 Jur. (N. S.) 806 ; 5 L. T. 79 ; 9 W. R. 343 445
—— *v.* Sweeting (1853), 1 Drew. 331 ; 22 L. J. (CH.) 441 ; 17 Jur. 123 ; 1 W. R. 122 234, 238
Swift *v.* M'Tiernan (1848), 11 I. Eq. R. 602 564
Swinfen *v.* Swinfen (No. 3) (1860), 29 Beav. 199 147
Swinnerton *v.* Stafford (Marquis) (1810), 3 Taunt. 91 505, 513, 514
Syer *v.* Gladstone (1885), 30 Ch. D. 614 117
Sykes, *Re* (1899), County Court of Redhill, April 12th, cited Soward's Estate Duty, 4th ed., p. 23 200
—— *v.* Sheard (1863), 33 Beav. 114 ; 2 De G. J. & Sm. 6 ; 3 New Rep. 144 ; 33 L. J. (CH.) 181 ; 9 L. T. 430 ; 9 Jur. (N. S.) 1262 ; 12 W. R. 117 . 106
—— *v.* Sykes, [1897] P. 306 ; 66 L. J. (P.) 162 ; 77 L. T. 150, C. A. . . . 552
Sykes's Trusts, *Re* (1862), 2 John. & H. 415 622
Syllivan *v.* Stradling (1764), 2 Wils. 208 402
Symes, *Re*, *Ex parte* Poole (1847), 1 De G. 581 ; 17 L. J. (BCY.) 12 ; 11 Jur. 1005...140
Symonds *v.* Gas Light and Coke Co. (1848), 11 Beav. 283 561
Symons *v.* Rees (1876), 1 Ex. D. 417 334
Synge *v.* Synge (1874), 9 Ch. App. 121 ; 29 L. T. 855 ; 22 W. R. 227 . . . 119

T.

TABER, *Re*, Arnold *v.* Kayess (1882), 51 L. J. (CH.) 721 ; 46 L. T. 805 ; 30 W. R. 883...240
Tadcaster Tower Brewery Co. *v.* Wilson, [1897] 1 Ch. 705 ; 66 L. J. (CH.) 402 ; 76 L. T. 459 ; 61 J. P. 360 ; 45 W. R. 428 154
Tadman *v.* Henman, [1893] 2 Q. B. 168 ; 57 J. P. 664 ; 5 R. 479 . . . 404
Taff Vale Rail. Co. *v.* Nixon (1847), 1 H. L. Cas. 111 28
Tailby *v.* Official Receiver (1888), 13 App. Cas. 523 ; 58 L. J. (Q. B.) 75 ; 60 L. T. 162 ; 37 W. R. 513 104, 140
Taite's Case (1867), L. R. 3 Eq. 795 ; 36 L. J. (CH.) 475 ; 16 L. T. 343 ; 15 W. R. 891 174
Talbot *v.* Hodson (1816), 7 Taunt. 251 ; 2 Marsh. 527 606
—— (Earl) *v.* Hope Scott (1858), 4 K. & J. 96 55
—— *v.* Lewis (1834), 5 Tyr. 1 ; 1 Cr. M. & R. 495 ; 4 L. J. (EX.) 9 . . 541
—— *v.* Radnor (Earl) (1834), 3 My. & K. 252 117
—— *v.* Scarisbrick, [1908] 1 Ch. 812 ; 77 L. J. (CH.) 436 ; 99 L. T. 46 . . 113
—— *v.* Shrewsbury (Duke) (1714), Prec. Ch. 394 ; Gilb. (CH.) 89 ; 2 White & Tud. L. C., 7th ed. 128, 136
—— de Malahide (Lord) *v.* Cusack (1864), 17 I. C. L. R. 213 ; 12 L. T. 678 . 596
Tall *v.* Ryland (1670), 1 Cas. in Ch. 183 ; 1 Eq. Cas. Abr. 91 151
Talleyrand *v.* Borlanger (1797), 3 Ves. 447 19
Talmash *v.* Mugleston (1826), 4 L. J. (O. S.) (CH.) 200 175
Tamplin *v.* James (1880), 15 Ch. D. 215 ; 43 L. T. 520 ; 29 W. R. 311, C. A. . 23
Tanner *v.* Taylor (1756), 3 Term Rep. 754 596
Taplin *v.* Atty (1825), 3 Bing. 164 ; 10 Moore (C. P.), 564 ; 3 L. J. (O. S.) (C. P.) 213...521
Tarlton *v.* Fisher (1781), 2 Doug. (K. B.) 671 588
Tatham *v.* Vernon (1861), 29 Beav. 604 ; 4 L. T. 531 94
—— *v.* Wright (1831), 2 Russ. & M. 1 605
Taunton, Delmard, Lane & Co., *Re*, Christie *v.* Taunton, Delmard, Lane & Co., [1893] 2 Ch. 175 ; 62 L. J. (CH.) 385 ; 68 L. T. 638 ; 41 W. R. 475 ; 3 R. 404 104

PAGE
Tayler *v.* Great Indian Peninsula Rail. Co. (1859), 4 De G. & J. 559 ; 28 L. J. (CH.) 709 ; 5 Jur. (N. S.) 1087 ; 7 W. R. 637 400, 401, 412
Taylor, *Ex parte* (1820), 1 Jac. & W. 483 538
——— *Re*, Atkinson *v.* Lord (1900), 81 L. T. 812 170, 172, 173
——— *v.* Barclay (1828), 2 Sim. 213 ; 7 L. J. (O. S.) (CH.) 65 493
——— *v.* Bowers (1876), 1 Q. B. D. 291 ; 45 L. J. (Q. B.) 163 ; 34 L. T. 938 ; 24 W. R. 499, C. A. 379
——— *v.* Cartwright (1872), L. R. 14 Eq. 167 ; 41 L. J. (CH.) 529 ; 26 L. T. 571 ; 20 W. R. 603 130
——— *v.* Cole (1797), 3 Term Rep. 3, n. (a) 543
——— *v.* Cook (1820), 8 Price, 650 608
——— *v.* Diplock (1815), 2 Phillim. 261 503
——— *v.* Gates (1895), 72 L. T. 436, C. A. 629
——— *v.* Haygarth (1844), 14 Sim. 8 107
——— *v.* London and County Banking Co., London and County Banking Co. *v.* Nixon, [1901] 2 Ch. 231 ; 70 L. J. (CH.) 477 ; 84 L. T. 397 ; 49 W. R. 451 ; 17 T. L. R. 413, C. A. 79, 80, 81, 82, 85
——— *v.* M'Calmont (1855), 4 W. R. 59 366
——— *v.* Meads (1865), 4 De G. J. & Sm. 597 ; 34 L. J. (CH.) 203 ; 11 Jur. (N. S.) 166 ; 13 W. R. 394 9
——— *v.* Needham (1810), 2 Taunt. 278 403
——— *v.* Plumer (1815), 3 M. & S. 562 ; 2 Rose, 457 159
——— *v.* Poncia, [1901] W. N. 87 225
——— *v.* Russell, [1891] 1 Ch. 8 ; 60 L. J. (CH.) 1 ; 63 L. T. 593 ; 39 W. R. 81, C. A. ; [1892] A. C. 244 ; 61 L. J. (CH.) 657 ; 66 L. T. 565 ; 41 W. R. 43 80, 83, 84
——— *v.* Smith, [1893] 2 Q. B. 65 ; 61 L. J. (Q. B.) 331 ; 67 L. T. 39 ; 40 W. R. 486, C. A. 426
——— *v.* Stibbert (1794), 2 Ves. 437 78, 87, 88
——— *v.* Taylor (1875), L. R. 20 Eq. 155 ; 44 L. J. (CH.) 718 . . 130, 162, 163
——— *v.* ——— (1853), 3 De G. M. & G. 190 ; 22 L. J. (CH.) 742 ; 17 Jur. 583 ; 1 W. R. 398 105
——— *v.* Willans (1831), 2 B. & Ad. 845 589
——— *v.* Witham, Witham *v.* Taylor (1876), 3 Ch. D. 605 ; 45 L. J. (CH.) 798 ; 24 W. R. 877 464
Taylor's Settlement, *Re* (1852), 9 Hare, 596 106, 108, 110, 111
——— Estate, *Re* (1853), 8 Exch. 384 ; 22 L. J. (EX.) 211 . . . 250, 313
Teasdale *v.* Sanderson (1864), 33 Beav. 534 41
——— *v.* Teasdale (1726), Cas. *temp.* King, 59 168
Teevan *v.* Smith (1882), 20 Ch. D. 724 ; 51 L. J. (CH.) 621 ; 47 L. T. 208 ; 30 W. R. 716, C. A. 91
Temple, *Ex parte* (1814), 2 Ves. & B. 391 586, 587
——— *v.* Baltinglass (Viscountess) (1677), Cas. *temp.* Finch, 275 326
Tench *v.* Cheese (1855), 6 De G. M. & G. 453 ; 24 L. J. (CH.) 716 ; 1 Jur. (N. S.) 689 ; 3 W. R. 500 109
Tendring Union Guardians *v.* Dowton, [1891] 3 Ch. 26 ; 61 L. J. (CH.) 82 ; 65 L. T. 434 ; 40 W. R. 145, C. A. 102
Tenham *v.* Herbert (1742), 2 Atk. 483 58, 59
Tennant *v.* Hamilton (1839), 7 Cl. & Fin. 122 ; 1 Macl. & Rob. 821 . 452, 598, 601
Tennent *v.* Welch (1888), 37 Ch. D. 622 ; 57 L. J. (CH.) 481 ; 58 L. T. 368 ; 36 W. R. 389 114
Terry *v.* Sweeting, *Re* Duncan. *See* Duncan, *Re*, Terry *v.* Sweeting.
Terwit *v.* Gresham (1666), 1 Cas. in Ch. 73 ; 1 Eq. Cas. Abr. 227 . . . 547
Thacker *v.* Key (1869), L. R. 8 Eq. 408 141
Thairlwall *v.* Great Northern Railway, [1910] 2 K. B. 509 ; 103 L. T. 186 ; 26 T. L. R. 555 ; 54 Sol. Jo. 652 556
Tharpe *v.* Gisburne (1825), 2 C. & P. 21 607
Thelluson *v.* Cosling (1803), 4 Esp. 266. 493
Thellusson *v.* Liddard, [1900] 2 Ch. 635 ; 69 L. J. (CH.) 673 ; 82 L. T. 753 ; 49 W. R. 10 63
——— *v.* Woodford (1806), 13 Ves. 209 ; affirmed *sub nom.* Rendlesham *v.* Woodford (1813), 1 Dow, 249 120
Thetford's (Mayor) Case (1703), 1 Salk. 192 ; 3 Salk. 103 ; 6 Mod. Rep. 25 ; 11 Mod. Rep. 141 ; Holt (K. B.), 171 327
Thomas, *In the Goods of* (1871), 41 L. J. (P.) 32 ; 25 L. T. 509 ; 20 W. R. 149 . 463
———, *Re*, Thomas *v.* Howell (1886), 34 Ch. D. 166 ; 56 L. J. (CH.) 9 ; 55 L. T. 629 99, 110, 121
——— *v.* Bennet (1725), 2 P. Wms. 341 136

PAGE
Thomas *v.* Brown (1876), 1 Q. B. D. 714 ; 45 L. J. (Q. B.) 811 ; 35 L. T. 237 ; 24 W. R. 821 378, 382, 389
——— *v.* Canterbury (Archbishop) (1787), 1 Cox, Eq. Cas. 399 31
——— *v.* Cook (1818), 2 B. & Ald. 119 375, 376
——— *v.* David (1836), 7 C. & P. 350 594, 602
——— *v.* Exeter Flying Post Co. (1887), 18 Q. B. D. 822 ; 56 L. J. (Q. B.) 313 ; 56 L. T. 361 ; 35 W. R. 594 359
——— *v.* Foster, *Re* Foster. *See* Foster, *Re*, Thomas *v.* Foster.
——— *v.* Hudson, *Re* Creed. *See* Creed, *Re*, Thomas *v.* Hudson.
——— *v.* Jenkins (1837), 6 Ad. & El. 525 ; 1 Nev. & P. (K. B.) 587 ; Will. Woll. & Dav. 265 ; 6 L. J. (K. B.) 163 ; 1 Jur. 261 468
——— *v.* Montgomery (1827), 3 Russ. 502 245, 250
——— *v.* Newton (1826), Mood. & M. 48, n. 570, 575
——— *v.* Porter (1668), 1 Cas. in Ch. 95 ; 1 Eq. Cas. Abr. 121 72
——— *v.* Thomas (1864), 2 Drew. & Sm. 298 ; 11 L. T. 47 ; 13 W. R. 225...500, 501
Thompson, *In the Goods of* (1887), 12 P. D. 100 ; 56 L. J. (P.) 46 ; 57 L. T. 373 ; 35 W. R. 384 470
———, *Re*, Langham *v.* Thompson (1904), 91 L. T. 680 . . 444, 446, 504
——— *v.* Bennett, *Re* Poole's Estate. *See* Poole's Estate, *Re*, Thompson *v.* Bennett.
——— *v.* Birch, [1876] W. N. 177 ; reversed, [1876] W. N. 278, C. A. . . 275
——— *v.* Burra (1873), L. R. 16 Eq. 592 ; 42 L. J. (CH.) 827 . . . 121
——— *v.* Cartwright (1863), 33 Beav. 178 85
——— *v.* Eastwood (1877), 2 App. Cas. 215 157
——— *v.* Gibson (1841), 7 M. & W. 456 ; 9 Dowl. 717 ; 10 L. J. (EX.) 330 . 337
——— *v.* Hickman, [1907] 1 Ch. 550 ; 76 L. J. (CH.) 254 ; 96 L. T. 454 ; 23 T. L. R. 311 63
——— *v.* Hudson (1869), L. R. 4 H. L. 1 ; 38 L. J. (CH.) 431 . . 151, 152
——— *v.* Moore (1889), 23 L. R. Ir. Ch. 599 357
——— *v.* Mosely (1833), 5 C. & P. 501 581
——— *v.* Trevanion (1693), Skin. 402 ; Holt (K. B.), 286 437
——— *v.* Woodfine, *Re* Woodfine. *See* Woodfine, *Re*, Thompson *v.* Woodfine.
——— and Holt, *Re* (1890), 44 Ch. D. 492 ; 59 L. J. (CH.) 651 ; 62 L. T. 651 ; 38 W. R. 524 165
——— & Sons *v.* Clarke (1901), 17 T. L. R. 455 331
Thomson *v.* Advocate-General (1845), 12 Cl. & Fin. 1 ; 9 Jur. 217 . . 238, 239
——— *v.* Austen (1823), 2 Dow. & Ry. (K. B.) 358 457
——— *v.* Clydesdale Bank, Ltd., [1893] A. C. 282 ; 62 L. J. (P. C.) 91 ; 67 L. T. 156 ; 1 R. 255 88
——— *v.* Davenport (1829), 9 B. & C. 78 ; 4 Man. & Ry. (K. B.) 110 . . 398
——— *v.* Thomson (1802), 7 Ves. 470 73
Thorley (J.), *Re*, Thorley *v.* Massam, *Re* Thorley (W. R.), Thorley *v.* Massam, [1891] 2 Ch. 613 ; 60 L. J. (CH.) 537 ; 64 L. T. 515 ; 39 W. R. 565, C. A. . 233, 234
Thornborough *v.* Baker (1675), 3 Swan. 628 ; 1 Cas. in Ch. 283 ; Freem. (CH.) 143 . 91
Thorne *v.* Cann, [1895] A. C. 11 ; 64 L. J. (CH.) 1 ; 71 L. T. 852 ; 11 R. 67...147, 148, 149
——— *v.* Gibbs, *Re* Gibbs. *See* Gibbs, *Re*, Thorne *v.* Gibbs.
——— *v.* Heard and Marsh, [1895] A. C. 495 ; 64 L. J. (CH.) 652 ; 73 L. T. 291 ; 44 W. R. 155 ; 11 R. 254 85
——— *v.* Jackson (1846), 3 C. B. 661 ; 4 Dow. & L. 478 ; 16 L. J. (C. P.) 87 . 494
——— *v.* Tilbury (1858), 3 H. & N. 534 ; 27 L. J. (EX.) 407 407
Thornhill, *Re*, Thornhill *v.* Nixon, [1904] W. N. 112, C. A. 504
Thornton *v.* Hawley (1804), 10 Ves. 129 106
——— *v.* Knight (1849), 16 Sim. 509 ; 13 Jur. 180 53
——— *v.* Maynard (1875), L. R. 10 C. P. 695 ; 44 L. J. (C. P.) 382 ; 33 L. T. 433 162
——— *v.* Thornton (1861), 11 I. Ch. R. 474 121
Thorpe *v.* Eyre (1834), 1 Ad. & El. 926 ; 3 Nev. & M. (K. B.) 214 . . . 545
——— *v.* Gisbourne (1825), 11 Moore (C. P.), 55 589
——— *v.* Jackson (1837), 2 Y. & C. (EX.) 553 39
Three Towns Banking Co. *v.* Maddever, *Re* Maddever. *See* Maddever, *Re*, Three Towns Banking Co. *v.* Maddever.
Throgmorton *v.* Walton (1624), 2 Roll. Rep. 461 502
Thrussell *v.* Barker (1868), 17 L. T. 665 537
Thurle *v.* Madison (1655), Sty. 462 606
Thursby *v.* Plant (1669), 1 Saund. 237 ; 1 Sid. 401 ; 1 Lev. 259 ; 1 Vent. 10 ; 2 Keb. 439 375
Thursby's Settlement, *Re*, Grant *v.* Littledale, [1910] 2 Ch. 181 ; 79 L. J. (CH.) 538 ; 102 L. T. 838 ; 54 Sol. Jo. 581, C. A. 95

PAGE
"Thyatira," The (1883), 8 P. D. 155; 52 L. J. (P.) 85; 49 L. T. 406; 32 W. R. 276 346
Thynn *v.* Thynn (1684), 1 Vern. 296; 1 Eq. Cas. Abr. 380 75
Thynne (Lady E.) *v.* Glengall (Earl) (1848), 2 H. L. Cas. 131; 12 Jur. 805...128, 129, 130, 131, 133, 134, 136, 137, 138
——— *v.* Prothero (1814), 2 M. & S. 553 305
Tibbits *v.* Tibbits (1816), 19 Ves. 656 125
——— *v.* ——— (1821), Jac. 317 123
Tidd *v.* Lister (1852), 10 Hare, 140 71, 144
Tighe *v.* Tighe (1877), 11 I. R. Eq. 203 345
Tilley *v.* Thomas (1867), 3 Ch. App. 61; 17 L. T. 422; 16 W. R. 166 . . . 154
Tillotson, *Ex parte* (1816), 1 Stark. 470 588
Tilonko *v.* A.-G. of Natal, [1907] A. C. 93; 76 L. J. (P. C.) 29; 95 L. T. 853; 23 T. L. R. 21 363
Tily *v.* Smith (1844), 1 Coll. 434 108
Timothy *v.* Fenn (1910), 102 L. T. 283; 74 J. P. 123; 8 L. G. R. 156 . . 526
Tindall, *Ex parte*, Burchard *v.* Macfarlane. *See* Burchard *v.* Macfarlane, *Ex parte* Tindall.
Tindall's Trust, *Re* (1861), 30 Beav. 151 500
Tinkler *v.* Hilder (1849), 4 Exch. 187; 7 Dow. & L. 61; 18 L. J. (EX.) 429; 13 Jur. 684 364
Tinley *v.* Porter (1837), 5 Dowl. 744; 2 M. & W. 822; 6 L. J. (EX.) 233 . . 589
Tipping *v.* Tipping (1721), 1 P. Wms. 729 145
Tishall *v.* Parnell (1863), 14 I. C. L. R. 1 564
Toal *v.* North British Railway, [1908] A. C. 352; [1908] S. C. (H. L.) 29; 45 Sc. L. R. 683; 77 L. J. (P. C.) 119; 99 L. T. 173; 24 T. L. R. 673 . . 429
Todd, *Re*, Shand *v.* Kidd (1854), 19 Beav. 582 488
——— *v.* Gee (1810), 17 Ves. 273 12, 67
——— *v.* Stewart (1845), 9 Q. B. 759; 9 Jur. 326; 14 L. J. (Q. B.) 150; reversed, Stewart *v.* Todd (1846), 9 Q. B. 767; 11 Jur. 560; 16 L. J. (Q. B.) 327, Ex. Ch. 334
Toleman *v.* Portbury (1870), L. R. 5 Q. B. 288; 39 L. J. (Q. B.) 136; 22 L. T. 33; 18 W. R. 579 499
——— and England, *Re*, *Ex parte* Bramble (1880), 13 Ch. D. 885; 42 L. T. 413; 28 W. R. 676 581
Tollemache, *Re*, *Ex parte* Anderson (1885), 14 Q. B. D. 606; 54 L. J. (Q. B.) 383; 52 L. T. 786, C. A. 348, 543, 551
———, *Re*, *Ex parte* Edwards (1884), 14 Q. B. D. 415, C. A. 464
———, *Re*, *Ex parte* Revell (1884), 13 Q. B. D. 720; 54 L. J. (Q. B.) 89; 51 L. T. 376; 33 W. R. 288, C. A. 348
Toller *v.* Carteret (1705), 2 Vern. 494; 1 Eq. Cas. Abr. 134 65
Tolman *v.* Johnstone (1860), 2 F. & F. 66 601
Tolson *v.* Collins (1799), 4 Ves. 483 137, 138
Tombs *v.* Roch (1846), 2 Coll. 490 145
Tomkins *v.* Ashby (1827), Mood. & M. 32 543
——— *v.* Tucker, *Re* Sealy. *See* Sealy, *Re*, Tomkins *v.* Tucker.
——— *v.* Willshear (1814), 5 Taunt. 431; 1 Marsh. 115; 2 Wms. Saund. 127, n. 27
Tomkyns *v.* Blane (1860), 28 Beav. 422 119
——— *v.* Ladbroke (1755), 2 Ves. Sen. 591 126
Tomline, *Ex parte*, *Re* Walton-cum-Trimley Manor. *See* Walton-cum-Trimley Manor, *Re*, *Ex parte* Tomline.
Tomlinson *v.* Harrison (1802), 8 Ves. 32 60
Tompson *v.* Browne (1835), 3 My. & K. 32; 5 L. J. (CH.) 64 236
Tooker *v.* Beaufort (Duke) (1756), Say. 297 496
——— *v.* ——— (Duke) (1757), 1 Burr. 146 530
Toomes *v.* Conset (1745), 3 Atk. 261 91
Topham *v.* M'Gregor (1844), 1 Car. & Kir. 320 565, 596
——— *v.* Portland (Duke) (1863), 1 De G. J. & Sm. 517 490
Torkington *v.* Magee, [1902] 2 K. B. 430; 71 L. J. (K. B.) 712; 87 L. T. 304; 18 T. L. R. 703 61, 64
Toronto Railway *v.* Toronto Corporation, [1904] A. C. 809; 73 L. J. (P. C.) 120; 91 L. T. 541; 20 T. L. R. 774 353, 389
Toulmin *v.* Price (1800), 5 Ves. 235 26
——— *v.* Steere (1817), 3 Mer. 210 148
Tourville *v.* Naish (1734), 3 P. Wms. 307 76
Tovey *v.* Turner, *Re* Bacon. *See* Bacon, *Re*, Tovey *v.* Turner.
Towers *v.* Newton (1841), 1 Q. B. 319; 9 Dowl. 576; 4 Per. & Dav. 625; 5 Jur. 1035 583

PAGE
Townend *v.* Toker (1866), 1 Ch. App. 446; 35 L. J. (CH.) 608; 14 L. T. 531; 12 Jur. (N. S.) 477; 14 W. R. 806 567
Townley *v.* Bedwell (1808), 14 Ves. 591 111
Townsend, *Re*, [1901] 2 K. B. 331; 70 L. J. (K. B.) 764; 65 J. P. 344; 84 L. T. 714; 49 W. R. 600. 212
———— *v.* Kilmurrey (1637), Toth. 121 8
———— *v.* Moore, [1905] P. 66; 74 L. J. (P.) 17; 92 L. T. 335; 53 W. R. 338...608
Townshend (Marquis) *v.* Stangroom (1801), 6 Ves. 328. 17, 22, 23
———— *v.* Townshend (1783), 1 Bro. C. C. 550 174
———— (Lord) *v.* Windham (1750), 2 Ves. Sen. 1 34
———— Peerage, The (1843), 10 Cl. & Fin. 289 45
Tracy Peerage, The (1843), 10 Cl. & Fin. 154 519, 560, 561, 565
Trafford *v.* Blanc, *Re* Trufort. *See* Trufort, *Re*, Trafford *v.* Blanc.
———— *v.* Boehm (1746), 3 Atk. 440 113
Traill *v.* Kibblewhite (1846), 10 Jur. 107 533
Trash *v.* Wood (1839), 4 My. & Cr. 324; 9 L. J. (CH.) 105; 4 Jur. 669 . . . 94
Travers *v.* Kelly, *Re* King. *See* King, *Re*, Travers *v.* Kelly.
Treasure, *Re*, Wild *v.* Stanham, [1900] 2 Ch. 648; 69 L. J. (CH.) 751; 83 L. T. 142; 48 W. R. 696; 16 T. L. R. 542 220
Treasury Solicitor *v.* White (1886), 55 L. J. (P.) 79, C. A. 613
Tredegar (Lord) *v.* Winders (1875), L. R. 19 Eq. 607; 44 L. J. (CH.) 268 . . 365
Trelawney *v.* Colman (1817), 2 Stark. 191 439, 609
Trenchard, *Re*, Trenchard *v.* Trenchard, [1905] 1 Ch. 82; 74 L. J. (CH.) 135; 92 L. T. 265; 53 W. R. 235 219
———— *v.* Wanley (1723), 2 P. Wms. 165; 2 Eq. Cas. Abr. 724 . . . 14
Treport's Case (1594), 6 Co. Rep. 14 b; 2 Bulst. 44 373
Treviban *v.* Lawrence (1704), 2 Ld. Raym. 1048 350
Trevor *v.* Trevor (1833), 2 My. & K. 675 147
Trickett *v.* Tomlinson (1863), 13 C. B. (N. S.) 663; 7 L. T. 678 390
Trickett's Claim, Pocock's Claim, Carew's Claim, *Re* Romford Canal Co. *See* Romford Canal Co., *Re*, Pocock's Claim, Trickett's Claim, Carew's Claim.
"Trident," The (1839), 1 Wm. Rob. 29 146
Trimbey *v.* Vignier (1834), 4 Moo. & S. 695; 6 C. & P. 25; 3 L. J. (C. P.) 246; 1 Bing. (N. C.) 151 489
Trimmer *v.* Bayne (1802), 7 Ves. 508 128, 132, 134, 136
———— *v.* ———— (1803), 9 Ves. 209 142, 144
Tringham's Trusts, *Re*, Tringham *v.* Greenhill, [1904] 2 Ch. 487; 73 L. J. (CH.) 693; 91 L. T. 370; 20 T. L. R. 657 95
Trinidad Asphalte Co. *v.* Coryat, [1896] A. C. 587; 65 L. J. (P. C.) 100; 75 L. T. 108; 45 W. R. 225 100, 372
Trinity House Corporation *v.* Burge (1828), 2 Sim. 411; 7 L. J. (O. S.) (CH.) 44 . 575
Trotter *v.* Maclean (1879), 13 Ch. D. 574; 42 L. T. 118; 28 W. R. 244 . 71, 466, 556
Troughton *v.* Troughton (1748), 1 Ves. Sen. 86 71
Trower *v.* Knightley (1821), Madd. & G. 134 113
Trufort, *Re*, Trafford *v.* Blanc (1887), 36 Ch. D. 600; 57 L. J. (CH.) 135; 57 L. T. 674; 36 W. R. 163. 338
Truman (W.), Ltd. *v.* Attenborough (1910), 54 Sol. Jo. 682; 26 T. L. R. 601...81, 379, 393
Trumper *v.* Trumper (1872), L. R. 14 Eq. 295; 41 L. J. (CH.) 673; affirmed (1873), 8 Ch. App. 870; 42 L. J. (CH.) 641; 29 L. T. 86; 21 W. R. 692 . 144
Tubbs *v.* Broadwood (1831), 2 Russ. & M. 487 139
———— *v.* Esser (1909), 26 T. L. R. 145 101
Tucker *v.* Bennett (1887), 38 Ch. D. 1; 57 L. J. (CH.) 507; 58 L. T. 650, C. A. 25
———— *v.* Linger (1882), 21 Ch. D. 34 445
———— *v.* Vowles, [1893] 1 Ch. 195; 62 L. J. (CH.) 172; 67 L. T. 763; 41 W. R. 156; 3 R. 107. 101
Tucket *v.* Shaw, *Re* Shaw. *See* Shaw, *Re*, Tucket *v.* Shaw.
Tuer *v.* Turner (1855), 20 Beav. 560 114
Tufton *v.* Whitmore (1840), 12 Ad. & El. 370; 9 L. J. (Q. B.) 405 546
Tugwell, *Re* (1884), 27 Ch. D. 309; 53 L. J. (CH.) 1006; 51 L. T. 83; 33 W. R. 132 111
Tulk *v.* Moxhay (1848), 2 Ph. 774 100
Tullett *v.* Armstrong (1838), 1 Beav. 1; 8 L. J. (CH.) 19; 2 Jur. 912 . . . 9
Tunley *v.* Evans (1845), 2 Dow. & L. 747; 14 L. J. (Q. B.) 116; 9 Jur. 428 . 461
Turley *v.* Daw (1906), 94 L. T. 216; 22 T. L. R. 231 326
Turnbull, *Re*, Skipper *v.* Wade, [1905] 1 Ch. 726; 74 L. J. (CH.) 438; 53 W. R. 440 231, 242

PAGE
Turnbull *v.* Turnbull (1910), 47 Sc. L. R. 668 221
Turner, *In the Goods of* (1864), 3 Sw. & Tr. 476; 33 L. J. (P.) 180; 10 Jur. (N. S.) 708 500
———, *Re*, Meyding *v.* Hinchcliff, [1906] W. N. 27 488
———, *Re*, Glenister *v.* Harding (1885), 29 Ch. D. 985; 53 L. T. 528 . 470, 537
——— *v.* Bowley & Son (1896), 12 T. L. R. 402, C. A. 431
——— *v.* Collins (1871), 7 Ch. App. 329; 41 L. J. (CH.) 558; 25 L. T. 779; 20 W. R. 305 18, 171, 174
——— *v.* Cox (1853), 8 Moo. P. C. C. 288 35
——— *v.* Green, [1895] 2 Ch. 205; 64 L. J. (CH.) 539; 72 L. T. 763; 43 W. R. 537; 13 R. 551 24
——— *v.* Harvey (1821), Jac. 169 14
——— *v.* Hellard, *Re* Harrison. *See* Harrison, *Re*, Turner *v.* Hellard.
——— *v.* Hutchinson (1861), 3 L. T. 815 466, 467
——— *v.* Martin (1857), 7 De G. M. & G. 429; 26 L. J. (CH.) 216; 3 Jur. (N. S.) 397; 5 W. R. 277 234
——— *v.* Morgan (1803), 8 Ves. 143 41
——— *v.* Trelawny (1841), 12 Sim. 49; 10 L. J. (CH.) 249; 5 Jur. 698 . . 174
——— *v.* Turner (1819), 1 Jac. & W. 39 33
——— *v.* ——— (1852), 2 De G. M. & G. 28 327
——— *v.* ———, Hall *v.* Turner (1880), 14 Ch. D. 829; 42 L. T. 495; 28 W. R. 859; 44 J. P. 734 566
——— *v.* Watson, *Re* Watson. *See* Watson, *Re*, Turner *v.* Watson.
Turner's Case (1681), 1 Vern. 7; 1 Eq. Cas. Abr. 58 94
Turner Pneumatic Tyre Co. *v.* Dunlop Pneumatic Tyre Co. (1897), 75 L. T. 651...613
Turquand, *Ex parte*, *Re* Parker. *See* Parker, *Re*, *Ex parte* Turquand.
Turton *v.* Benson (1718), 1 P. Wms. 496; 1 Eq. Cas. Abr. 45; 2 Vern. 784; Prec. Ch. 522; Gilb. 445 20
——— *v.* Turton (1830), 3 Hagg. Ecc. 338 441
Tussaud's Estate, *Re*, Tussaud *v.* Tussaud (1878), 9 Ch. D. 363; 47 L. J. (CH.) 849; 39 L. T. 113; 26 W. R. 874, C. A. 132, 134, 135, 136
Tutton *v.* Darke (1860), 2 H. & N. 647; 29 L. J. (EX.) 271; 6 Jur. (N. S.) 983; 2 L. T. 361 479, 492
Tweedie *v.* Hayward, *Re* Hayward. *See* Hayward, *Re*, Tweedie *v.* Hayward.
——— and Mills, *Re* (1884), 27 Ch. D. 315; 54 L. J. (CH.) 71; 33 W. R. 133 113
"Twentje," The, Van Hasselt *v.* Sack. *See* Van Hasselt *v.* Sack, The "Twentje."
Twentyman *v.* Barnes (1848), 2 De G. & Sm. 225; 12 Jur. 743 508
Twining *v.* Powell (1845), 2 Coll. 262 131, 135
Twisden *v.* Twisden (1804), 9 Ves. 413 128
Twiss *v.* Massey (1737), 1 Atk. 67 39
Twistleton *v.* Griffith (1716), 1 P. Wms. 310; 2 Eq. Cas. Abr. 510 . . 20, 21
Twogood, *Ex parte* (1805), 11 Ves. 517 163
Two Sicilies (King) *v.* Willcox (1851), 1 Sim. (N. S.) 301; 20 L. J. (CH.) 417; 15 Jur. 214 574
Twycross *v.* Grant (1877), 2 C. P. D. 469; 46 L. J. (C. P.) 636; 36 L. T. 812; 25 W. R. 701, C. A. 67
Twyman *v.* Knowles (1853), 13 C. B. 222; 22 L. J. (C. P.) 143; 17 Jur. 238 . 421
Tyerman *v.* Smith (1856), 6 E. & B. 719; 25 L. J. (Q. B.) 359; 2 Jur. (N. S.) 860...389
Tyler, *Re*, *Ex parte* Higgins (1858), 3 De G. & J. 33; 27 L. J. (BCY.) 27; 4 Jur. (N. S.) 595; 6 W. R. 406 335
———, *Re*, *Ex parte* Official Receiver, [1907] 1 K. B. 865; 76 L. J. (K. B.) 541; 97 L. T. 30; 23 T. L. R. 328; 14 Mans. 73, C. A. 22
——— *v.* Lake (1831), 4 Sim. 351 148
——— *v.* Yates (1870), L. R. 11 Eq. 265; 23 L. T. 447; 19 W. R. 118; affirmed (1871), 6 Ch. App. 665; 40 L. J. (CH.) 768; 25 L. T. 284; 19 W. R. 909...21, 22
Tyler's Estate, *Re* (1860), 8 W. R. 540 114
Tyne Mutual Steamship Insurance Association *v.* Brown (1896), 74 L. T. 283 . 389
Tynt *v.* Tynt (1729), 2 P. Wms. 542 145
Tyrconnell (Lord) *v.* Ancaster (Duke) (1754), Amb. 237; 2 Ves. Sen. 500 . . 141
Tyrrel's Case (1557), Dyer, 155 a 89
Tyrwhitt *v.* Tyrwhitt (1863), 32 Beav. 244; 1 New Rep. 458; 32 L. J. (CH.) 553; 8 L. T. 140; 9 Jur. (N. S.) 346; 11 W. R. 409 147, 148
Tyson *v.* Smith (1838), 9 Ad. & El. 406; 1 Per. & Dav. 307; Will. Woll. & Dav. 749 432

U.

PAGE
UNDERDOWN *v.* Stannard, [1871] W. N. 171 625
Underhill *v.* Plumptre, *Re* Plumptre's Marriage Settlement. *See* Plumptre's Marriage Settlement, *Re*, Underhill *v.* Plumptre.
Underwood, *Re* (1857), 3 K. & J. 745 112
——— *v.* Wing (1855), 4 De G. M. & G. 633 ; 3 Eq. Rep. 794 ; 24 L. J. (CH.) 293 ; 1 Jur. (N. S.) 159 ; 2 W. R. 641 440, 503
Union Bank of London *v.* Kent (1888), 39 Ch. D. 238 ; 57 L. J. (CH.) 1022 ; 59 L. T. 714 ; 37 W. R. 364, C. A. 80
Union Credit Bank *v.* Mersey Docks & Harbour Board, Same *v.* Same and North and South Wales Bank, [1899] 2 Q. B. 205 ; 68 L. J. (Q. B.) 842 ; 81 L. T. 44 ; 4 Com. Cas. 227 392, 398, 400
United Shoe Machinery Co. of Canada *v.* Brunet, [1909] A. C. 330 ; 78 L. J. (P. C.) 101 ; 101 L. T. 579 ; 25 T. L. R. 442 ; 53 Sol. Jo. 396 . . 432
United States of America *v.* McRae (1867), 3 Ch. App. 79 ; 37 L. J. (CH.) 129 ; 17 L. T. 428 ; 16 W. R. 377. . . . 489, 574
——————— *v.* Wagner (1867), 2 Ch. App. 582 493
Universo Insurance Co. of Milan *v.* Merchants Marine Insurance Co., [1897] 2 Q. B. 93 ; 66 L. J. (Q. B.) 564 ; 76 L. T. 748 ; 45 W. R. 625, C. A. . . 444
Unwin *v.* Adams (1858), 1 F. & F. 312 408
Upton *v.* Prince (1735), Cas. *temp.* Talb. 71 130
Urquhart *v.* Butterfield (1887), 37 Ch. D. 357 ; 57 L. J. (CH.) 521 ; 57 L. T. 780 ; 36 W. R. 376, C. A. 264
Urruela, *In the Goods of* (1869), L. R. 1 P. & D. 598 315
Usher *v.* Ayleward (1685), 1 Vern. 360 70
——— *v.* Martin (1889), 24 Q. B. D. 272 ; 59 L. J. (Q. B.) 11 ; 61 L. T. 778 . 63
Usticke *v.* Peters (1858), 4 K. & J. 437 ; 4 Jur. (N. S.) 1271 . . . 121, 122
Uxbridge (Lord) *v.* Staveland (1747), 1 Ves. Sen. 56 574
Uxbridge Union *v.* New Winchester Union (1904), 91 L. T. 533 ; 69 J. P. 120 ; 3 L. G. R. 362 326, 328

V.

VACHEL *v.* Vachel (1669), 1 Cas. in Ch. 129 ; 2 Rep. Ch. 151 ; 1 Eq. Cas. Abr. 361 96
Vacher *v.* Cocks (1830), 1 B. & Ad. 145 ; Mood. & M. 353 ; 8 L. J. (O. S.) (K. B.) 341 606
Vadala *v.* Lawes (1890), 25 Q. B. D. 310 ; 63 L. T. 128 ; 38 W. R. 594, C. A. . 351
Vagliano Brothers *v.* Bank of England (1889), 23 Q. B. D. 243 ; 58 L. J. (Q. B.) 357 ; 61 L. T. 419 ; 53 J. P. 564 ; 37 W. R. 640, C. A. 388
Vailant *v.* Dodomede (1743), 2 Atk. 592 588
Vaise *v.* Delaval (1785), 1 Term Rep. 11 571
Vale *v.* Oppert (1875), 10 Ch. App. 340 ; 44 L. J. (CH.) 579 ; 33 L. T. 41 ; 23 W. R. 780 581
Vallance, *Re*, Vallance *v.* Blagden (1884), 26 Ch. D. 353 ; 50 L. T. 574 ; 48 J. P. 398 ; 32 W. R. 918 73
Vallentine *v.* Vallentine, [1901] P. 283 ; 70 L. J. (P.) 89 ; 85 L. T. 171 ; 17 T. L. R. 564 613
Valletort Sanitary Steam Laundry Co., Ltd., *Re*, Ward *v.* Valletort Sanitary Steam Laundry Co., Ltd., [1903] 2 Ch. 654 ; 72 L. J. (CH.) 674 ; 89 L. T. 60 ; 19 T. L. R. 593 80, 88
Valter's Trusts, *Re*, [1887] W. N. 128 533
Van *v.* Barnett (1812), 19 Ves. 102 110, 114, 115
Vanderberg *v.* Blake (1661), Hard. 194 326
Vander Donckt *v.* Thellusson (1849), 8 C. B. 812 ; 19 L. J. (C. P.) 12 . 481, 488
Vandergucht *v.* De Blaquiere (1838), 8 Sim. 315 ; 7 L. J. (CH.) 270 ; 2 Jur. 738. 60
Van Diemen's Land Co. *v.* Table Cape Marine Board, [1906] A. C. 92 ; 75 L. J. (P. C.) 28 ; 93 L. T. 709 ; 54 W. R. 498 ; 22 T. L. R. 114 . . . 568
Vandiest *v.* Fynmore (1834), 6 Sim. 570 307
Vane *v.* Barnard (Lord) (1716), 2 Vern. 738 ; 1 Eq. Cas. Abr. 399 ; 1 Salk. 161 ; Gilb. (CH.) 6, 127 ; Prec. Ch. 454 49, 90
——— *v.* Vane (1876), 24 W. R. 565 46
Van Gheluve *v.* Nerinckx (1882), 21 Ch. D. 189 ; 51 L. J. (CH.) 929 ; 47 L. T. 46 ; 30 W. R. 789 35
Van Grutten *v.* Foxwell, [1897] A. C. 658 ; 66 L. J. (Q. B.) 745 ; 77 L. T. 170 342

PAGE
Van Hasselt *v.* Sack, The "Twentje" (1865), 13 Moo. P. C. C. 185 . . . 386
Van Omeron *v.* Dowick (1809), 2 Camp. 42 441
Van Praagh *v.* Everidge, [1902] 2 Ch. 266; 71 L. J. (CH.) 598; 87 L. T. 42; 18 T. L. R. 593; reversed, [1903] 1 Ch. 434, C. A. 23
Vardon's Trusts, *Re* (1884), 28 Ch. D. 124; 54 L. J. (CH.) 244; 51 L. T. 884; 33 W. R. 297; reversed (1885), 31 Ch. D. 275; 55 L. J. (CH.) 259; 53 L. T. 895; 34 W. R. 185, C. A. 117, 123, 126
Varicas *v.* French (1849), 2 Car. & Kir. 1008 547, 618
Varteg Iron Works Wesleyan Chapel, *Re* (1853), 10 Hare, Appendix, xxxvii. . 625
Vaucher *v.* Treasury Solicitor, *Re* Grove. *See* Grove, *Re*, Vaucher *v.* Treasury Solicitor.
Vaughan *v.* Martin (1796), 1 Esp. 440 595
——— *v.* Vanderstegen (1854), 2 Drew. 363 9, 72, 168
Vaughton *v.* Brine (1840), 9 Dowl. 179; 1 Web. Pat. Cas. 41; 4 Jur. 1061 . 579, 589
——— *v.* London and North Western Rail. Co. (1874), L. R. 9 Exch. 93; 43 L. J. (EX.) 75; 30 L. T. 119; 22 W. R. 336; 12 Cox, C. C. 580...434
——— *v.* Noble (1861), 30 Beav. 34 18
Vaux Peerage, The (1837), 5 Cl. & Fin. 526 479, 534
Vauxhall Bridge Co. *v.* Spencer (Earl) (1821), Jac. 64 20
Vavasseur *v.* Vavasseur (1909), 25 T. L. R. 250 604
Veale *v.* Warner (1669), 1 Wms. Saund. 323; 2 Keb. 568 402
Venables *v.* Schweitzer (1873), L. R. 16 Eq. 76; 42 L. J. (CH.) 389; 28 L. T. 462; 21 W. R. 505 576
Venezuela Central Rail. Co. (Directorate) *v.* Kisch (1867), L. R. 2 H. L. 99; 36 L. J. (CH.) 849; 16 L. T. 500; 15 W. R. 821, C. A. 174
Venugopal Chetti *v.* Venugopal Chetti. *See* Chetti *v.* Chetti.
Verner *v.* Cochrane (1889), 23 L. R. Ir. 422 627
Vernon, *Re*, [1901] 1 K. B. 297; 70 L. J. (K. B.) 202; 83 L. T. 535; 64 J. P. 804; 49 W. R. 192; 17 T. L. R. 91 196, 211, 216
———, *Re*, Garland *v.* Shaw (1906), 95 L. T. 48 132, 134 135
——— *v.* Vawdrey (1740), 2 Atk. 119 171
——— *v.* Vernon (1782), 2 Bro. C. C. 659 29
———, Ewens & Co., *Re* (1886), 33 Ch. D. 402; 56 L. J. (CH.) 12; 55 L. T. 416; 35 W. R. 225, C. A. 79
Vesey *v.* Elwood (1842), 3 Dr. & War. 74; 2 Con. & Law. 47; Fl. & K. 667; 5 I. Eq. R. 184 99
Vezey *v.* Rashleigh, [1904] 1 Ch. 634; 73 L. J. (CH.) 422; 90 L. T. 663; 52 W. R. 442 566
Vibart *v.* Coles (1890), 24 Q. B. D. 364; 59 L. J. (Q. B.) 152; 62 L. T. 551; 38 W. R. 359, C. A. 36, 64
Vice *v.* Anson (Countess) (1827), 3 C. & P. 19; 1 Man. & Ry. (K. B.) 113; 7 B. & C. 409; Mood. & M. 97; 6 L. J. (O. S.) (K. B.) 24 583
Vickers, *Re*, Vickers *v.* Vickers (1888), 37 Ch. D. 525; 57 L. J. (CH.) 738; 58 L. T. 920; 36 W. R. 545 133
Viditz *v.* O'Hagan, [1899] 2 Ch. 569; 68 L. J. (CH.) 553; 80 L. T. 794; 48 W. R. 571; 15 T. L. R. 357, C. A.; reversed, [1900] 2 Ch. 87; 69 L. J. (CH.) 507; 82 L. T. 480; 48 W. R. 516; 16 T. L. R. 357, C. A. 127
Villers *v.* Beaumont (1682), 1 Vern. 100; 1 Eq. Cas. Abr. 23 17
Vimbos *v.* Meadowcraft (1901), 46 Sol. Jo. 2 617
Viney *v.* Barss (1795), 1 Esp. 293 451
Vitoria, *Re*, *Ex parte* Vitoria, [1894] 2 Q. B. 387; 63 L. J. (Q. B.) 795; 71 L. T. 48; 42 W. R. 529; 9 R. 536; 1 Mans. 236, C. A. 348, 353, 483
Vivian *v.* Moat, Vivian *v.* Walker (1881), 44 L. T. 210; 29 W. R. 504 . . . 463
Volant *v.* Soyer (1853), 13 C. B. 231; 22 L. J. (C. P.) 83 581
Von Linden, *In the Goods of*, [1896] P. 148; 65 L. J. (P.) 87; 44 W. R. 448 . 520
Vooght *v.* Winch (1819), 2 B. & Ald. 662 350
Vowles *v.* Young (1806), 13 Ves. 140 565
Vulcan Ironworks, *Re*, [1885] W. N. 120 411
Vulliamy *v.* Huskisson (1838), 3 Y. & C. (EX.) 82 560
——— *v.* Noble (1817), 3 Mer. 593 163
Vyner *v.* Wirrall Rural District Council (1909), 73 J. P. 242; 7 L. G. R. 628...469, 531, 564
Vyvyan *v.* Vyvyan (1861), 30 Beav. 65: 31 L. J. (CH.) 158; 5 L. T. 511; 8 Jur. (N. S.) 3; 9 W. R. 879 166

W.

PAGE
W. *v.* B. (1863), 32 Beav. 574 54
Wace *v.* Bickerton (1850), 3 De G. & Sm. 751; 19 L. J. (CH.) 254; 14 Jur. 784 . 141
Waddilove *v.* Barnet (1836), 2 Bing (N. C.) 538; 1 Hodg. 395; 5 L. J. (C. P.) 145 405
Waddington *v.* Roberts (1868), L. R. 3 Q. B. 579; 18 L. T. 853; 16 W. R. 1040; 9 B. & S. 697 477
Wade *v.* Wade, [1898] 2 Ch. 276: 78 L. T. 808; 47 W. R. 43 222
Wadling *v.* Oliphant (1875), 1 Q. B. D. 145; 45 L. J. (Q. B.) 173; 33 L. T. (N. S.) 837; 24 W. R. 246 389
Wadman *v.* Calcraft (1804), 10 Ves. 67 153
Wadsworth *v.* Marshall (1832), 1 Cr. & M. 87; 3 Tyr. 228; 2 L. J. (EX.) 10 . 578
Wagstaff, *Ex parte*, *Re* Sanders. *See* Sanders, *Re*, *Ex parte* Wagstaff.
——— *v.* Wagstaff (1724), 2 P. Wms. 258; 2 Eq. Cas. Abr. 763 . . . 8
——— *v.* Wilson (1832), 4 B. & Ad. 339; 1 Nev. & M. (K. B.) 1 462
Waine *v.* Crocker (1862), 3 De G. F. & J. 421; 31 L. J. (CH.) 285; 5 L. T. 702; 10 W. R. 204, C. A. 350, 355
Wainwright, *In the Goods of* (1858), 1 Sw. & Tr. 257; 28 L. J. (P. & M.) 2 . 503
Wait, *Re* (1820), 1 Jac. & W. 605 39
Waite *v.* Bingley (1882), 21 Ch. D. 674; 30 W. R. 698 41
Wake *v.* Harrop (1861), 6 H. & N. 768; 7 Jur. (N. S.) 710; 30 L. J. (EX.) 273; 4 L. T. 555; 9 W. R. 788; affirmed (1862) 1 H. & C. 202; 31 L. J. (EX.) 451; 7 L. T. 96; 8 Jur. (N. S.) 845; 10 W. R. 626 . . . 566
——— *v.* Wake (1791), 3 Bro. C. C. 255 126
Wakefield Corporation *v.* Cooke, [1903] 1 K. B. 417; 72 L. J. (K. B.) 345; 88 L. T. 225; 67 J. P. 121; 51 W. R. 305; 19 T. L. R. 214; affirmed, [1904] A. C. 31; 73 L. J. (K. B.) 88; 89 L. T. 707; 68 J. P. 225; 52 W. R. 321; 20 T. L. R. 115; 2 L. G. R. 270, C. A. . . . 323, 327, 328, 338, 340, 542
Wakeham *v.* West (1836), 7 C. & P. 479 564
Wakelin *v.* London and South Western Rail. Co. (1886), 12 App. Cas. 40; 56 L. J. (Q. B.) 229; 55 L. T. 709; 51 J. P. 404; 35 W. R. 141, C. A. . 434, 435
Walcot *v.* Hall (1788), 2 Bro. C. C. 305; 1 P. Wms. (6th ed.) 495, n . . 160, 161
——— *v.* Walker (1802), 7 Ves. 1 73
Waldridge *v.* Kennison (1794), 1 Esp. 143 457, 558
Waldron *v.* Sloper (1852), 1 Drew. 193 80
Waldy *v.* Gray (1875), L. R. 20 Eq. 238; 44 L. J. (CH.) 394; 32 L. T. 531; 23 W. R. 676 85, 519
Wales *v.* Wales, [1900] P. 63; 69 L. J. (P.) 34 452
Walford *v.* Fleetwood (1845), 14 M. & W. 449; 3 Dow. & L. 65; 14 L. J. (EX.) 271 487
Walker, *In the Estate of*, [1909] P. 115; 78 L. J. (P.) 50; 25 T. L. R. 278 . 503
——— *Re* (1871), 7 Ch. App. 120; 41 L. J. (CH.) 219; 25 L. T. 775; 20 W. R. 171 501
——— *Re*, *Re* Jackson (1885), 53 L. T. 660; 34 W. R. 95 504
——— *Re* (1910), 26 T. L. R. 260 395
——— *Re*, Mackintosh-Walker *v.* Walker, [1908] 2 Ch. 705; 77 L. J. (CH.) 755; 99 L. T. 469 104, 105
——— *v.* Beauchamp (Countess) (1834), 6 C. & P. 552 536
——— *v.* Clements (1850), 15 Q. B. 1046 163
——— *v.* Denne (1793), 2 Ves. 170 105, 107, 113
——— *v.* Fletcher (1804), 3 Bli. 172, n. 509
——— *v.* Jeffreys (1842), 1 Hare, 341 154
——— *v.* Lever, *Re* Appleby. *See* Appleby, *Re*, Walker *v.* Lever.
——— *v.* Linom, [1907] 2 Ch. 104; 76 L. J. (CH.) 500; 97 L. T. 92 . 80, 88
——— *v.* Nisbet, *Re* Appleby. *See* Appleby, *Re*, Walker *v.* Nisbet.
——— *v.* Poole (1882), 21 Ch. D. 835; 51 L. J. (CH.) 840 626
——— *v.* Richardson (1837), 2 M. & W. 882; Murp. & H. 251; 6 L. J. (EX.) 229 375
——— *v.* Symonds (1818), 3 Swan. 1 172
——— *v.* Webb (1797), 3 Anst. 941 588
——— *v.* Willoughby (1816), 6 Taunt. 530 390
——— *v.* Wilsher (1889), 23 Q. B. D. 335; 58 L. J. (Q. B.) 501; 54 J. P. 213; 37 W. R. 723, C. A. 457, 558, 559
——— *v.* Wingfield (1812), 18 Ves. 443 537
Wall *v.* Colstead (1858), 2 De G. & J. 683; 4 Jur. (N. S.) 985; 6 W. R. 761 . 105
—— *v.* Thurborne (1686), 1 Vern. 355 70
Wallace, *Re*, *Ex parte* Campbell (1885), 15 Q. B. D. 213; 54 L. J. (Q. B.) 382; 53 L. T. 208; 2 Morr. 167, C. A. 546

PAGE
Wallace *v.* A.-G. (1865), 1 Ch. App. 1; 35 L. J. (CH.) 124; 13 L. T. 480; 11 Jur. (N. S.) 937; 14 W. R. 116 273, 274, 275, 276
——— *v.* Greenwood (1880), 16 Ch. D. 362; 50 L. J. (CH.) 289; 43 L. T. 720...114
——— *v.* Kelsall (1840), 7 M. & W. 264; 8 Dowl. 841; 10 L. J. (EX.) 12; 4 Jur. 1064 562
——— *v.* Pomfret (1805), 11 Ves. 542 139
——— *v.* Wallace (1896), 74 L. T. 253 534
Waller *v.* Atkinson, *Re* Atkinson. *See* Atkinson, *Re*, Waller *v.* Atkinson.
——— *v.* Dalt (1676), 1 Cas. in Ch. 276; Cas. *temp.* Finch, 295; 1 Eq. Cas. Abr. 90 71
——— *v.* Drakeford (1853), 1 E. & B. 749; 22 L. J. (Q. B.) 274; 17 Jur. 853 . 390, 393, 396
Wallgrave *v.* Tebbs (1855), 2 K. & J. 313 75
Wallinger *v.* Wallinger (1869), L. R. 9 Eq. 301; 22 L. T. 259; 18 W. R. 274 . 123
Wallingford *v.* Mutual Society (1880), 5 App. Cas. 685; 50 L. J. (Q. B.) 49; 43 L. T. 258; 29 W. R. 81 152
Wallis *v.* Hands, [1893] 2 Ch. 75; 62 L. J. (CH.) 586; 68 L. T. 428; 41 W. R. 471; 3 R. 351 376
——— *v.* Little (1862), 11 C. B. (N. S.) 369 567
——— *v.* Pipon (1753), Amb. 183 31
——— *v.* Smith (1882), 21 Ch. D. 243; 52 L. J. (CH.) 145; 47 L. T. 389; 31 W. R. 214, C. A. 432
——— *v.* Woodyear (1855), 2 Jur. (N. S.) 179 142
———, Son and Wells *v.* Pratt and Haines (1910), 26 T. L. R. 572; 103 L. T. 118, C. A. 448
Wallop's Trust, *Re* (1864), 1 De G. J. & Sm. 656; 5 New Rep. 679; 33 L. J. (CH.) 351; 10 L. T. 174; 10 Jur. (N. S.) 328; 12 W. R. 587, C. A. . 272, 274, 275, 276
Wallworth *v.* Holt (1841), 4 My. & Cr. 619 38
Wallwyn *v.* Lee (1803), 9 Ves. 24 76, 77
Walmsley *v.* Child (1749), 1 Ves. Sen. 341 26
Walpole *v.* Alexander (1782), 3 Doug. (K. B.) 45 586, 587
——— *v.* Conway (Lord), (1740), Barn. (CH.) 153 118
Walrond *v.* Fulford (1879), 11 Ch. D. 640; 48 L. J. (CH.) 602 113
——— *v.* Hawkins (1875), L. R. 10 C. P. 342; 44 L. J. (C. P.) 116; 32 L. T. 119; 23 W. R. 390 389
——— *v.* Rosslyn (1879), 11 Ch. D. 640; 48 L. J. (CH.) 602 113
Walsh *v.* Lonsdale (1882), 21 Ch. D. 9; 52 L. J. (CH.) 2, C. A. 65
Walshaw *v.* Brighouse Corporation, [1899] 2 Q. B. 286; 68 L. J. (Q. B.) 828; 81 L. T. 2; 47 W. R. 600; 15 T. L. R. 403, C. A. 449
Walter *v.* Everard, [1891] 2 Q. B. 369; 60 L. J. (Q. B.) 738; 65 L. T. 443; 55 J. P. 693; 39 W. R. 676, C. A. 371
——— *v.* Maunde (1815), 19 Ves. 424 105
Walters, *Re*, Neison *v.* Walters (1889), 61 L. T. 872; reversed (1890), 63 L. T. 328...357, 543
——— *v.* Rees (1819), 4 Moore (C. P.), 34 586, 588
——— *v.* Walters (1881), 18 Ch. D. 182; 50 L. J. (CH.) 819; 44 L. T. 769; 29 W. R. 888 36
Walthamstow Urban District Council *v.* Henwood, [1897] 1 Ch. 41; 66 L. J. (CH.) 31; 75 L. T. 375; 61 J. P. 23; 45 W. R. 124 557
Walton *v.* Lavater (1860), 8 C. B. (N. S.) 162; 29 L. J. (C. P.) 275; 6 Jur. (N. S.) 1251; 3 L. T. 272 413
——— *v.* Waterhouse (1672), 2 Wms. Saund. 415; 3 Keb. 40 373
Walton-cum-Trimley Manor, *Re*, *Ex parte* Tomline (1873), 28 L. T. 12; 21 W. R. 475 345, 346, 540
Want *v.* Moss (1894), 50 L. T. 178, P. C. 354, 356
Wappett *v.* Robinson, *Re* Steel. *See* Steel, *Re*, Wappett *v.* Robinson.
Warbrick *v.* Varley (No. 1) (1861), 30 Beav. 241 240, 241, 242, 257
Ward, *Re*, Simmons *v.* Rose, Weeks *v.* Ward (1862) 31 Beav. 8 515
——— *v.* Alpha Co., *Re* Alpha Co., Ltd. *See* Alpha Co., Ltd., *Re*, Ward *v.* Alpha Co.
——— *v.* Arch (1846), 15 Sim. 389 105, 108
——— *v.* Audland (1845), 8 Beav. 201 98
——— *v.* Baugh (1799), 4 Ves. 623 125
——— *v.* Duncombe, [1893] A. C. 369; 62 L. J. (CH.) 881; 69 L. T. 121; 42 W. R. 59 103
——— *v.* Gamgee (1891), 65 L. T. 610; 40 W. R. 39 628
——— *v.* Ryan (1875), 10 I. R. C. L. 17 403

PAGE
Ward *v.* Sinfield (1880), 49 L. J. (Q. B.) 696 ; 43 L. T. 252 602
—— *v.* Valletort Steam Laundry Co., Ltd., *Re* Valletort Steam Laundry Co., Ltd. *See* Valletort Steam Laundry Co., Ltd., *Re*, Ward *v.* Valletort Steam Laundry Co., Ltd.
Warde *v.* Warde (1852), 16 Beav. 103 140, 141
Wardell *v.* Fermor (1809), 2 Camp. 282 605
Ware *v.* Egmont (Lord) (1854), 4 De G. M. & G. 460 ; 24 L. J. (CH.) 361 ; 1 Jur. (N. S.) 97 ; 3 Eq. Rep. 1 ; 3 W. R. 48 86
—— *v.* Polhill (1805), 11 Ves. 257 148
Waring *v.* Lacey (1876), 24 W. R. 318 622
Warner *v.* Baynes (1750), Amb. 589 41
—— *v.* Mosses (1880), 16 Ch. D. 100 ; 50 L. J. (CH.) 28 ; 29 W. R. 201, C. A. 612, 613, 620
—— *v.* ——, [1881] W. N. 69, C. A. 626
Warner's Settled Estates, *Re*, Warner *v.* Steel (1881), 17 Ch. D. 711 ; 50 L. J. (CH.) 542 ; 45 L. T. 37 ; 29 W. R. 726 277, 300
Warren *v.* Baring Bros. & Co., Ltd. (1910), 54 Sol. Jo. 720 327, 407
—— *v.* Murray, [1894] 2 Q. B. 648 ; 64 L. J. (Q. B.) 42 ; 71 L. T. 458 ; 43 W. R. 3, C. A. 62
—— *v.* Rudall, *Ex parte* Godfrey (1860), 1 John. & H. 1 ; 29 L. J. (CH.) 543 ; 2 L. T. 693 ; 6 Jur. (N. S.) 395 ; 8 W. R. 331 117
—— *v.* Warren (1783), 1 Bro. C. C. 305 130
—— *v.* —— (1834), 1 Cr. M. & R. 250 ; 4 Tyr. 850 ; 3 L. J. (EX.) 294 . 441
Warren's Trusts, *Re* (1884), 26 Ch. D. 208 ; 53 L. J. (CH.) 787 ; 50 L. T. 454 ; 32 W. R. 641 119
Warrick *v.* Queen's College, Oxford (1871), 6 Ch. App. 716 ; 40 L. J. (CH.) 780 ; 25 L. T. 254 ; 19 W. R. 1098 59
—— *v.* Warrick (1745), 3 Atk. 291 85
Warriner *v.* Rogers (1873), L. R. 16 Eq. 340 ; 42 L. J. (CH.) 581 ; 28 L. T. 863 ; 21 W. R. 766 98
Warwick, *Re*, *Ex parte* Jackson (1839), Mont. & Ch. 263 604
Warwick Tyre Co., Ltd. *v.* New Motor and General Rubber Co., Ltd., [1910] 1 Ch. 248 ; 79 L. J. (CH.) 177 ; 101 L. T. 889 ; 27 R. P. C. 161 15
Wason *v.* Walter (1868), L. R. 4 Q. B. 73 ; 8 B. & S. 671 ; 38 L. J. (Q. B.) 34 ; 19 L. T. 409 ; 17 W. R. 169 485
Waterer *v.* Waterer (1873), L. R. 15 Eq. 402 ; 21 W. R. 508 308
Waterhouse *v.* Stansfield (1851), 9 Hare, 234 ; 21 L. J. (CH.) 881 ; 16 Jur. 1006 ; 1 W. R. 11 66
Waters *v.* Taylor (1813), 2 Ves. & B. 299 38, 39
—— *v.* Waters (1848), 2 De G. & Sm. 591 43, 327
Wathen *v.* Smith (1819), 4 Madd. 325 137, 138
Watherston's Trustees *v.* Lord Advocate (1901), 38 Sc. L. R. 324 ; 3 F. (Ct. of Sess.) 429 ; 8 Scots Law Times, 479 213, 228, 229
Watkins, *Re*, *Ex parte* Evans (1879), 13 Ch. D. 252 ; 49 L. J. (BCY.) 7 ; 41 L. T. 565 ; 28 W. R. 127, C. A. 56
—— *v.* Rymill (1883), 10 Q. B. D. 178 ; 52 L. J. (Q. B.) 121 ; 48 L. T. 426 ; 47 J. P. 357 ; 31 W. R. 337 448
Watson, *Ex parte*, *Re* Companies Acts. *See* Companies Acts, *Re*, *Ex parte* Watson.
——, *Re*, Turner *v.* Watson, [1896] 1 Ch. 925 ; 65 L. J. (CH.) 553 ; 74 L. T. 453 ; 44 W. R. 571 164
—— *v.* Dr. Jaeger's Sanitary Woollen System Co. (1897), 13 T. L. R. 150 . 444
—— *v.* England (1844), 14 Sim. 28 ; 8 Jur. 1062 502
—— *v.* Hayes (1839), 5 My. & Cr. 125 ; 9 Sim. 500 ; 9 L. J. (CH.) 49 . . 109
—— *v.* Inland Revenue Commissioners (1900), 16 Sheriff Court Reports, 235 . . . 194
—— *v.* King (1815), 1 Stark. 121 ; 4 Camp. 272 501, 542
—— *v.* —— (1846), 3 C. B. 608 462
—— *v.* Lane (1856), 11 Exch. 769 ; 25 L. J. (EX.) 101 ; 2 Jur. (N. S.) 119 ; 4 W. R. 293 404
—— *v.* McEwan, Watson *v.* Jones, [1905] A. C. 480 ; 74 L. J. (P. C.) 151 ; 93 L. T. 489 588
—— *v.* Reid (1830), 1 Russ. & M. 236 174
—— *v.* Rodwell (1878), 11 Ch. D. 150 ; 48 C. J. (CH.) 209 ; 39 T. L. 614 ; 27 W. R. 265, C. A. 517
—— *v.* Toone (1820), Madd. & G. 153 170, 173
—— *v.* Watson (1864), 33 Beav. 574 130, 131
Watt *v.* Assets Co., Bain *v.* Assets Co., [1905] A. C. 317 ; 74 L. J. (P. C.) 82 . 171

PAGE
Watt *v.* Watt, [1905] A. C. 115; 74 L. J. (K. B.) 438; 92 L. T. 480; 69 J. P. 249; 53 W. R. 547; 21 T. L. R. 386 558
Watts *v.* Ball (1708), 1 P. Wms. 108; 2 Eq. Cas. Abr. 727: cited 2 Vern. 681 . 96
——— *v.* Symes (1851), 1 De G. M. & G. 240; 16 Jur. 114, C. A. . . 147, 148
——— *v.* Watts (1873), L. R. 17 Eq. 217; 43 L. J. (CH.) 77; 29 L. T. 671; 22 W. R. 105 110
——— *v.* ——— (1867), 45 L. J. (CH.) 658; 24 W. R. 623, C. A. 629
Way *v.* Great Eastern Rail. Co. (1876), 1 Q. B. D. 692; 45 L. J. (Q. B.) 874; 35 L. T. 253 398
Waygood *v.* James (1869), L. R. 4 C. P. 361; 38 L. J. (C. P.) 195; 21 L. T. 202; 17 W. R. 824 328
Weall *v.* James (1893), 68 L. T. 515 336
——— *v.* Rice (1831), 2 Russ. & M. 251; 9 L. J. (O. S.) (CH.) 116 . 128, 129, 133, 136
Weaver *v.* Prentice and Pratt (1795), 1 Esp. 369 541
Weatherall, *Ex parte*, Middleton *v.* Pollock. *See* Middleton *v.* Pollock, *Ex parte* Weatherall.
Webb *v.* Austin (1844), 7 Man. & G. 701; 8 Scott (N. R.), 419; 13 L. J. (C. P.) 203 373, 403
——— *v.* Bird (1863), 15 C. B. (N. S.) 841; 31 L. J. (C. P.) 335; 8 Jur. (N. S.) 621...506
——— *v.* Catchlove (1886) 3 T. L. R. 159 573
——— *v.* East (1879), 5 Exch. 23; 49 L. J. (EX.) 250; 41 L. T. 715; 28 W. R. 336 575
——— *v.* Fox (1797), 7 Term Rep. 397 442
——— *v.* Haycock (1854), 19 Beav. 342 537
——— *v.* Herne Bay Commissioners (1870), L. R. 5 Q. B. 642; 39 L. J. (Q. B.) 221; 22 L. T. 745; 19 W. R. 241 371, 381
——— *v.* Page (1843), 1 Car. & Kir. 23 583
——— *v.* Shaftesbury (Earl) (1802), 7 Ves. 480 119, 158
——— *v.* Smith (1885), 30 Ch. D. 192; 55 L. J. (CH.) 343; 53 L. T. 737, C. A. 143, 144
——— *v.* Taylor (1843), 1 Dow. & L. 676; 13 L. J. (Q. B.) 24; 8 Jur. 39 . 586, 587
Webber, *Re*, Gribble *v.* Webber, [1896] 1 Ch. 914; 65 L. J. (CH.) 484; 74 L. T. 347; 45 W. R. 10 219, 231
Webster *v.* Armstrong (1885), 54 L. J. (Q. B.) 236; Cab. & El. 471 . 332, 334, 337
——— *v.* Birchmore (1807), 13 Ves. 362 501
——— *v.* Cecil (1861), 30 Beav. 62 23
Wedmore, *Re*, Wedmore *v.* Wedmore, [1907] 2 Ch. 277; 76 L. J. (CH.) 486; 97 L. T. 26; 23 T. L. R. 547 137
Weeding *v.* Weeding (1861), 1 John. & H. 424; 4 L. T. 616; 9 W. R. 131 . 111
Weeks *v.* Birch (1893), 69 L. T. 759 344, 373
——— *v.* Ward, Simmons *v.* Rose, *Re* Ward. *See* Ward, *Re*, Simmons *v.* Rose, Weeks *v.* Ward.
Wegg Prosser *v.* Evans, [1895] 1 Q. B. 108; 64 L. J. (Q. B.) 1; 72 L. T. 8; 43 W. R. 66; 9 R. 830, C. A. 336
——— *v.* Wegg Prosser, *Re* Somerscock. *See* Somerscock, *Re*, Wegg Prosser *v.* Wegg Prosser.
Weikersheim's Case (1873), 8 Ch. App. 831; 42 L. J. (CH.) 435; 28 L. T. 653; 21 W. R. 612 97
Weiner *v.* Gill, [1905] 2 K. B. 172; 74 L. J. (K. B.) 845; 92 L. T. 843; 53 W. R. 553; 21 T. L. R. 478; 10 Com. Cas. 213; affirmed, [1906] 2 K. B. 574; 75 L. J. (K. B.) 916; 95 L. T. 438; 22 T. L. R. 699; 11 Com. Cas. 240, C. A. 379, 393
——— *v.* Harris, [1910] 1 K. B. 285; 69 L. J. (K. B.) 342; 101 L. T. 647; 26 T. L. R. 96; 54 Sol. Jo. 81; 15 Com. Cas. 39, C. A. 393
Weir *v.* Lord Advocate (1865), 3 Macph. (Ct. of Sess.) 1006; 37 Sc. Jur. 522 . 264
Welby *v.* Rutland (Duke) (1773), 2 Bro. Parl. Cas. 39 49, 59
——— *v.* Welby (1813), 2 Ves. & B. 187 118, 120, 122, 123
Weld *v.* Baxter (1856), 1 H. & N. 568; 26 L. J. (EX.) 112; 3 Jur. (N. S.) 91; 5 W. R. 113 405
Well *v.* Bright (1820), 1 Jac. & W. 494 99
Weller *v.* Smeaton (1784), 1 Cox, Eq. Cas. 102; 1 Bro. C. C. 572 . . 49, 59
——— *v.* Spiers (1872), 26 L. T. 866; 20 W. R. 772 403
Wellesley *v.* Wellesley (1839), 4 My. & Cr. 561 140
Welstead *v.* Levy (1831), 1 Mood. & R. 138 428
Welton *v.* Taneborne (1908), 99 L. T. 668; 72 J. P. 419; 24 T. L. R. 873; 6 L. G. R. 891; 21 Cox, C. C. 702 331
Weniger's Policy, *Re*, [1910] 2 Ch. 291; 79 L. J. (CH.) 546; 102 L. T. 728 . 88
Wenlock (Baroness) *v.* River Dee Co. (1887), 19 Q. B. D. 155; 56 L. J. (Q. B.) 589; 57 L. T. 320; 35 W. R. 822, C. A. 150

PAGE
Wenman (Lady) *v.* Mackenzie (1855), 5 E. & B. 447; 25 L. J. (Q. B.) 44; 1 Jur. (N. S.) 1015; 3 W. R. 626 346, 545
Wentworth *v.* Lloyd (No. 2) (1865), 34 Beav. 455 616
West *v.* Baxendale (1850), 9 C. B. 141; 19 L. J. (C. P.) 149 431
——— *v.* Reid (1843), 2 Hare, 249; 12 L. J. (CH.) 245; 7 Jur. 147 86
——— *v.* Sackville (Lord), [1903] 2 Ch. 378; 72 L. J. (CH.) 649; 88 L. T. 814; 51 W. R. 625; 19 T. L. R. 541, C. A. 45, 46
——— *v.* Skip (1749) 1 Ves. Sen. 239 39
West Coast Gold Fields, Ltd., *Re*, Rowe's Trustee's Claim, [1906] 1 Ch. 1; 75 L. J. (CH.) 23; 93 L. T. 609; 54 W. R. 116; 22 T. L. R. 39, C. A. . . 164
West London Commercial Bank *v.* Kitson (1884), 13 Q. B. D. 360; 53 L. J. (Q. B.) 345; 50 L. T. 656; 32 W. R. 757, C. A. 378
——————————— *v.* Reliance Permanent Building Society (1885), 29 Ch. D. 954; 54 L. J. (CH.) 1081; 53 L. T. 442; 33 W. R. 916, C. A. . 83
West of England Bank, *Re*, *Ex parte* Brown (1879), 12 Ch. D. 823; 48 L. J. (CH.) 604; 41 L. T. 27; 27 W. R. 869 164
West of England and South Wales District Bank, *Re*, *Ex parte* Dale & Co. (1879), 11 Ch. D. 772; 48 L. J. (CH.) 600; 40 L. T. 712; 27 W. R. 815 . 159
Westbrook's Trusts, *Re*, [1873] W. N. 167 500
Western Bank of New York *v.* Koppel (1892), 8 T. L. R. 36, C. A. . . . 615
Western of Canada Oil, Lands and Works Co., *Re* (1877), 6 Ch. D. 109; 46 L. J. (CH.) 683; 25 W. R. 787 593, 617
Westmacott *v.* Westmacott, [1899] P. 183; 68 L. J. (P.) 63; 80 L. T. 632 . 535
Westoby *v.* Day (1853), 2 E. & B. 605; 22 L. J. (Q. B.) 418; 18 Jur. 10; 1 W. R. 431 486
Weston and Thomas's Contract, *Re*, [1907] 1 Ch. 244; 76 L. J. (CH.) 179; 96 L. T. 324 299
Weyman *v.* Smythies, *Re* Smythies. *See* Smythies, *Re*, Weyman *v.* Smythies.
Whaley *v.* Brancker (1864), 10 Jur. (N. S.) 535; 10 L. T. 155; 12 W. R. 570 . 509
——— *v.* Carlisle (1866), 17 I. C. L. R. 792; 15 W. R. 1183 . . . 477, 492
——— *v.* Dawson (1805), 2 Sch. & Lef. 367. 41
Whalley *v.* Pepper (1836), 7 C. & P. 506 588
Wharton, *Re* (1854), 5 De G. M. & G. 33; 23 L. J. (CH.) 522; 22 L. T. 298; 18 Jur. 289; 2 W. R. 248, C. A. 114
——— *v.* Mackenzie (1844), 5 Q. B. 606; Dav. & Mer. 544; 13 L. J. (Q. B.) 130; 8 Jur. 466 432
——— Peerage, The (1845), 12 Cl. & Fin. 295 543
Wheatley, *Re*, Smith *v.* Spence (1884), 27 Ch. D. 606; 54 L. J. (CH.) 201; 51 L. T. 681; 33 W. R. 275 126, 127
Wheeler *v.* Humphreys, [1898] A. C. 506; 67 L. J. (CH.) 499; 78 L. T. 799; 47 W. R. 17 188
Wheldale *v.* Partridge (1800), 5 Ves. 388 104, 105
——— *v.* ——— (1803), 8 Ves. 227 108, 110, 115, 116
Whichcote *v.* Lawrence (1798), 3 Ves. 740 157
Whicker *v.* Hume (1858), 7 H. L. Cas. 124; 28 L. J. (CH.) 396; 4 Jur. (N. S.) 933 554
Whiffen *v.* Hartwright (1848), 11 Beav. 112 557
Whincup *v.* Hughes (1871), L. R. 6 C. P. 78; 40 L. J. (C. P.) 104; 24 L. T. 74; 19 W. R. 439 28
Whipple *v.* Manley (1836), 1 M. & W. 432; 2 Gale, 56; 5 Dowl. 100; 1 Tyr. & Gr. 672; 5 L. J. (EX.) 191 543
Whistler *v.* Webster (1794), 2 Ves. 367 117, 118, 119, 124
Whiston's Settlement, *Re*, Lovatt *v.* Williamson, [1894] 1 Ch. 661; 63 L. J. (CH.) 273; 70 L. T. 681; 42 W. R. 327; 8 R. 175 94
Whitaker, *Re*, Whitaker *v.* Palmer, [1901] 1 Ch. 9; 70 L. J. (CH.) 6; 83 L. T. 449; 49 W. R. 106; 17 T. L. R. 24, C. A. 36
——— *v.* Forbes (1875), 1 C. P. D. 51; 45 L. J. (Q. B.) 140; 33 L. T. 582; 24 W. R. 241, C. A. 66
——— *v.* Wisbey (1852), 12 C. B. 44; 21 L. J. (C. P.) 116; 16 Jur. 411 . 487
Whitchurch *v.* Hide (1742), 2 Atk. 391 50
White, *Re*, Pennell *v.* Franklin, [1898] 1 Ch. 297; 67 L. J. (CH.) 139; 77 L. T. 793; 46 W. R. 247; affirmed, [1898] 2 Ch. 217; 67 L. J. (CH.) 502; 78 L. T. 770; 46 W. R. 676; 14 T. L. R. 503, C. A. . 233, 235
———, *Re*, White *v.* Edmond, [1901] 1 Ch. 570; 70 L. J. (CH.) 300; 84 L. T. 199; 49 W. R. 429 504
——— *v.* Cox (1876), 2 Ch. D. 387; 45 L. J. (CH.) 685; 34 L. T. 418 . . 548
——— *v.* Dowling (1845), 8 I. L. R. 128 544

PAGE
White *v.* Greenish (1861), 11 C. B. (N. S.) 209 ; 8 Jur. (N. S.) 563 . . 383, 385
——— *v.* Hall (1806), 12 Ves. 321 352
——— *v.* Harrow (1901), 50 W. R. 166 63
——— *v.* Ivory (1910), *Times*, April 28th 352
——— *v.* Lake (1868), L. R. 6 Eq. 188 241
——— *v.* Mellin, [1895] A. C. 154 ; 64 L. J. (CH.) 308 ; 72 L. T. 334 ; 59 J. P. 628 ; 43 W. R. 353 ; 11 R. 141 50
——— *v.* Morris (1852), 11 C. B. 1015 ; 21 L. J. (C. P.) 185 ; 16 Jur. 500 . . 544
——— *v.* Neaylon (1886), 11 App. Cas. 171 ; 55 L. J. (P. C.) 25 ; 54 L. T. 688 . 87
——— *v.* Peterborough (Bishop) (1818), 3 Swan. 109 55
——— *v.* Sharp (1844), 12 M. & W. 712 ; 1 Dow. & L. 1039 ; 1 Car. & Kir. 348 ; 13 L. J. (EX.) 215 ; 8 Jur. 344 552
——— *v.* White (1882), 22 Ch. D. 555 ; 52 L. J. (CH.) 232 ; 48 L. T. 151 ; 13 W. R. 451 119
——— and Smith's Contract, *Re*, [1896] 1 Ch. 637 ; 65 L. J. (CH.) 481 ; 74 L. T. 377 ; 44 W. R. 424 101
Whitechurch (George), Ltd. *v.* Cavanagh, [1902] A. C. 117 ; 71 L. J. (K. B.) 400 ; 50 W. R. 218 376, 377, 379, 381, 384, 385, 390, 411, 412
Whitehead *v.* Clifford (1814), 5 Taunt. 518 375
Whitehouse *v.* Partridge (1818), 3 Swan. 365 60
Whiteland *v.* Grant (1840), 4 Jur. 1061 579
Whitelegg, *In the Goods of*, [1899] P. 267 ; 68 L. J. (P.) 97 ; 81 L. T. 234 . 481, 489
Whiteley, *Re*, Whiteley *v.* London (Bishop) (1909), 101 L. T. 508 ; 26 T. L. R. 16, C. A. 242
Whitfield *v.* Aland (1849), 2 Car. & Kir. 1015 595
——— *v.* Fausset (1750), 1 Ves. Sen. 387 26, 518
Whiting *v.* Bassett (1872), L. R. 14 Eq. 70 ; 41 L. J. (CH.) 551 625
Whitley and Roberts' Arbitration, *Re*, [1891] 1 Ch. 558 ; 60 L. J. (CH.) 149 ; 64 L. T. 81 ; 39 W. R. 248 462
——— *v.* Whitley (1862), 31 Beav. 173 121, 126
Whitmore *v.* Farley (1881), 45 L. T. 99 ; 29 W. R. 825 ; 14 Cox, C. C. 617, C. A. 71, 73
——— *v.* Rook (1756), Say. 299 544
Whitmores (Edenbridge), Ltd. *v.* Stanford, [1909] 1 Ch. 427 ; 78 L. J. (CH.) 144 ; 99 L. T. 924 ; 25 T. L. R. 169 ; 53 Sol. Jo. 134 506
Whittaker, *Re*, Whittaker *v.* Whittaker (1882), 21 Ch. D. 657 ; 51 L. J. (CH.) 737 ; 46 L. T. 802 ; 30 W. R. 787 604
——— *v.* Jackson (1864), 2 H. & C. 926 ; 33 L. J. (EX.) 181 ; 11 L. T. 155 . 344, 356
——— *v.* Kershaw (1890), 45 Ch. D. 320 ; 60 L. J. (CH.) 9 ; 63 L. T. 203 ; 39 W. R. 23, C. A. 161, 337
Whittet *v.* Bush, *Re* Fry. *See* Fry, *Re*, Whittet *v.* Bush.
Whitton, *Ex parte*, *Re* Greaves. *See* Greaves, *Re*, *Ex parte* Whitton.
——— *v.* Russell (1739), 1 Atk. 448 13, 27
——— *v.* Whitton, [1900] P. 178 ; 69 L. J. (P.) 126 ; 64 J. P. 329 . . 535
Whittuck *v.* Waters (1830), 4 C. & P. 375 470, 538, 565
Whitty's Trust, *Re* (1875), 9 I. R. Eq. 41 105
Whitwham *v.* Piercy, *Re* Piercy. *See* Piercy, *Re*, Whitwham *v.* Piercy.
Whitwick *v.* Jermin. *See* Baden *v.* Pembroke (Earl).
Whitwood Chemical Co. *v.* Hardman, [1891] 2 Ch. 416 ; 60 L. J. (CH.) 428 ; 64 L. T. 716 ; 39 W. R. 433, C. A. 50
Whitworth *v.* Gaugain (1846), 1 Ph. 728 ; 15 L. J. (CH.) 433 ; 10 Jur. 531. . 79
——— *v.* Wright, *Re* Wright. *See* Wright, *Re*, Whitworth *v.* Wright.
Whyman *v.* Garth (1853), 8 Exch. 803 ; 17 Jur. 559 ; 22 L. J. (EX.) 316...511, 605, 606
Whyte *v.* Hallett (1859), 28 L. J. (EX.) 208 ; 7 W. R. 408 547
——— *v.* O'Brien (1824), 1 Sim. & St. 551 162
——— *v.* Whyte (1873), L. R. 17 Eq. 50 ; 43 L. J. (CH.) 104 ; 22 W. R. 180...129, 554
Wiedemann *v.* Walpole, [1891] 2 Q. B. 534 ; 60 L. J. (Q. B.) 762 ; 40 W. R. 114, C. A. 458, 459, 603
Wiedermann *v.* Walpole (1891), *Times*, June 15th 547
Wigens *v.* Cook (1859), 6 C. B. (N. S.) 784 ; 28 L. J. (C. P.) 312 ; 6 Jur. (N. S.) 72...578
Wiggins *v.* Horlock (1888), 39 Ch. D. 142, C. A. 136
Wigglesworth *v.* Dallison (1779), 1 Doug. (K. B.) 201 444, 567
Wigley *v.* Treasury (Solicitor), [1902] P. 233 ; 71 L. J. (P.) 115 ; 87 L. T. 745 . 535
Wigsell *v.* Wigsell (1825), 2 Sim. & St. 364 ; 4 L. J. (O. S.) (CH.) 84 . . . 147
Wihen *v.* Law (1821), 3 Stark. 63 537
Wilberforce *v.* Hearfield (1877), 5 Ch. D. 709 ; 46 L. J. (CH.) 584 ; 25 W. R. 861 529, 531

PAGE
Wilcocks *v.* Wilcocks (1706), 2 Vern. 558 ; 1 Eq. Cas. Abr. 26 140
Wilcox *v.* Smith (1857), 4 Drew. 40 ; 26 L. J. (CH.) 596 ; 3 Jur. (N. S.) 604 ; 5 W. R. 667 265, 266
Wild *v.* Stanham, *Re* Treasure. *See* Treasure, *Re*, Wild *v.* Stanham.
Wilde *v.* Gibson (1848), 1 H. L. Cas. 605 ; 12 Jur. 527 15
Wilder *v.* Pigott (1882), 22 Ch. D. 263 ; 52 L. J. (CH.) 141 ; 48 L. T. 112 ; 31 W. R. 377 127, 128
Wildes *v.* Russell (1866), L. R. 1 C. P. 722 ; 35 L. J. (M. C.) 241 ; 16 L. T. 478 ; 12 Jur. (N. S.) 645 ; 14 W. R. 796 326
Wilding *v.* Sanderson, [1897] 2 Ch. 534 ; 66 L. J. (CH.) 684 ; 77 L. T. 57 ; 45 W. R. 675, C. A. 23
Wiles *v.* Gresham (1854), 2 Drew. 258 ; 5 De G. M. & G. 770 ; 3 Eq. Rep. 116 ; 24 L. J. (CH.) 264 ; 3 W. R. 87, C. A. 140
——— *v.* Woodward (1850), 5 Exch. 557 ; 20 L. J. (EX.) 261 369
Wilkes *v.* Bodington (1707), 2 Vern. 599 77, 81
——— *v.* Collin (1869), L. R. 8 Eq. 338 ; 17 W. R. 878 147
Wilkins, *Re*, Wilkins *v.* Rotherham (1884), 27 Ch. D. 703 ; 54 L. J. (CH.) 188 ; 33 W. R. 42 242
——— *v.* Jadis (1831), 2 B. & Ad. 188 ; 1 Mood. & R. 41 ; 9 L. J. (O. S.) (K. B.) 173 495
Wilkinson, *Re* (1834), 1 Cr. M. & R. 142 ; 4 Tyr. 513 ; 3 L. J. (EX.) 236 ; *sub nom.* A.-G. *v.* Nash (1836), 1 M. & W. 237 ; 1 Tyr. & Gr. 584 ; 5 L. J. (EX.) 289 239
——— *v.* Barber (1872), L. R. 14 Eq. 96 ; 41 L. J. (CH.) 721 ; 26 L. T. 937 ; 20 W. R. 763 242
——— *v.* Blades, *Re* Lart. *See* Lart, *Re*, Wilkinson *v.* Blades.
——— *v.* Dent (1871), 6 Ch. App. 339 ; 40 L. J. (CH.) 253 ; 25 L. T. 142 ; 19 W. R. 611 118, 122
——— *v.* Ferniehough, *Re* Howe. *See* Howe, *Re*, Wilkinson *v.* Ferniehough.
——— *v.* Henderson (1833), 1 My. & K. 582 ; 2 L. J. (CH.) 190 39
——— *v.* Stoney (1839), 1 Jebb. & S. 509 430
Wilks *v.* Groom (1856), 2 Jur. (N. S.) 798 ; 4 W. R. 697 240
——— *v.* Wilks (1713), 5 Vin. Abr. 293 140
Willan *v.* Willan (1810), 16 Ves. 72 16
Willé *v.* St. John, [1910] 1 Ch. 325 ; 79 L. J. (CH.) 239 ; 102 L. T. 383 ; 26 T. L. R. 495 ; 54 Sol. Jo. 269, C. A. 101
Williams, *Ex parte*, R. *v.* Powell. *See* R. *v.* Powell, *Ex parte* Williams.
———, *Re*, Williams *v.* Williams, [1897] 2 Ch. 12 ; 66 L. J. (CH.) 485 ; 76 L. T. 600 ; 45 W. R. 519, C. A. 155
——— *v.* Baily (1866), L. R. 2 Eq. 731 127
——— *v.* Bartholomew (1798), 1 Bos. & P. 326. 405
——— *v.* Bayley (1866), L. R. 1 H. L. 200 ; 35 L. J. (CH.) 717 ; 14 L. T. 802 ; 12 Jur. (N. S.) 875 19
——— *v.* Broadhead (1827), 1 Sim. 151 ; 5 L. J. (O. S.) (CH.) 112 . . . 546
——— *v.* Burrell (1845), 1 C. B. 402 ; 9 Jur. 282 ; 14 L. J. (C. P.) 98 . . 373
——— *v.* Davis (1829), 2 Sim. 461 162
——— *v.* Eady (1893), 10 T. L. R. 41, C. A. 495
——— *v.* East India Co. (1802), 3 East, 192 499
——— *v.* Eyton (1859), 4 H. & N. 357 ; 28 L. J. (EX.) 176 ; 5 Jur. (N. S.) 770 ; 7 W. R. 291 552
——— *v.* Farrington (1789), 2 Cox, Eq. Cas. 202 ; 3 Bro. C. C. 38 . . . 575
——— *v.* Frere, *Re* Smith. *See* Smith, *Re*, Williams *v.* Frere.
——— *v.* Geaves (1838), 8 C. & P. 592 464
——— *v.* Gerry (1842), 10 M.& W. 296 ; 2 Dowl. (N. S.) 201 ; 11 L. J. (EX.) 385 517
——— *v.* Heales (1874), L. R. 9 C. P. 177 ; 43 L. J. (C. P.) 80 ; 30 L. T. 20 ; 22 W. R. 317 403
——— *v.* Hughes (1857), 24 Beav. 474 241
——— *v.* Innes (1808), 1 Camp. 364 462
——— *v.* Knight, *Re* Hodson. *See* Hodson, *Re*, Williams *v.* Knight.
——— *v.* Lake (1859), 2 E. & E. 349 ; 29 L. J. (Q. B.) 1 ; 1 L. T. 56 ; 6 Jur. (N. S.) 45 ; 8 W. R. 41 426
——— *v.* Lambe (1791), 3 Bro. C. C. 264 42, 77
——— *v.* Lucas (1789), 2 Cox, Eq. Cas. 160 93
——— *v.* Mayne (1867), I. R. 1 Eq. 519 127
——— *v.* Morgan (1850), 15 Q. B. 782 422
——— *v.* Munnings (1824), Ry. & M. 18 520

PAGE
Williams *v.* Pinckney (1897), 67 L. J. (CH.) 34; 77 L. T. 700, C. A. . . 367
——— *v.* Preston (1882), 20 Ch. D. 672; 51 L. J. (CH.) 927; 47 L. T. 265; 30 W. R. 555, C. A. 462
——— *v.* Quebrada Railway, Land and Copper Co., [1895] 2 Ch. 751; 65 L. J. (CH.) 68; 73 L. T. 397; 44 W. R. 76 573
——— *v.* Richardson (1877), 36 L. T. 505 358
——— *v.* St. George's Harbour Co. (1858), 2 De G. & J. 547 327
——— *v.* Star Newspaper Co., Ltd. (1908), 24 T. L. R. 297 573
——— *v.* Stern (1879), 5 Q. B. D. 409; 49 L. J. (Q. B.) 663; 12 L. T. 719; 28 W. R. 901, C. A. 165
——— *v.* Steward (1817), 3 Mer. 472 12
——— *v.* Thomas (1862), 2 Drew. & Sm. 29; 31 L. J. (CH.) 674; 7 L. T. 184; 8 Jur. (N. S.) 250; 10 W. R. 417 559
——— *v.* ——— [1909] 1 Ch. 713; 78 L. J. (CH.) 473; 100 L. T. 630, C. A. 42, 172
——— *v.* Wilcox (1838), 8 Ad. & El. 314; 3 Nev. & P. (Q. B.) 606; 1 Will. Woll. & H. 477 518
——— *v.* Williams (1841), 3 Beav. 547 488, 490
——— *v.* ——— (1881), 17 Ch. D. 437; 44 L. T. 573 86
——— *v.* ——— (1882), 20 Ch. D. 659; 51 L. J. (CH.) 385; 46 L. T. 275; 46 J. P. 726; 30 W. R. 438; 15 Cox, C. C. 39 210
Williams's Estate, *Re*, Williams *v.* Williams (1872), L. R. 15 Eq. 270; 42 L. J. (CH.) 158; 28 L. T. 17; 21 W. R. 160 36
Williamson, *Ex parte*, *Re* National Permanent Benefit Building Society. *See* National Permanent Benefit Building Society, *Re*, *Ex parte* Williamson.
——— *v.* Advocate-General (1843), 10 Cl. & Fin. 1; 13 Sim. 513 . . 264
——— *v.* Codrington (1750), 1 Ves. Sen. 511 97
——— *v.* Freer (1874), L. R. 9 C. P. 393; 43 L. J. (C. P.) 161; 30 L. T. 332; 22 W. R. 878 495
——— *v.* Gihon (1805), 2 Sch. & Lef. 357 20
——— *v.* Naylor (1838), 3 Y. & C. (EX.) 208 234
——— *v.* Rover Cycle Co., [1901] 2 I. R. 615, C. A. 507
Willingham *v.* Matthews (1815), 6 Taunt. 358 586, 587
Willis, *Re*, *Ex parte* Morier (1879), 12 Ch. D. 491; 49 L. J. (BCY.) 9; 40 L. T. 792; 28 W R. 235, C. A. 163
——— *v.* Bernard (1832), 1 Moo. & S. 584; 5 C. & P. 342; 1 L. J. (C. P.) 118; 8 Bing. 376 439
——— *v.* Jernegan (1741), 2 Atk. 251 16
——— *v.* Lovick, [1901] 2 K. B. 195; 70 L. J. (K. B.) 656; 84 L. T. 713; 49 W. R. 540 487
Willman *v.* Worrall (1838), 8 C. & P. 380 605, 607
Willmott *v.* Barber (1880), 15 Ch. D. 96; 43 L. T. 95; 28 W. R. 911 . 167, 396
——— *v.* Gardner, *Re* Anglesey (Marquis). *See* Anglesey (Marquis), *Re*, Willmott *v.* Gardner.
Willoughby *v.* Middleton (1862), 2 John. & H. 344; 31 L. J. (CH.) 683; 8 Jur. (N. S.) 1055; 6 L. T. 814; 10 W. R. 460 . . . 118, 121, 126
——— *v.* Willoughby (1756), 1 Term Rep. 763; 2 Ves. Sen. 684 . 76, 79, 83, 84
Wills *v.* Bourne (1873), L. R. 16 Eq. 487; 43 L. J. (CH.) 89 146
——— *v.* Palmer (1904), 53 W. R. 169 463, 500, 503
Willson *v.* Leonard (1840), 3 Beav. 373 97
——— *v.* Love, [1896] 1 Q. B. 626; 65 L. J. (Q. B.) 474; 74 L. T. 580; 44 W. R. 450, C. A. 432
Willyams *v.* Scottish Widows Fund Life Assurance Society (1888), 52 J. P. 471 . 502, 503
Wilmot *v.* Pike (1845), 5 Hare, 14; 9 Jur. 839 80, 81
Wilson *v.* Anderton (1830), 1 B. & Ad. 450; 9 L. J. (O. S.) (K. B.) 48 . . 406
——— *v.* Barton (1671), Nels. 148 151
——— *v.* Bennett (1904), 6 F. (Ct. of Sess.) 269 344
——— *v.* Butler (1838), 4 Bing. (N. C.) 748; 6 Scott, 540; 1 Arn. 333 . . 350
——— *v.* Coxwell (1883), 23 Ch. D. 764; 52 L. J. (CH.) 975 37
——— *v.* De Coulon (1883), 22 Ch. D. 841; 53 L. J. (CH.) 248; 48 L. T. 514; 31 W. R. 839 615
——— *v.* Fielding (1718), 2 Vern. 763; 10 Mod. Rep. 426; 1 Eq. Cas. Abr. 143 34
——— *v.* Harman (1755), 2 Ves. Sen. 672 29
——— *v.* Hart (1866), 1 Ch. App. 463; 35 L. J. (CH.) 569; 14 L. T. 499; 12 Jur. (N. S.) 460; 14 W. R. 748 86, 87, 101

PAGE
Wilson *v.* Hoare (1839), 10 Ad. & El. 236; 2 Per. & Dav. 659 . . . 432
——— *v.* Hodges (1802), 2 East, 312 502
——— *v.* Kelland, [1910] 2 Ch. 306; 79 L. J. (CH.) 580; 103 L. T. 17; 26 T. L. R. 485 88
——— *v.* Major (1805), 511 Ves. 205 109
——— *v.* Maryon-Wilson, *Re* Maryon-Wilson. *See* Maryon-Wilson, *Re*, Wilson *v.* Maryon-Wilson.
——— *v.* Moore (1834), 1 My. & K. 337 156
——— *v.* ——— (1864), 12 W. R. 1137 490
——— *v.* Northampton and Banbury Junction Rail. Co. (1874), 9 Ch. App. 279; 43 L. J. (CH.) 503; 30 L. T. 147; 22 W. R. 380 . . . 11
——— *v.* O'Leary (1874). L. R. 17 Eq. 419 242
——— *v.* Paul (1836), 8 Sim. 63 36
——— *v.* Rastall (1792), 4 Term Rep. 753 427, 572
——— *v.* Thornbury (1874), L. R. 17 Eq. 517; 43 L. J. (CH.) 356; 22 W. R. 509 608
——— *v.* ——— (1875), 10 Ch. App. 239; 44 L. J. (CH.) 242; 32 L. T. 350; 23 W. R. 329 15
——— *v.* Townsend (Lord John) (1795), 2 Ves. 693 127
——— *v.* Turner (1808), 1 Taunt. 398 462
——— *v.* West Hartlepool Rail. Co. (1864), 34 Beav. 187; affirmed (1865), 2 De G. J. & Sm. 475, C. A. 390
——— *v.* Wilson (1847), 1 De G. & Sm. 152; 11 Jur. 793 120
——— *v.* ——— (1872), L. R. 2. P. & D. 435 608
——— *v.* ——— (1883), 9 P. D. 8; 49 L. T. 430; 32 W. R. 282, C. A. . 611, 618
——— *v.* ———, [1903] P. 157; 72 L. J. (P.) 52; 89 L. T. 77 489
Wilton *v.* Webster (1835), 7 C. & P. 198 439
——— & Co. *v.* Phillips (1903), 19 T. L. R. 390 533
Wiltshire *v.* Rabbits (1844), 14 Sim. 76; 13 L. J. (CH.) 284; 8 Jur. 769 . . 80
Winans *v.* A.-G., [1904] A. C. 287; 73 L. J. (K. B.) 613; 90 L. T. 721; 20 T. L. R. 510 238
——— *v.* ———, [1910] A. C. 27; 79 L. J. (K. B.) 156; 101 L. T. 754; 26 T. L. R. 133; 54 Sol. Jo. 133 193, 215, 306, 309
Winchelsea (Earl) *v.* Norcliff (1688), Freem. (CH.) 95; 1 Vern. 403; 2 Rep. Ch. 374; 1 Eq. Cas. Abr. 262 149
Winchester (Bishop) *v.* Fournier (1752), 2 Ves. Sen. 445 53
——— *v.* Knight (1717), 1 P. Wms. 406; 2 Eq. Cas. Abr. 226 . 68
Windhill Local Board of Health *v.* Vint (1890), 45 Ch. D. 351; 59 L. J. (CH.) 608; 63 L. T. 366; 38 W. R. 738, C. A. 73
Winfield *v.* Shoolbred, [1880] W. N. 192 620
Wing *v.* Angrave (1860), 8 H. L. Cas. 183; 30 L. J. (CH.) 65 . . . 440, 503
——— *v.* Harvey (1854), 5 De G. M. & G. 265; 2 Eq. Rep. 533; 23 L. J. (CH.) 511; 18 Jur. 394; 2 W. R. 370, C. A. 386, 388
Wingfield, *Ex parte*, *Re* Florence. *See* Florence, *Re*, *Ex parte* Wingfield.
——— *v.* Erskine, *Re* Fludyer. *See* Fludyer, *Re*, Wingfield *v.* Erskine.
Winslow, *Re*, Frere *v.* Winslow (1890), 45 Ch. D. 249; 60 L. J. (CH.) 20; 63 L. T. 485; 39 W. R. 120 161
Winstone, *In the Goods of*, [1898] P. 143; 67 L. J. (P.) 76; 78 L. T. 535 . . 500
Winter *v.* Butt (1841), 2 Mood. & R. 357 600
——— *v.* Henn (1831), 4 C. & P. 494 455
——— *v.* Miles (1809), 10 East, 578; 1 Camp. 475, n. 485
——— *v.* Wroot (1834), 1 Mood. & R. 404 439
Wintle, *Re*, (1870), L. R. 9 Eq. 373; 21 L. T. 781; 18 W. R. 394 . . . 533
Wintour *v.* Clifton (1856), 8 De G. M. & G. 641; 21 Beav. 447 . . 121, 122, 125
Wisden *v.* Wisden (1849), 6 Hare, 549 579
Wishart *v* Lord Advocate (1880), 18 Sc. L. R. 62; 8 R. (Ct. of Sess.) 74 . . 313
Witham *v.* Taylor, Taylor *v.* Witham. *See* Taylor *v.* Witham, Witham *v.* Taylor.
Withers *v.* Kelsea (1670), 1 Cas. in Ch. 189; 3 Salk. 66 151
Wodehouse *v.* Scobell, *Re* Repington. *See* Repington, *Re*, Wodehouse *v.* Scobell.
Wogan *v.* Doyle (1883), 12 L. R. Ir. 69 403
Wolestoncroft *v.* Long (1663), 1 Cas. in Ch. 32; 3 Rep. Ch. 12 70
Wollaston *v.* Berkeley (1876), 2 Ch. D. 213; 45 L. J. (CH.) 772; 34 L. T. 171; 24 W. R. 360 503
——— *v.* King (1869), L. R. 8 Eq. 165; 38 L. J. (CH.) 392; 20 L. T. 1003; 17 W. R. 641 117, 118, 119
——— *v.* Tribe (1869), L. R. 9 Eq. 44; 21 L. T. 449; 18 W. R. 83 . . 25

PAGE
Wolmershausen *v.* Gullick, [1893] 2 Ch. 514; 62 L. J. (CH.) 773 . . 80, 52
Wolton *v.* Gavin (1850), 16 Q. B. 48; 20 L. J. (Q. B.) 73; 15 Jur. 329 . . 443
Wolverhampton Corporation *v.* Emmons, [1901] 1 K. B. 515; 70 L. J. (K. B.) 429; 84 L. T. 407; 49 W. R. 553; 15 T. L. R. 234, C. A. 12
Wolverton (Baron) *v.* A.-G., [1898] A. C. 535; 67 L. J. (Q. B.) 829; 79 L. T. 58; 62 J. P. 708; 47 W. R. 97; 14 T. L. R. 519 . . 226, 267, 268, 270, 280, 293
Womersley, *Re*, Etheridge *v.* Womersley (1885), 29 Ch. D. 557; 54 L. J. (CH.) 965; 53 L. T. 260; 33 W. R. 935 33
——— *v.* Dally (1857), 26 L. J. (EX.) 219 445
——— *v.* Horsnaill, *Re* Horsnaill. *See* Horsnaill, *Re*, Womersley *v.* Horsnaill.
Wood *v.* Abrey (1818), 3 Madd. 417 21
——— *v.* Braddick (1807), 1 Taunt. 104 461
——— *v.* Briant (1742), 2 Atk. 521 139
——— *v.* Cooper (1845), 1 Car. & Kir. 645 595
——— *v.* Cox (1888), 4 T. L. R. 550 454
——— *v.* Drury (1699), 1 Ld. Raym. 734 605
——— *v.* Durham (1888), 21 Q. B. D. 501; 57 L. J. (Q. B.) 547; 59 L. T. 142; 37 W. R. 222 454
——— *v.* Harpur (1840), 3 Beav. 290 628
——— *v.* Mackinson (1840). 2 Mood. & R. 273 597
——— *v.* Stenning, *Re* Stenning. *See* Stenning, *Re*, Wood *v.* Stenning.
——— *v.* Wood (1844), 7 Beav. 183 142
Woodcock *v.* Houldsworth (1846), 16 M. & W. 124; 16 L. J. (EX.) 49 . . 556
Woodfine, *Re*, Thompson *v.* Woodfine (1878), 47 L. J. (CH.) 832; 38 L. T. 753; 26 W. R. 678 598
Woodgate *v.* Knatchbull (1787), 2 Term Rep. 148 360
Woodhouse *v.* Balfour (1887), 13 P. D. 2; 57 L. J. (P.) 22; 58 L. T. 59; 52 J. P. 7; 36 W. R. 368 506
Woodhouselee (Lord) *v.* Dalrymple (1861), 30 L. J. (CH.) 607; 4 L. T. 455; 7 Jur. (N. S.) 615; 9 W. R. 564, C. A. 502
Woodley *v.* Coventry (1863), 2 H. & C. 164; 32 L. J. (EX.) 185; 8 L. T. 249; 9 Jur. (N. S.) 548; 11 W. R. 599 386, 387, 408
Woodward *v.* Buchanan (1870), L. R. 5 Q. B. 285; 39 L. J. (Q. B.) 71; 22 L. T. 123 452
——— *v.* Eastern Counties and London and Blackwall Rail. Co. (1855), 1 Jur. 899 558
——— *v.* Goulstone (1886), 11 App. Cas. 469; 56 L. J. (P.) 1; 55 L. T. 790; 51 J. P. 307; 35 W. R. 337 472
Wooldridge *v.* Norris (1868), L. R. 6 Eq. 410; 37 L. J. (CH.) 640; 19 L. T. 144 31, 51
Woollett *v.* Roberts (1665), 1 Cas. in Ch. 64; Nels. 102; 1 Eq. Cas. Abr. 227 . 543
Woolridge *v.* Woolridge (1859), John. 63; 5 Jur. (N. S.) 566 119
Woolway *v.* Rowe (1834), 1 Ad. & El. 114; 3 Nev. & M. (K. B.) 849; 3 L. J. (K. B.) 121 442, 460, 540
Wordsworth *v.* Sugden (No. 2) (1888), 32 Sol. Jo. 743 619
Working Men's Mutual Society, *Re* (1882), 21 Ch. D. 83; 51 L. J. (CH.) 850; 47 L. T. 645; 30 W. R. 938 578, 579, 583, 622
Works and Public Buildings Commissioners, *Ex parte*, *Re* Mills' Estate. *See* Mills' Estate, *Re*, *Ex parte* Works and Public Buildings Commissioners.
Worman *v.* Worman (1889), 43 Ch. D. 296; 61 L. T. 637; 38 W. R. 442 . 330, 335
Worrall *v.* Jacob (1817), 3 Mer. 256 25
Worsley *v.* Scarborough (Earl) (1746), 3 Atk. 392 85
Worthington *v.* Moore (1891), 64 L. T. 338 511, 604
——— *v.* Morgan (1849), 16 Sim. 547; 18 L. J. (CH.) 233; 13 Jur. 316 . 88
——— *v.* Wiginton (1855), 20 Beav. 67 125, 126
Wortley *v.* Birkhead (1754), 2 Ves. Sen. 571 81, 83
Wrexham, Mold, and Connah's Quay Railway, *Re*, [1899] 1 Ch. 440; 68 L. J. (CH.) 270; 80 L. T. 130; 47 W. R. 464; 15 T. L. R. 122; 6 Mans. 218, C. A. . . . 150
Wride *v.* Clarke (1766), 1 Dick. 382 34
Wright, *Re*, Whitworth *v.* Wright, [1906] 2 Ch. 288; 75 L. J. (CH.) 500; 94 L. T. 696; 54 W. R. 515 119
——— *v.* Barnewall (1849), 19 L. J. (CH.) 38; 13 Jur. 1041 257
——— *v.* Beckett (1834), 1 Mood. & R. 414 600
——— *v.* Carter, [1903] 1 Ch. 27; 72 L. J. (CH.) 138; 87 L. T. 624; 51 W. R. 106; 19 T. L. R. 29, C. A. 19
——— *v.* Cobb (1885), 1 T. L. R. 555 607
——— *v.* Graham (1848), 3 Exch. 131; 18 L. J. (EX.) 29 552

PAGE
Wright *v.* Hunter (1801), 1 East, 20; 5 Ves. 792 30
——— *v.* London Omnibus Co. (1877), 2 Q. B. D. 271; 46 L. J. (Q. B.) 429; 36 L. T. 590; 25 W. R. 647 335, 337, 353
——— *v.* Maidstone (Lord) (1855), 1 K. & J. 701; 24 L. J. (CH.) 623; 1 Jur. (N. S.) 1013; 3 W. R. 613 26
——— *v.* Netherwood (1793), 2 Salk (6th ed.) 593, n. 503
——— *v.* Redgrave (1879), 11 Ch. D. 24; 40 L. T. 206; 27 W. R. 562, C. A. . 63
——— *v.* Rose (1825), 2 Sim. & St. 323 112
——— *v.* Sharman, *Re* Sharman. *See* Sharman, *Re*, Wright *v.* Sharman.
——— *v.* Doe d. Tatham (1834), 1 Ad. & El. 3; 3 Nev. & M. (K. B.) 268; 3 L. J. (EX.) 366 546, 547
——— *v.* ——— (1837), 7 Ad. & El. 313; 2 Nev. & P. (K. B.) 305; Will. Woll. & Dav. 539 423, 446, 448
——— *v.* Tatham (1838), 5 Cl. & Fin. 670; 4 Bing. (N. C.) 489; 6 Scott, 68; 2 Jur. 461 420, 459, 608
——— *v.* Vanderplank (1856), 8 De G. M. & G. 133; 2 K. & J. 1; 25 L. J. (CH.) 753; 2 Jur. (N. S.) 599; 4 W. R. 410, C. A. 18, 174
——— *v.* Ward (1827), 4 Russ. 215 58
——— *v.* Wilkin (1878), 4 Jur. (N. S.) 804; 6 W. R. 643 617
——— *v.* Wright (1750), 1 Ves. Sen. 409 102, 103
——— & Co. *v.* Mills (1890), 62 L. T. 558 427, 573
Wright's Trustees and Marshall, *Re* (1884), 28 Ch. D. 93; 54 L. J. (CH.) 60; 51 L. T. 781; 33 W. R. 304 193
Wrightson *v.* Macaulay (1845), 4 Hare, 487 106, 107
Wyatt, *In the Goods of*, [1898] P. 15; 67 L. J. (P.) 7; 78 L. T. 80; 46 W. R. 425 582, 583
——— *v.* Barwell (1815), 19 Ves. 435 86
——— *v.* Gore (1816), Holt (N. P.), 299 427
——— *v.* Hertford (Marquis) (1802), 3 East, 147 398
——— *v.* Palmer, [1899] 2 Q. B. 106; 68 L. J. (Q. B.) 709; 80 L. T. 639; 47 W. R. 549, C. A. 352, 542
Wyckoff, *In the Goods of* (1862), 3 Sw. & Tr. 20; 32 L. J. (P.) 214; 7 L. T. 565; 9 Jur. (N. S.) 84; 11 W. R. 218 309, 310
Wyllie *v.* Pollen (1863), 3 De G. J. & Sm. 596; 2 New Rep. 500; 32 L. J. (CH.) 782; 9 L. T. 71; 11 W. R. 1081 85
Wyndham *v.* Egremont (Earl) (1775), Amb. 753 147
——— *v.* Leconfield, *Re* Leconfield. *See* Leconfield, *Re*, Wyndham *v.* Leconfield.
Wynne *v.* Callander (1826), 1 Russ. 293 53, 54
——— *v.* Tyrwhitt (1821), 4 B. & Ald. 376 505, 512
Wynstanley *v.* Lee (1818), 2 Swan. 333 50
Wynter *v.* Orlebar, *Re* Orlebar. *See* Orlebar, *Re*, Wynter *v.* Orlebar.

X.

X. Y., *Re*, *Ex parte* Haes, [1902] 1 K. B. 98; 71 L. J. (K. B.) 102; 85 L. T. 564; 50 W. R. 182; 18 T. L. R. 66; 9 Mans. 5 574

Y.

YARMOUTH and Ventnor Rail. Co., *Re*, [1871] W. N. 236 525
Yates *v.* Kyffin Taylor, [1899] W. N. 141 344
——— *v.* Morton, *Re* Dodson. *See* Dodson, *Re*, Yates *v.* Morton.
——— *v.* Thomson (1835), 3 Cl. & Fin. 544 490
Yearsley *v.* Heane (1845), 14 M. & W. 322; 3 Dowl. 265 588
Yeatman *v.* Dempsey (1860), 7 C. B. (N. S.) 628; 29 L. J. (C. P.) 177; 1 L. T. 402; 6 Jur. (N. S.) 778; 8 W. R. 219; affirmed, 9 C. B. (N. S.) 881; 7 Jur. (N. S.) 1245; 9 W. R. 743 579, 590
Yeo *v.* Clemow, *Re* Clemow. *See* Clemow, *Re*, Yeo *v.* Clemow.
Yeomans and Heaps, *Ex parte*, *Re* Larrard. *See* Larrard, *Re*, *Ex parte* Yeomans and Heaps.
Yockney *v.* Hansard (1844), 3 Hare, 620 129
York Building Co. *v.* Mackenzie (1795), 8 Bro. Parl. Cas. 42 157
York Corporation *v.* Pilkington (1742), 1 Atk. 282; 9 Mod. Rep. 273. . . . 58
York Tramways *v.* Willows (1882), 8 Q. B. D. 685; 51 L. J. (Q. B.) 257; 46 L. T. 296; 30 W. R. 624, C. A. 389

PAGE
Yorke *v.* Smith (1851), 21 L. J. (Q. B.) 53 ; 16 Jur. 63 516
Young, *Ex parte*, *Re* Kitchen. *See* Kitchen, *Re*, *Ex parte* Young.
———, *Ex parte*, *Re* Quartz Hill etc. Co. *See* Quartz Hill etc. Co., *Re*, *Ex parte* Young.
——— *v.* Brassey (1875), 1 Ch. D. 277 ; 45 L. J. (CH.) 142 ; 24 W. R. 110 . . 625
——— *v.* Grote (1827), 4 Bing. 253 ; 12 Moore (C. P.), 484 . . . 392, 393, 400
——— *v.* Harris (1891), 65 L. T. 45 170
——— *v.* Holloway, [1895] P. 87 ; 64 L. J. (P.) 55 ; 72 L. T. 118 ; 43 W. R. 429 ; 11 R. 596 338
——— *v.* Payne & Co., *Re* Payne & Co., Ltd. *See* Payne & Co., Ltd., *Re*, Young *v.* Payne & Co.
——— *v.* Raincock (1849), 7 C. B. 310 ; 13 Jur. 539 ; 18 L. J. (C. P.) 193 . 368, 369
——— *v.* Schuler (1883), 11 Q. B. D. 651 ; 49 L. T. 546, C. A. 566
——— *v.* Young (1867), L. R. 3 Eq. 801 82
——— *v.* ——— (1871), 5 I. R. Eq. 615 141
——— (J. L.) Manufacturing Co., Ltd., *Re*, Young *v.* Young (J. L.) Manufacturing Co., Ltd., [1900] 2 Ch. 753 ; 69 L. J. (CH.) 868 ; 83 L. T. 418 ; 49 W. R. 115, C. A. 456, 482, 625, 626
Yrisarri *v.* Clement (1826), 11 Moore (C. P.), 308 ; 2 C. & P. 223 ; 3 Bing. 432 . 493

Z.

ZETLAND (Earl) *v.* Lord Advocate (1878), 3 App. Cas. 505 ; 38 L. T. 297 ; 26 W. R. 725 262, 267, 268, 270, 271
Zumbech *v.* Biggs (1900), 82 L. T. 654 ; 48 W. R. 507. 582

EQUITY.

PAGE

PART I. EQUITABLE JURISDICTION - - - - - - - 4

SECT. 1. NATURE AND EXTENT OF EQUITABLE JURISDICTION - 4

Sub-sect. 1. The Subjects of Equitable Jurisdiction - - 4
Sub-sect. 2. The Nature of Equity - - - - - - 6
Sub-sect. 3. The Exclusive Jurisdiction in Equity - - 9
Sub-sect. 4. The Concurrent Jurisdiction in Equity - - 10

(i.) Specific Performance - - - - - - - 11
(ii.) Fraud - - - - - - - - - - 13
(iii.) Extensions of Fraud - - - - - - - 15
(iv.) Mistake - - - - - - - - - 22
(v.) Accident - - - - - - - - - 25
(vi.) Account and Apportionment - - - - 27
(vii.) Contribution - - - - - - - - 30
(viii.) Administration - - - - - - - - 30
(ix.) Partnership - - - - - - - - 38
(x.) Determination of Boundaries - - - - 39
(xi.) Partition - - - - - - - - - 40
(xii.) Dower - - - - - - - - - 41

Sub-sect. 5. The Auxiliary Jurisdiction in Equity - - 42

(i.) Discovery - - - - - - - - - 43
(ii.) Perpetuation of Testimony and Suits *de bene esse* - 44
(iii.) Injunction - - - - - - - - - 46
(iv.) *Quia timet* Actions - - - - - - 51
(v.) Delivery up and Cancelling of Documents - - 52
(vi.) Receivers - - - - - - - - - 54
(vii.) Interpleader - - - - - - - - 56
(viii.) Bills of Peace - - - - - - - - 58
(ix.) *Ne exeat regno* - - - - - - - - 59

SECT. 2. THE PRESENT EXERCISE OF EQUITABLE JURISDICTION BY ALL DIVISIONS OF THE HIGH COURT - - - - - 61

PART II. PRINCIPLES AFFECTING RELIEF IN EQUITY - - 65

SECT. 1. EQUITY ACTS IN PERSONAM - - - - - - - 65

SECT. 2. EQUITY GIVES ACCOUNT OF PROFITS, NOT DAMAGES - 67

SECT. 3. EQUITY FOLLOWS THE LAW - - - - - - - 68

SECT. 4. EQUALITY IS EQUITY - - - - - - - - 69

SECT. 5. HE WHO SEEKS EQUITY MUST DO EQUITY. HE WHO COMES INTO EQUITY MUST COME WITH CLEAN HANDS- 70

SECT. 6. EQUITY LOOKS ON THAT AS DONE WHICH OUGHT TO BE DONE - - - - - - - - - - - - 73

SECT. 7. EQUITY DOES NOT ALLOW A STATUTE TO BE MADE AN INSTRUMENT OF FRAUD - - - - - - - - 75

SECT. 8. EQUITY FAVOURS A PURCHASER FOR VALUE WITHOUT NOTICE - - - - - - - - - - - 76

PART II. PRINCIPLES AFFECTING RELIEF IN EQUITY—*continued.* PAGE

SECT. 9. EQUITIES RANK IN ORDER OF TIME - - - - 79
SECT. 10. THE LEGAL ESTATE GIVES PRIORITY - - - - 81
SECT. 11. NOTICE - - - - - - - - - - 84

PART III. EQUITABLE INTERESTS IN PROPERTY - - - 88
SECT. 1. NATURE OF EQUITABLE ESTATES - - - - - 88
Sub-sect. 1. Trust Estates - - - - - - - 88
Sub-sect. 2. Equity of Redemption - - - - - 90
Sub-sect. 3. Equitable Securities - - - - - 92
Sub-sect. 4. Incidents of Equitable Estates - - - 93
Sub-sect. 5. Equitable Interests in Personal Property and under Contracts - - - - - - 96
Sub-sect. 6. Imperfect Gifts not Assisted - - - - 97
SECT. 2. EQUITABLE INTERESTS UNDER CONTRACTS OF SALE - 98
SECT. 3. RESTRICTIVE COVENANTS - - - - - - - 100

PART IV. EQUITABLE DOCTRINES AFFECTING PROPERTY - 102
SECT. 1. EQUITABLE ASSIGNMENTS - - - - - - - 102
SECT. 2. CONVERSION - - - - - - - - - - 104
SECT. 3. ELECTION - - - - - - - - - - 116
SECT. 4. SATISFACTION - - - - - - - - - 128
SECT. 5. PERFORMANCE - - - - - - - - - 139
SECT. 6. MARSHALLING - - - - - - - - - 142
SECT. 7. MERGER OF ESTATES AND CHARGES - - - - 146
SECT. 8. SUBROGATION - - - - - - - - - 149

PART V. EQUITABLE RELIEF AGAINST PENALTIES AND FORFEITURES - - - - - - - - - 150
SECT. 1. PENALTIES - - - - - - - - - - 150
SECT. 2. FORFEITURES - - - - - - - - - 153

PART VI. EQUITABLE RELIEF IN CASES OF FIDUCIARY RELATIONSHIP - - - - - - - - - 154
SECT. 1. THE FIDUCIARY CHARACTER - - - - - - 154
Sub-sect. 1. Express, Constructive, and Resulting Trusts - 154
Sub-sect. 2. Fiduciary Relationship - - - - - 156
SECT. 2. DISABILITY OF TRUSTEE TO PURCHASE - - - - 156
SECT. 3. DISABILITY OF TRUSTEE TO MAKE A PROFIT - - 158
SECT. 4. FOLLOWING ASSETS - - - - - - - - 159

PART VII. EQUITABLE DEFENCES - - - - - - - 161
SECT. 1. EQUITABLE SET-OFF - - - - - - - - 161
SECT. 2. RELEASE AND WAIVER - - - - - - - - 164
SECT. 3. ACQUIESCENCE - - - - - - - - - 166
SECT. 4. LACHES - - - - - - - - - - 168
SECT. 5. ANALOGY OF THE STATUTES OF LIMITATION - - - 174

For Administration - - - *See title* EXECUTORS AND ADMINISTRATORS.
Administration of Assets - ,, BANKRUPTCY AND INSOLVENCY; COMPANIES; EXECUTORS AND ADMINISTRATORS.

For Advancements	*See title*	DESCENT AND DISTRIBUTION; INFANTS AND CHILDREN; TRUSTS AND TRUSTEES; WILLS.
Anticipation, Restraint on	,,	HUSBAND AND WIFE; PERPETUITIES; PERSONAL PROPERTY; REAL PROPERTY AND CHATTELS REAL; TRUSTS AND TRUSTEES.
Appointment	,,	POWERS.
Assignment of Choses in Action	,,	CHOSES IN ACTION.
Cancellation of Deeds	,,	DEEDS AND OTHER INSTRUMENTS; MISREPRESENTATION AND FRAUD; MISTAKE; SALE OF LAND.
Capital and Income	,,	REAL PROPERTY AND CHATTELS REAL; TRUSTS AND TRUSTEES; WILLS.
Construction of Deeds	,,	DEEDS AND OTHER INSTRUMENTS.
Coverture	,,	HUSBAND AND WIFE.
Cy-près Doctrine	,,	CHARITIES; WILLS.
Defeasance	,,	BONDS; MORTGAGE; TRUSTS AND TRUSTEES.
Discovery and Inspection	,,	DISCOVERY.
Donatio Mortis Causâ	,,	GIFTS.
Duress	,,	CONTRACT; WILLS.
Equitable Assignments	,,	CHOSES IN ACTION; MORTGAGE.
Equitable Estoppel	,,	ESTOPPEL.
Equitable Execution	,,	EXECUTION.
Equitable Lien	,,	LIEN IN EQUITY.
Executors	,,	EXECUTORS AND ADMINISTRATORS.
Executory Devise	,,	REAL PROPERTY AND CHATTELS REAL; TRUSTS AND TRUSTEES; WILLS.
Fraud and Deceit	,,	FRAUDULENT AND VOIDABLE CONVEYANCES; MISREPRESENTATION AND FRAUD.
Income and Capital	,,	REAL PROPERTY AND CHATTELS REAL; TRUSTS AND TRUSTEES.
Infants	,,	INFANTS AND CHILDREN.
Injunction	,,	INJUNCTION.
Interpleader	,,	INTERPLEADER.
Interpretation of Wills	,,	WILLS.
Interrogatories	,,	DISCOVERY, INSPECTION, AND INTERROGATORIES.
Lunatics	,,	LUNATICS AND PERSONS OF UNSOUND MIND.
Married Women	,,	HUSBAND AND WIFE; REAL PROPERTY AND CHATTELS REAL.
Marshalling Assets and Securities	,,	BANKRUPTCY AND INSOLVENCY; EXECUTORS AND ADMINISTRATORS; MORTGAGE.
Mistake	,,	MISTAKE.
Mortgages	,,	MORTGAGE.
Mortmain	,,	CHARITIES; CORPORATIONS; REAL PROPERTY AND CHATTELS REAL.
Parent and Child	,,	INFANTS AND CHILDREN.
Partition	,,	PARTITION.
Partnership	,,	PARTNERSHIP.
Perpetuating Testimony	,,	EVIDENCE.
Receiver	,,	EXECUTION; RECEIVERS.
Rectification of Deeds	,,	MISREPRESENTATION AND FRAUD; MISTAKE; SALE OF LANDS.
Restraint on Alienation	,,	PERSONAL PROPERTY; REAL PROPERTY AND CHATTELS REAL; TRUSTS AND TRUSTEES.

For Separate Property of Married Women	*See title* PERSONAL PROPERTY; REAL PROPERTY AND CHATTELS REAL.
Set-off	,, SET-OFF AND COUNTERCLAIM.
Specific Performance	,, SPECIFIC PERFORMANCE.
Statute of Uses	,, REAL PROPERTY AND CHATTELS REAL; TRUSTS AND TRUSTEES.
Trusts and Trustees	,, TRUSTS AND TRUSTEES.
Unconscionable Bargains	,, FRAUDULENT AND VOIDABLE CONVEYANCES; MONEY AND MONEY-LENDING.
Undue Influence	,, CONTRACT; FRAUDULENT AND VOIDABLE CONVEYANCES; MISREPRESENTATION AND FRAUD; WILLS.
Uses and Trusts	,, REAL PROPERTY AND CHATTELS REAL; TRUSTS AND TRUSTEES.
Voluntary Conveyances	,, FRAUDULENT AND VOIDABLE CONVEYANCES.
Waste	,, REAL PROPERTY AND CHATTELS REAL.

Part I.—Equitable Jurisdiction.

SECT. 1.—*Nature and Extent of Equitable Jurisdiction.*

SUB-SECT. 1.—*The Subjects of Equitable Jurisdiction* (*a*).

The subjects of equitable jurisdiction.

1. Equity is the system of law which, prior to the fusion of law and equity effected by the Judicature Acts, 1873 and 1875, was administered in the Court of Chancery (*b*). In certain matters that

(*a*) Many of the subjects discussed in this article are dealt with in detail elsewhere under their special titles. The object here is to state the leading principles of equity, and the relation of equity to law at the present time. The Judicature Acts have emphasised, rather than diminished, the importance of the principles which made up the former system of equity jurisprudence; and these cannot be understood without frequent reference to the practice of the Court of Chancery, and the introduction of matters which may seem to be mainly of historical interest. An outline of equity which discarded the history of the system would be of little practical value.

(*b*) For a general description of the jurisdiction of courts of equity, see Mitford (Lord Redesdale) on Pleadings, 4th ed., pp. 4, 111; Fonblanque, Treatise of Equity, 5th ed., Vol. I., p. 9, n. (f); and as to the authority of Lord Redesdale's work, see *Lloyd* v. *Johnes* (1804), 9 Ves. 37, *per* Lord ELDON, L.C., at p. 54; *Cholmondeley* (*Marquis*) v. *Clinton* (*Lord*) (1820), 2 Jac. & W. 1, *per* PLUMER, M.R., at pp. 151, 152. The Court of Chancery had its origin in the reign of Edward II. or earlier, and was due to the deficiencies of the common law courts. By reason of violence these were not always able to secure the enforcement of their judgments; moreover, their rules were needlessly strict in some matters, and in others they gave no remedy at all. In cases where the courts were thus at fault petitions for redress were presented to the King or his Council, and convenience required that these should be dealt with by a special tribunal. For this purpose the Chancellor and the officials in the Chancery—chief among them the Master of the Rolls—were available. They formed under the early Plantagenet kings an important department of state; they were intrusted with the issue of the original writs which set the ordinary courts in motion; and the Chancellor, as a member of the Council, already exercised to some extent an ordinary jurisdiction similar to that of the common law courts, which was the foundation of the subsequent common law jurisdiction of the Court of

Chancery (4 Co. Inst. 79, 80; Spence, Vol. I., p. 336; Kerly, History of Equity, pp. 52—56; Holdsworth, History of English Law, Vol. I., pp. 200, 235). It was not unnatural that to the Chancellor should fall the extraordinary jurisdiction which was needed to assist, correct, or supplement the jurisdiction of the ordinary courts.

The separate existence of the Court of Chancery probably arose from the practice of petitions being referred from the Council to the Chancellor. This was done under Edward I.; the Chancery was becoming an independent court under Edward II. and Edward III.; and from the latter reign onwards its existence was fully established and its progress continuous (see Pollock and Maitland, History of English Law, 2nd ed., Vol. I., pp. 193, 196, 197; Kerly, History of Equity, pp. 27—31; "Common Law and Conscience in Chancery," Law Quarterly Review, Vol. I., p. 443; Baild., pp. xv., xlv.; Holdsworth, History of English Law, Vol. I., pp. 196—199; Spence, Vol. I., p. 335). In 1349 (22 Edw. 3) the King issued a proclamation to the sheriffs of London directing, *inter alia*, that "matters of grace" should be referred to the Chancellor (Kerly, History of Equity, p. 31), and in 1394 recourse to the new tribunal was so frequent that the stat. 17 Ric. 2, c. 6 (1394), inflicted damages on plaintiffs for false claims in Chancery. In this reign, or perhaps earlier, the writ of subpœna was introduced, and the defendant was bound by it to answer the plaintiff's complaint (Spence, Vol. I., p. 345; Baild., p. xiv.).

The encroachments of the Court of Chancery, and the use of the writ of subpœna were a matter of continual, though ineffectual, protest in Parliament throughout the fifteenth century (Kerly, History of Equity, pp. 37—45). But in addition to the original reasons for the establishment of the court it had by its recognition and enforcement of trusts, in their old form of uses (Holdsworth, History of English Law, Vol. I., p. 238), rendered services to society of vast importance, and it had become impossible to dispense with it. The sixteenth century found it in similar conflict with the common law courts over the right which it claimed to override their judgments by injunction (see Kerly, History of Equity, Vol. I., pp. 89, 107—117); and the conflict was not terminated until James I. decided in favour of the Court of Chancery (*Oxford's (Earl) Case* (1615), 1 Rep. Ch. 1; 1 White & Tud. L. C., 7th ed., p. 730). The reports commence in the middle of the same century and incorporate a few rulings of earlier date, and thenceforward the system of equity jurisdiction was continuously developed under the Chancellors, of whom the most illustrious were Sir Heneage Finch (Lord Nottingham), 1673—1682 (see 3 Bl. Com. 55; 4 *ibid.* 435), known as the "father of equity" (1 Maddock, Practice of Chancery, 3rd ed., p. xix.); Lord Hardwicke, 1737—1756 (see Butler's (Charles) Reminiscences, Vol. I., s. xi., 2, 4th ed., p. 132; *Goodtitle* v. *Otway* (1797), 7 Term Rep. 399, 416, Ex. Ch.; *Ex parte Greenway* (1802), 6 Ves. 812); Lord Thurlow, 1778—1792; and Lord Eldon, 1801—6; 1807—27. During all this period the procedure in Chancery was based on orders issued in 1617 by Lord Bacon (see Kerly, History of Equity, p. 104).

For about a century relief corresponding to that in Chancery was given to poor suitors in the Court of Requests. This was established in the reign of Henry VIII., and notwithstanding that it incurred the jealousy of the common law courts and was decided to be illegal (*Stepney* v. *Lloyd* (1598), Cro. Eliz. 647; *Derby's (Earl) Case* (1614), 12 Co. Rep. 114; *Penson* v. *Cartwright* (1614), Cro. Jac. 345; *Calmady's Case* (1640), Cro. Car. 595), it continued till it was abolished by statute in 1640 (Holdsworth, History of English Law, Vol. I., p. 210; 3 Bl. Com. 50). There was also an equity side to the Court of Exchequer, but this jurisdiction was transferred to the Court of Chancery by the Court of Chancery Act, 1841 (5 Vict. c. 5), s. 1. And equitable jurisdiction was exercised by the courts of Wales and of the counties palatine, and by other local courts (Spence, Vol. I., p. 352). The courts of the County Palatine of Chester and of Wales were abolished by the Law Terms Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 70), s. 14. As to the Chancery Courts of Lancaster and Durham, see title COURTS, Vol. IX., pp. 120—127. For further authorities as to the early history of the Court of Chancery, see Ashb., p. 25. The power of assisting the common law courts by punishing violent interference with their process appears to have been transferred to the Star Chamber when that tribunal was instituted under Henry VII. (Ashb., p. 27; Baild., p. xx.).

The jurisdiction of the Chancellor was often delegated to the Master of the

SECT. 1. Nature and Extent of Equitable Jurisdiction.

court enforced rights which were not in general (*c*) recognised at law, as in trusts, married women's settled property, and equities of redemption; or gave relief where no relief was available at law, as in relief against penalties and forfeitures. This was known as the exclusive jurisdiction in equity. In other matters the Court of Chancery enforced rights which were also recognised at law; and it then either gave an alternative and usually a more efficient remedy, as in contract (with the alternative remedy of specific performance), fraud, mistake, account, partition and partnership; or supplied a remedy to replace a legal remedy which had been lost, as where by accident a plaintiff had lost the means of asserting his remedy at law. This was known as the concurrent jurisdiction. There was also the auxiliary jurisdiction in equity; and in exercising this the Court of Chancery did not in general itself decide upon the rights of the parties, but afforded the benefit of its special procedure either (1) to facilitate the determination of the rights of the parties in other courts, as where it compelled discovery of facts or documents, or entertained suits to perpetuate testimony; or (2) to secure to the plaintiff, if successful, the fruits of the litigation, as where it protected property pending litigation by the appointment of a receiver, or prevented irreparable damage by granting injunctions to restrain the assertion of doubtful rights; or (3) to prevent injury to a third person from the conflicting rights of others, as in interpleader. Moreover, the Court of Chancery exercised an overriding jurisdiction by preventing proceedings in the common law courts from being made the instrument of oppression: this it did by restraining the commencement or prosecution of such proceedings, or the enforcement of judgments under them, as the case might require.

SUB-SECT. 2.—*The Nature of Equity.*

The nature of equity.

2. Early authorities refer to "conscience," "reason," and "good faith" as the principles which guided the Court of Chancery, and the term "equity" implies a system of law which is more consonant than the ordinary law with opinions current for the time being as to a just regulation of the mutual rights and duties of men

Rolls, who thus became the deputy of the Chancellor (Holdsworth, History of English Law, Vol. I., p. 214; Kerly, History of Equity, pp. 60, 127), and in time exercised a regular jurisdiction, subject to appeal to the Chancellor (see stat. (1729—30) 3 Geo. 2, c. 30, repealed by Civil Procedure Acts Repeal Act, 1879 (42 & 43 Vict. c. 59)). The first Vice-Chancellor was appointed in 1813, and two more were added in 1842 by the Court of Chancery Act, 1841 (5 Vict. c. 5). As to the staff of the court, and as to the defects in its organisation and its reconstitution in the nineteenth century, see Holdsworth, History of English Law, Vol. I., pp. 217 *et seq.*; Kerly, History of Equity, pp. 59, 127; and compare *Ex parte The Six Clerks* (1798), 3 Ves. 589, 599, 600; Masters of the Chancery, Hargrave's Law Tracts, Vol. I., p. 293. In 1852 the masters were abolished; the Master of the Rolls and the Vice-Chancellors were empowered to sit in chambers, and two chief clerks were assigned to each; and conveyancing counsel to the court were appointed (Court of Chancery Act, 1852 (15 & 16 Vict. c. 80)); as to taxing masters, see *Silkstone and Haigh Moor Coal. Co.* v. *Edey*, [1901] 2 Ch. 652, 655, C. A. See, as to the present organisation, title COURTS, Vol. IX., pp. 60, 67, 68.

(*c*) As to devises of equitable estates, see note (*u*), p. 94, *post*.

living in a civilised society (*d*). But there was never a time in the history of the court when the Chancellor was at liberty to follow generally either his own, or professional, or common opinions as to what was right and convenient. Law and the administration of law are, in all systems, intended as a means of attaining justice, but the means are imperfect. The special imperfections of mediæval common law were, as to the law itself, that its rules were too strict (*e*), and that it did not cover the whole field of obligations; as to its administration, that it had no effectual means of extracting truth from the parties, that its judgments were not capable of being adapted to meet special circumstances, and that they were often unenforceable through the opposition of the defendant, or were turned into a means of oppression.

The Court of Chancery, in so far as it remedied these defects, afforded an improved system of attaining justice, but this was the extent of the difference between law and equity (*f*). Each had the

(*d*) Baild., p. xxx.; Spence, Vol. I., pp. 408, n. (a), 411, 415, n. (b). A writ from Henry V. to the Chancellor in 1419 directs him to do both right and equity (Baild., p. xxx.). Compare the words in 7 Edw. 4 (Close Rolls), xxxi., "according to equity and conscience and to the old course and laudable custom of the same court" (cited in Holdsworth, History of English Law, Vol. I., p. 202). But in general, when the word "conscience" was used, this denoted the conscience of the defendant, and the court by decree *in personam* prevented his making an unconscionable use of his rights at common law. This was the ground of injunctions against enforcing judgments at law. "When a judgment is obtained by oppression, wrong, and a hard conscience, the Chancellor will frustrate and set it aside, not for any error or defect in the judgment, but for the hard conscience of the party" (*Oxford's (Earl) Case* (1615), 1 Rep. Ch. 1; 1 White & Tud. L. C., 7th ed., p. 730). And the correction of the conscience of the defendant was the ground of the interference of equity in cases of fraud, breach of trust, and wrong and oppression generally.

(*e*) Thus there could be no action on a bond, if lost, since production of the bond was at law essential; and, on the other hand, an obligor, who paid the debt, but took no receipt and left the bond outstanding, was liable to pay over again (Doctor and Student, p. 42). The necessity for equity to correct the excessive strictness of the law was usually put upon the ground that the law was concerned with general rules and could not adapt itself to particular circumstances: "The cause why there is a Chancery is for that men's actions are so divers and infinite, that it is impossible to make any general law which may aptly meet with every particular act, and not fail in some circumstances" (*per* Lord ELLESMERE, L.C., in *Oxford's (Earl) Case, supra*); see Doctor and Student, p. 52.

(*f*) Law and equity, it was said by Lord ELLESMERE, L.C., have both the same end, which is to do right (*Oxford's (Earl) Case, supra*), and in some matters, especially in regard to titles to equitable estates, equity followed the law implicitly. Where it differed from the law, this was in order to moderate its rigour; to supply its omissions; to assist the legal remedy; or to relieve against the evasion of the law, or the abuse of the legal right (*Dudley (Lord)* v. *Dudley (Lady)* (1705), Prec. Ch. 241, 244; *Cowper* v. *Cowper (Earl)* (1734), 2 P. Wms. 720). It moderated its rigour by giving relief against forfeitures or the loss of documents; it supplied its omissions by exacting conscientious conduct from the defendant when the law recognised no binding obligation; it assisted the legal remedy by discovery and the preservation of property *pendente lite;* it relieved against the evasion of the law by removing technical impediments, such as a satisfied term which prevented dower from attaching; and it relieved against the abuse of the legal right by granting injunctions to restrain the enforcement of unconscientious judgments. In early days the power or number of the defendants frequently called for the intervention of equity to assist the law, and a relic of this existed in the common clause in equity bills charging combination

SECT. 1. Nature and Extent of Equitable Jurisdiction.

same object; each attained it only imperfectly—equity somewhat less imperfectly than law. Both, moreover, were developed in the same way, by decisions given in accordance with precedents and subject to professional criticism. From the beginning the Court of Chancery acted on the maxim that "equity follows the law," and in cases where the legal analogy clearly applied the rule of law was adopted however harsh it might be (*g*).

As to matters not ordinarily dealt with at common law, such as trusts and legacies, equity was free to go to new sources of law, and the Roman law and the canon law were laid under contribution (*h*); and for a time, in laying the foundations of a new system of jurisprudence, the Chancellors acted, when necessary, on their own initiative, and made precedents. But they made as few innovations on the common law as possible, and the usual course was to disclaim the free following of any such notion as natural justice and to adhere to precedents (*i*). By the time that Lord Eldon's chancellorship closed equity was a system of rules as well

and conspiracy which lasted until the nineteenth century (Mitford on Pleadings, p. 40). As to the early records of the Court of Chancery, see Baild., and as to the grounds of the jurisdiction and the subjects originally dealt with, see Kerly, History of Equity, pp. 70—93, 129—153; Holdsworth, History of English Law, Vol. I., pp. 237 *et seq.*

(*g*) *Bath* (*Earl*) v. *Sherwin* (1710), 10 Mod. Rep. 1, *per* Lord COWPER, L.C., at p. 3; and see p. 68, *post*. A judge in equity cannot "alter the maxims of the common law, for this would be to assume a power paramount to the law." Thus, as pointed out in that case, equity did not interfere with the singularly harsh doctrine of collateral warranty (Cary, 6, and see Co. Litt. 373 a, b). The doctrine was abolished by 4 Ann. c. 16, s. 21, see Rawle on Covenants for Title, s. 8. Equity did not allow money to be followed, as against the heir, into land purchased with it (*Townsend* v. *Kilmurrey* (1637), Toth. 121; see *Buxton* v. *Snee* (1748), 1 Ves. Sen. 154; Spence, Vol. I., p. 417). But in some matters equity exercised a jurisdiction corrective of the common law (Spence, Vol. I., p. 409), and at a late date it created the doctrine of separate property of married women in violation of common law principles (*ibid.*, p. 419).

(*h*) The exclusion of the Roman law from the common law courts was not followed in Chancery (Spence, Vol. I., p. 346), though the extent to which it was really used there has been disputed (see Kerly, History of Equity, p. 189).

(*i*) "With such a conscience as is only *naturalis* and *interna* this court has nothing to do; the conscience by which I am to proceed is merely *civilis et politica*, and tied to certain measures" (*Cook* v. *Fountain* (1676), 3 Swan. 585, *per* Lord NOTTINGHAM, L.C., at p. 600). "Though proceedings in equity are said to be *secundum discretionem boni viri*, yet, when it is asked, *vir bonus est quis?* the answer is, *qui consulta patrum, qui leges juraque servat*" (*Cowper* v. *Cowper* (*Earl*) (1734), 2 P. Wms. 720, *per* JEKYLL, M.R., at p. 753). And as to the influence of precedents in Chancery, see Kerly, History of Equity, pp. 100, 184; Spence, Vol. I., p. 416. In *Fry* v. *Porter* (1670), 1 Mod. Rep. 300, the question was raised whether, since equity was a universal truth, there could be a precedent for it (*per* VAUGHAN, C.J., p. 307). But of course equity is not of this nature, and Lord Keeper BRIDGMAN put the matter on a practical ground: "Certainly precedents are very necessary and useful to us, for in them we may find the reasons of the equity to guide us; and besides the authority of those who made them is much to be regarded" (*ibid.*). Lord MACCLESFIELD's opinion was, "never to shake any settled resolution touching property or the title of land, it being for the common good that these should be certain and known, however ill-grounded the first resolution should be" (*Wagstaff* v. *Wagstaff* (1724), 2 P. Wms. 258; compare *Sparrow* v. *Hardcastle* (1754), Amb. 224, 227; and Lord NOTTINGHAM in *Pitt* v. *Hunt* (1681), 1 Vern. 18, approving a saying attributed to WALTER, C.B.: "It is no matter what the law is, so it be known what it is." See Maddock, Chancery Practice, 3rd ed., Vol. I., p. xiii.

settled as ever the common law had been (*j*), and it had become incapable of judicial alteration except by the application of old rules to new subjects or to fresh circumstances, a process that is continually going on both at law and in equity (*k*). At the end of the eighteenth century an effort was made by Lord Mansfield and other common law judges to introduce equitable principles into the common law courts, but this was viewed with jealousy in the Court of Chancery (*l*), and on most points the common law courts reverted to their former rules (*m*).

SUB-SECT 3.—*The Exclusive Jurisdiction in Equity* (*n*).

Trusts.

3. Trusts formed the leading subject-matter of the exclusive jurisdiction in equity (*o*), and the jurisdiction extended beyond express trusts to constructive and resulting trusts, and to rights and obligations arising out of fiduciary relationship generally (*p*). Charities constituted a special class of trust, and fell within this jurisdiction (*q*). The recognition of trusts resulted in the creation of equitable interests in property, and as to these equity had exclusive jurisdiction, though in general it dealt with them in accordance with the rules applicable at common law to legal interests.

Married women's separate estate.

4. Where property was given in trust for a married woman, equity allowed it to be settled on her as separate estate and subject to a restraint on anticipation (*r*); and even where there was no trust, equity, if the property was intended for her separate use, produced the same effect by treating the husband as a trustee for her (*s*).

Equitable assignments.

5. Choses in action and contingent or expectant interests in real property were not assignable at law, but were assignable

(*j*) *Gee* v. *Pritchard* (1818), 2 Swan. 402, *per* Lord ELDON, L.C., at p. 414: "The doctrines of this court ought to be as well settled, and made as uniform almost as those of the common law, laying down fixed principles, but taking care that they are to be applied according to the circumstances of each case"; *Davis* v. *Marlborough* (*Duke*) (1819), 2 Swan. 108, 163; see Kerly, History of Equity, p. 167; and see *ibid.*, pp. 184—263, for a detailed account of the growth of modern equity.

(*k*) As to modern rules of equity, see *Re Hallett's Estate, Knatchbull* v. *Hallett* (1880), 13 Ch. D. 696, C. A., *per* JESSEL, M.R., at p. 710.

(*l*) See *Cooth* v. *Jackson* (1801), 6 Ves. 12, 39.

(*m*) See Ashb., pp. 15, 16. But the action to recover money paid by mistake, or obtained by improper means, which was in the nature of an equitable action, became established at law (*Moses* v. *Macferlan* (1760), 2 Burr. 1005); see p. 22, *post*.

(*n*) Technically the distinction between the exclusive, the concurrent, and the auxiliary jurisdiction—a distinction never very clearly established in certain details—is obsolete. But references to it are still of frequent occurrence in judgments, and it is retained here as the most convenient way of showing the scope of equitable jurisdiction.

(*o*) As to the refusal of the common law courts to recognise trusts, and the consequent rise of this exclusive jurisdiction, see p. 89, *post*.

(*p*) See p. 154, *post*; and title TRUSTS AND TRUSTEES.

(*q*) See title CHARITIES, Vol. IV., p. 294.

(*r*) See *Jones* v. *Harris* (1804), 9 Ves. 486, 493; *Tullett* v. *Armstrong* (1838), 1 Beav. 1, 21; *Vaughan* v. *Vanderstegen* (1854), 2 Drew. 363; *Taylor* v. *Meads* (1865), 4 De G. J. & Sm. 597; and see title HUSBAND AND WIFE.

(*s*) *Bennet* v. *Davis* (1725), 2 P. Wms. 316; see *Lucas* v. *Lucas* (1738), 1 Atk. 270; *Graham* v. *Londonderry* (1746), 3 Atk. 393.

SECT. 1. Nature and Extent of Equitable Jurisdiction.

in equity on the ground that the assignment, either in form or in effect, amounted to a declaration of trust, with authority for the assignee to make use of the name of the assignor to obtain the benefit of the assignment (*t*).

Application of equitable doctrines.

Conversion etc.

6. As regards claims to property generally, when they had once come, upon the ground of trust or otherwise, within its jurisdiction, equity applied its own peculiar doctrines in order to adjust the rights of the parties in accordance with the intention of settlors and testators, or to prevent injustice. Hence the exclusive jurisdiction included the application of the doctrines of conversion, election, satisfaction, and marshalling of assets and securities, and the enforcement of a wife's equity to a settlement.

Relief against forfeitures.

7. The strictness of the common law in enforcing penalties and forfeitures led to the intervention of equity in order to give relief in certain circumstances; and to this head of the jurisdiction may be referred the equitable relief against the forfeiture of mortgaged property which gave rise to the equity of redemption, and resulted in conferring upon equity a jurisdiction, which was practically exclusive, in adjusting the rights and liabilities of mortgagor and mortgagee. In addition to equities arising out of legal mortgages, equity recognised and enforced mortgages unaccompanied by the legal estate—whether mortgages of the equity of redemption or charges—and certain kinds of non-possessory liens, which were known as equitable liens (*u*).

SUB-SECT. 4.—*The Concurrent Jurisdiction in Equity.*

Grounds of the concurrent jurisdiction.

8. In certain matters which were ordinarily the subject of jurisdiction at law, equity exercised a concurrent jurisdiction. This was based on various circumstances—that the legal remedy was not available, that the equitable remedy was more efficient, or that the procedure in equity afforded advantages which were not attainable at law. In addition, the Court of Chancery could mould its decrees so as to adjust the rights of the parties in a manner not practicable at law, and, by bringing all the parties interested before it, could avoid multiplicity of suits (*v*). Upon some one or more of these considerations was based the jurisdiction in specific performance; fraud, mistake, and accident; account; contribution; administration of estates; partnership; determination of boundaries; partition; and dower. In tithes, and in dealing with the effects of deceased persons, the jurisdiction in equity was concurrent with that of the ecclesiastical courts.

In cases of concurrent jurisdiction, where proceedings were

(*t*) See Co. Litt. 232 b, n. (1); Story, s. 1040; and title CHOSES IN ACTION, Vol. IV., p. 374.

(*u*) See titles LIEN; MORTGAGE. As to the jurisdiction of equity in regard to infants, see title INFANTS AND CHILDREN. The Court of Chancery, as such, had no jurisdiction in regard to lunatics.

(*v*) Thus, where an heir was liable to a claim against his ancestor, but had a right to be reimbursed out of the personal estate, multiplicity of suits was avoided by bringing both heir and executor before the court (*Knight* v. *Knight* (1734), 3 P. Wms. 331).

pending at law, the Court of Chancery did not interfere unless it had better means of doing justice between the parties than a court of law; either because it could give a more perfect remedy, or because the nature of the case admitted of its being better tried by the procedure in equity than at law (*a*). Where the action at law was on an instrument or judgment, and the defence was fraud, this was a question which, under the later procedure at law, could be better tried there, and the Court of Chancery, although it had complete jurisdiction in such a case, refused to interfere (*b*).

But where jurisdiction in equity had once been assumed, because there was no adequate remedy at law, such jurisdiction was not lost upon the common law courts obtaining an equivalent jurisdiction (*c*).

(i.) *Specific Performance* (*d*).

Specific performance.

9. Where a contract is not duly performed on one side the normal remedy is an action at law to recover damages for breach of contract; but if this were the only remedy, it would always be at the option of the defaulting party either to perform his contract or to pay damages. In many cases damages are an adequate remedy, and the exercise of this option does no injury to the other party. But in cases where the remedy of damages was not adequate (*e*), equity in very early times (*f*) assumed jurisdiction to deprive the defaulting party of this option and to compel him to carry his contract into effect. The remedy of specific performance is peculiar to equity, but it is exercised in respect of a subject-matter—contract—which is equally within the cognisance of courts of common law; and the foundation of the equitable jurisdiction is that the remedy at law is inadequate (*g*). Originally,

(*a*) *Ochsenbein* v. *Papelier* (1873), 8 Ch. App. 695, 697.

(*b*) *Ibid.*; *Hoare* v. *Bremridge* (1872), 8 Ch. App. 22.

(*c*) "It does not follow, because the court of law will give relief, that this court loses the concurrent jurisdiction which it has always had," see *Atkinson* v. *Leonard* (1791), 3 Bro. C. C. 218, 224 (lost bonds); *Kemp* v. *Pryor* (1802), 7 Ves. 237 (money had and received); *British Empire Shipping Co.* v. *Somes* (1857), 3 K. & J. 433 (bill for discovery).

(*d*) See title SPECIFIC PERFORMANCE.

(*e*) "The court gives specific performance instead of damages only when it can by that means do more perfect and complete justice" (*Wilson* v. *Northampton and Banbury Junction Rail. Co.* (1874), 9 Ch. App. 279, *per* Lord SELBORNE, L.C., at p. 284).

(*f*) Kerly, History of Equity, p. 147; Fry on Specific Performance, 4th ed., ss. 33 *et seq.*; Baild., p. xxxv.

(*g*) *Harnett* v. *Yielding* (1805), 2 Sch. & Lef. 549, *per* Lord REDESDALE, L.C., at p. 553. The question whether or not specific performance will be enforced does not depend on whether the subject-matter of the contract is real or personal property, but on the inadequacy of the remedy at law; though usually this is inadequate in the case of realty and adequate in the case of personalty (*Adderley* v. *Dixon* (1824), 1 Sim. & St. 607, *per* LEACH, V.-C., at p. 610; and see title SPECIFIC PERFORMANCE). Thus specific performance does not lie upon a contract to purchase stock which is readily procurable in the open market (*Cuddee* v. *Rutter* (1719), 1 P. Wms. 570); but it lies for the delivery of certificates of stock (*Doloret* v. *Rothschild* (1824), 1 Sim. & St. 590), or on a contract for sale of personal chattels which cannot be readily replaced (see *Arundell (Lady)* v. *Phipps* (1804), 10 Ves. 139, 148), including shares in companies as opposed to

SECT. 1. Nature and Extent of Equitable Jurisdiction.

indeed, the plaintiff was required to establish his legal title by recovering damages on the contract at law before he came into equity (*h*); and specific performance was granted as a better remedy on the legal title (*i*), and, in strictness, it assumed that the contract could be sued on at law (*k*). But the remedy was not confined to cases where the plaintiff could sue at law, and it might be given where he had forfeited his legal remedy by not himself observing the contract in all respects (*l*), or where he had not acquired a remedy in consequence of the contract not complying with the Statute of Frauds. In the latter case a court of equity might dispense with the statute where there had been part performance, and, in suitable circumstances, specifically enforce the parol agreement (*m*); and this jurisdiction is now exercised by the High Court.

Delivery of chattels.

10. Analogous to the jurisdiction in specific performance, though not arising out of contract, was the jurisdiction to compel the specific delivery of chattels. This was exercised in cases where chattels were wrongfully withheld and the plaintiff could not be adequately compensated by damages (*n*). The appropriate remedy at common

public stocks (*Duncuft* v. *Albrecht* (1841), 12 Sim. 189; *Cheale* v. *Kenward* (1858), 3 De G. & J. 27), or where for any other reason damages will not place the innocent party in as advantageous a position as if the contract had been performed (*Buxton* v. *Lister* (1746), 3 Atk. 383); and though a contract involving the performance of work will not in general be specifically enforced, in consequence of the inability of the court to superintend the performance, yet this objection will not prevail if the contract is definite and damages are not an adequate remedy, and if the defaulting party has obtained possession of the subject-matter of the contract (*Wolverhampton Corporation* v. *Emmons*, [1901] 1 K. B. 515, C. A.; compare *Mosely* v. *Virgin* (1796), 3 Ves. 184).

There was at one time a notion that a court of equity, if it refused specific performance, might give compensation for the breach of contract (*Denton* v. *Stewart* (1786), 1 Cox, Eq. Cas. 258; *Greenaway* v. *Adams* (1806), 12 Ves. 395); but this was overruled (*Todd* v. *Gee* (1810), 17 Ves. 273; *Sainsbury* v. *Jones* (1839), 5 My. & Cr. 1; see *Aberaman Ironworks* v. *Wickens* (1868), L. R. 5 Eq. 485, 514). However, statutory power to give damages in addition to or in lieu of specific performance was conferred on the Court of Chancery by the Chancery Amendment Act, 1858 (21 & 22 Vict. c. 27), s. 2. This is repealed, but the jurisdiction was preserved by the Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Vict. c. 49), and the same power now exists also under the Judicature Acts; see p. 51, *post*.

(*h*) Before Lord Somers' time the party was sent to law, and the bill for specific performance was only entertained if he got damages (*Dodsley* v. *Kinnersley* (1761), Amb. 403, 406; see *Normanby* (*Marquis*) v. *Devonshire* (*Duke*) (1697), Freem. (CH.) 216; and as to the separation of courts of law and equity, see 1 Butler's (Charles) Reminiscences, s. III., 4).

(*i*) *Halsey* v. *Grant* (1806), 13 Ves. 73, 76; *Alley* v. *Deschamps* (1806), 13 Ves. 225, 229.

(*k*) *Williams* v. *Steward* (1817), 3 Mer. 472, 491; see *Cannel* v. *Buckle* (1724), 2 P. Wms. 243, where the jurisdiction to enforce an agreement to convey land in consideration of marriage was affirmed.

(*l*) *Davis* v. *Hone* (1805), 2 Sch. & Lef. 341, 347; *Lennon* v. *Napper* (1802), 2 Sch. & Lef. 682, 684.

(*m*) *Cooth* v. *Jackson* (1801), 6 Ves. 12, 27; see *Clinan* v. *Cooke* (1802), 1 Sch. & Lef. 22, 40; *Maddison* v. *Alderson* (1883), 8 App. Cas. 467, 479; *McManus* v. *Cooke* (1887), 35 Ch. D. 681, 697; and as to the policy of setting aside the statute, see *Lindsay* v. *Lynch* (1804), 2 Sch. & Lef. 1, 5.

(*n*) *Fells* v. *Read* (1796), 3 Ves. 70; see *Lloyd* v. *Loaring* (1802), 6 Ves. 773; *Lowther* v. *Lowther* (1806), 13 Ves. 95.

law was an action of detinue, but in this the defendant might either return the chattel or pay the assessed value (*o*). Where the chattel could be replaced, the payment of the value was a compensation to the plaintiff; but where the article was unique in its nature (*p*), or where it was associated with rights in real estate (*q*), damages were not a compensation, and equity supplied the deficiency of the common law remedy by requiring the chattel to be returned. There was additional reason for the interference of equity where the chattel was withheld in breach of trust (*r*).

(ii.) *Fraud* (*s*).

Fraud.

11. A court of equity has jurisdiction to relieve against every species of fraud (*t*), except that, where a will or a part of a will of personal estate has been procured by fraud, the matter is within the exclusive cognisance of the probate court, which, on proof of the fraud, will refuse probate of the will or will grant probate with the impugned part omitted, as the case may require (*a*); unless, indeed, the fraud is such as can properly be relieved against by allowing the will to stand and declaring the fraudulent legatee to be a trustee for the beneficiary intended by the testator (*b*). In the case of real estate the will might formerly be set aside at law on the issue *devisavit vel non*, and the Court of Chancery had no authority to set aside a will of land without a trial at law (*c*); but as regards real estate also the proper court in which to contest the will is now the probate court—that is, the Probate, Divorce, and Admiralty Division of the High Court of Justice (*d*).

Remedies for fraud.

12. Actual fraud was cognisable at law either as the ground of an action—in an action of deceit—or by way of defence, as where

(*o*) This option was taken away by the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 78, and the defendant in the common law action could be compelled to return the chattel. As to delivery of chattels due under contract, see Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 52. As to the power of the High Court to order specific delivery of chattels, see R. S. C., Ord. 48, and title EXECUTION.

(*p*) *Somerset* (*Duke*) v. *Cookson* (1735), 3 P. Wms. 390; *contra*, where the plaintiff had himself, in effect, placed a price on the article (*Dowling* v. *Betjemann* (1862), 2 John. & H. 544).

(*q*) *Pusey* v. *Pusey* (1684), 1 Vern. 273 (the Pusey horn, a chattel held as an incident of tenure); *Jackson* v. *Butler* (1742), 2 Atk. 306 (mortgage deeds); *Macclesfield* (*Earl*) v. *Davis* (1814), 3 Ves. & B. 16.

(*r*) *Fells* v. *Read* (1796), 3 Ves. 70.

(*s*) See title MISREPRESENTATION AND FRAUD.

(*t*) *Chesterfield* (*Earl*) v. *Janssen* (1751), 2 Ves. Sen. 125; *Hoare* v. *Bremridge* (1872), 8 Ch. App. 22, 26; see *Hanington* v. *Du Chastel* (1781), cited 2 Swan. 159, n; *St. Aubyn* v. *Smart* (1867), L. R. 5 Eq. 183. Fraud, trust, and accident were frequently referred to as the matters with which equity was specially conversant (*Man* v. *Ward* (1741), 2 Atk. 228; Hargrave, Law Tracts, p. 431).

(*a*) *Kerrich* v. *Bransby* (1727), 7 Bro. Parl. Cas. 437; *Allen* v. *Macpherson* (1842), 1 Ph. 133; (1847) 1 H. L. Cas. 191; *Meluish* v. *Milton* (1876), 3 Ch. D. 27, C. A. A distinction has been taken where probate has been obtained by fraud, and it has been said that in this case equity would interfere (*Barnesly* v. *Powel* (1749), 1 Ves. Sen. 284; *Price* v. *Dewhurst* (1838), 4 My. & Cr. 76).

(*b*) *Allen* v. *Macpherson*, *supra*; see judgment of Lord LYNDHURST, L.C., and cases there referred to. Compare *Whitton* v. *Russell* (1739), 1 Atk. 448.

(*c*) *Kerrich* v. *Bransby*, *supra*; *Allen* v. *Macpherson*, *supra*.

(*d*) See Court of Probate Act, 1857 (20 & 21 Vict. c. 77), ss. 61, 62; Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1 (3); and see title WILLS.

SECT. 1. Nature and Extent of Equitable Jurisdiction.

fraud was given in evidence to support a plea of *non est factum* to a deed; and the jurisdiction in equity was concurrent (*e*). The appropriate court was determined by the procedure and by the nature of the remedy.

As regards procedure equity was originally the better court, both for the plaintiff, because he could get discovery and relief at the same time, and for the defendant, because he could clear himself on oath (*f*), a privilege denied to him at law till 1851 (*g*). Moreover, in equity presumption of fraud could be acted on, when at law strict proof would be required (*h*).

As regards remedy the plaintiff was at law restricted to damages; in equity, while he could not get damages, he could obtain the rescission of a contract, or the setting aside of a deed or other instrument and the restitution of property, with any pecuniary adjustment that might be necessary on either side by way of accounting for profits or allowance for depreciation (*i*).

Nature of fraud.

An action of damages for deceit requires that actual fraud shall be proved. There is no such thing as an equitable action for deceit (*k*). But the court has never ventured to lay down as a general proposition what constitutes fraud (*l*). Actual fraud arises from acts and circumstances of imposition (*m*). It usually takes either the form of a statement of what is false or a suppression of what is true. A statement—*suggestio falsi*—is not necessarily fraudulent because it is untrue. To constitute fraud the person making the statement must either know it to be untrue, or make it without belief in its truth, or make it recklessly, careless whether it be true or false (*n*). The withholding of information—*suppressio veri*—is not in general fraudulent unless there is a special duty to disclose it (*o*); but the partial statement of fact, and the withholding of

(*e*) As to the extent of the concurrence, see *Hoare* v. *Bremridge* (1872), 8 Ch. App. 22.

(*f*) *Evans* v. *Bicknell* (1801), 6 Ves. 174, 184.

(*g*) Evidence Act, 1851 (14 & 15 Vict. c. 99), s. 2.

(*h*) *Man* v. *Ward* (1741), 2 Atk. 228; *Fullagar* v. *Clark* (1812), 18 Ves. 481, 483; see *Trenchard* v. *Wanley* (1723), 2 P. Wms. 166, 167.

(*i*) *Erlanger* v. *New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218, 1278. Restitution of property can be obtained from the holder of it, though he was no party to the fraud (*Bridgeman* v. *Green* (1757), Wilm. 58; *Smith* v. *Kay* (1859), 7 H. L. Cas. 750, 759), unless he has acquired it in such a manner as to give him a title free from this equity.

(*k*) *Arkwright* v. *Newbold* (1881), 17 Ch. D. 301, C. A.; *Smith* v. *Chadwick* (1884), 9 App. Cas. 187; *Derry* v. *Peek* (1889), 14 App. Cas. 337; see title MISREPRESENTATION AND FRAUD.

(*l*) *Mortlock* v. *Buller* (1804), 10 Ves. 291, 305, *per* Lord ELDON, L.C. The court did not lay down a general rule beyond which it would not go, lest other means of avoiding the equity of the court should be found out (*Lawley* v. *Hooper* (1745), 3 Atk. 278, 279).

(*m*) *Chesterfield (Earl)* v. *Janssen* (1751), 2 Ves. Sen. 125, 155. This is the first kind of fraud in Lord HARDWICKE'S classification.

(*n*) *Derry* v. *Peek*, *supra*, at p. 374.

(*o*) Thus upon a contract of sale the maxim *caveat emptor* applies both at law and in equity, and a party who has special knowledge of the property is not bound to disclose it unless there is some obligation of disclosure arising otherwise than out of the relation of vendor and purchaser (*Fox* v. *Mackreth* (1788), 2 Bro. C. C. 400, 420; see *Turner* v. *Harvey* (1821), Jac. 169, 178; *Keates*

essential qualifications, may make that which is stated absolutely false and bring it under the head of *suggestio falsi* (*p*).

A misrepresentation made without knowledge of its untruth does not ordinarily give a right to damages at law, but it is a ground in equity for rescinding a contract (*q*), though not for setting aside a conveyance for value (*r*). If, however, a gift has been obtained by means of an innocent misrepresentation, restitution will be ordered (*s*).

Innocent misrepresentation.

13. The jurisdiction of a court of equity to prevent a man from selling his goods under such a description as to lead the public to believe that they are buying the goods of another appears to have been based upon the jurisdiction to prevent fraud, although actual fraudulent intent need not now be proved, and the effect of the jurisdiction is to create a property in trade names and marks (*t*).

Passing off goods.

(iii.) *Extensions of Fraud* (*u*).

14. In cases of actual fraud the jurisdiction in equity was strictly concurrent with that at law. But equity extended its jurisdiction by including under the head of fraud transactions which were so opposed to fair dealing between the parties that they ought not to be held binding. Under the head of constructive fraud, as this was called, were included the following cases :—(1) Where on one side there was no true consent, including cases where consent had been obtained by surprise; (2) where one party, though consenting, was not free; (3) where the transaction infringed the rights of third parties; and (4) where undue advantage had been taken of expectant heirs (*a*). In all these cases there might also be circumstances of contrivance or undue advantage implying actual fraud.

Constructive fraud.

15. The first case—want of consent—arises when a transaction is entered into by a person of unsound mind. Such a person being

(1) Want of consent.

v. *Cadogan* (*Earl*) (1851), 10 C. B. 591). The obligation of disclosure may arise from the relation of the parties, as where they are agent and principal; or from the nature of the contract, as where it is *uberrimæ fidei*; or from circumstances occurring during the negotiation, as where a statement made with honest belief is subsequently discovered to be false (*Davies* v. *London and Provincial Marine Insurance Co.* (1878), 8 Ch. D. 469, *per* FRY, J., at pp. 474, 475; *Brownlie* v. *Campbell* (1880), 5 App. Cas. 925, *per* Lord BLACKBURN, at p. 950).

(*p*) *Peek* v. *Gurney* (1873), L. R. 6 H. L. 377, 403; *Aaron's Reefs* v. *Twiss*, [1896] A. C. 273, 287.

(*q*) *Rawlins* v. *Wickham* (1858), 3 De G. & J. 304; *Redgrave* v. *Hurd* (1881), 20 Ch. D. 1, C. A.; *Derry* v. *Peek* (1889), 14 App. Cas. 337, 374.

(*r*) See *Wilde* v. *Gibson* (1848), 1 H. L. Cas. 605.

(*s*) *Re Glubb, Bamfield* v. *Rogers*, [1900] 1 Ch. 354, C. A.; not following *Wilson* v. *Thornbury* (1875), 10 Ch. App. 239, in this respect. See title GIFTS.

(*t*) See *Leather Cloth Co.* v. *American Leather Cloth Co.* (1865), 11 H. L. Cas. 523, 538; *Reddaway* v. *Banham*, [1896] A. C. 199, 209, 215; *Warwick Tyre Co.* v. *New Motor etc. Co.*, [1910] 1 Ch. 248, 255; see title TRADE MARKS, ETC.

(*u*) See title FRAUDULENT AND VOIDABLE CONVEYANCES. As to frauds on powers, see *Aleyn* v. *Belchier* (1758), 1 Eden, 132; 2 White & Tud. L. C., 7th ed., 308; and title POWERS.

(*a*) The general principle is that if the party is in a situation in which he is not a free agent, and is not equal to protecting himself, a court of equity will protect him (*Evans* v. *Llewellin* (1787), 2 Bro. C. C. 150).

SECT. 1. **Nature and Extent of Equitable Jurisdiction.**

incapable of entering into a valid contract or of doing any valid act, a person dealing with him and knowing his incapacity is deemed to perpetrate a meditated fraud on him and his rights (*b*). And the mere incapacity is a ground in equity for reviewing the contract and setting it aside, if not for the lunatic's benefit (*c*); but this will not be done if the other party has acted in good faith, and if the parties cannot be restored to their original position (*d*).

Drunkenness.

Drunkenness existing at the time of a transaction, to such an extent as to deprive the party of mental capacity, invalidated the transaction at law, and, if there was nothing more, equity did not interfere, either to enable one party to get rid of his agreement or deed, or the other party to enforce it; but if the party had been enticed into drink or some unfair advantage had been taken of him, then equity would relieve him, even though the drunkenness was not such as to deprive him of reason (*e*); and the same relief will now be given by the High Court.

Weakness of mind.

Mere weakness of mind, short of unsoundness, is not alone a ground for relief in equity; but if the transaction is in itself improvident or unfair, there arises a presumption of fraud which will readily be supported if there are facts showing imposition, or advantage taken of the weakness of mind (*f*).

Inadequate consideration.

Inadequacy of consideration does not necessarily show want of consent, and it is not in itself a ground for relief in equity (*g*); but

(*b*) Story, s. 227. At common law a person of unsound mind could not himself plead his incapacity so as to invalidate his own acts (*Beverley's Case* (1603), 4 Co. Rep. 123 b), though his acts might be set aside by the Crown or by his heirs (Co. Litt. 247 a, b). But equity, in adopting the principle, confined it to acts done by the lunatic to the prejudice of others, and as to acts done to his own prejudice his lunacy was recognised as a ground for relief (Fonblanque, Treatise of Equity, 5th ed., Vol. I., p. 52; *Ridler* v. *Ridler* (1729), 1 Eq. Cas. Abr. 279; *Addison* v. *Dawson* (1711), 2 Vern. 678); and the courts of common law came to recognise that unsoundness of mind, if known to the other party, was a good defence to an action on a contract (*Baxter* v. *Portsmouth* (*Earl*) (1826), 5 B. & C. 170; *Molton* v. *Camroux* (1848), 2 Exch. 487; affirmed (1849) 4 Exch. 17, Ex. Ch.; *Imperial Loan Co.* v. *Stone*, [1892] 1 Q. B. 599, C. A.). The defence does not extend to claims for necessaries (*Re Rhodes*, *Rhodes* v. *Rhodes* (1890), 44 Ch. D. 94, C. A.); see also title LUNATICS AND PERSONS OF UNSOUND MIND.

(*c*) See *Selby* v. *Jackson* (1843), 6 Beav. 192; affirmed (1844), 13 L. J. (CH.) 249.

(*d*) *Niell* v. *Morley* (1804), 9 Ves. 478; *Sergeson* v. *Sealey* (1742), 2 Atk. 412; *Price* v. *Berrington* (1850), 3 Mac. & G. 486.

(*e*) *Cooke* v. *Clayworth* (1811), 18 Ves. 12; see *Rich* v. *Sydenham* (1671), 1 Cas. in Ch. 202; *Johnson* v. *Medlicott* (1734), 3 P. Wms., 6th ed., p. 130, n. (A); see title CONTRACT, Vol. VII., p. 342.

(*f*) *Osmond* v. *Fitzroy* (1731), 3 P. Wms. 129. There is no such thing as an equitable incapacity, where there is a legal capacity (*per* JEKYLL, M.R., at p. 130); *Clarkson* v. *Hanway* (1723), 2 P. Wms. 203; *Bridgman* v. *Green* (1755), 2 Ves. Sen. 627; *Filmer* v. *Gott* (1774), 4 Bro. Parl. Cas. 230; *Nantes* v. *Corrock* (1803), 9 Ves. 182; *Willan* v. *Willan* (1810), 16 Ves. 72; compare *Willis* v. *Jernegan* (1741), 2 Atk. 251, *per* Lord HARDWICKE, L.C.; *Gartside* v. *Isherwood* (1783), 1 Bro. C. C. 558; Fonblanque, Treatise of Equity, 5th ed. Vol. I., p. 62. And the transaction is set aside not only as against the party guilty of the fraud, but as against innocent persons claiming through him (*Huguenin* v. *Baseley* (1807), 14 Ves. 273, *per* Lord ELDON, L.C., at p. 289; *Bridgman* v. *Green*, *supra*). Where coverture is no bar to a contract or conveyance by a married woman, she is bound by it, unless there is such fraud as would be a ground for setting aside the transaction in the case of any other person (see *Dalbiac* v. *Dalbiac* (1809), 16 Ves. 116).

(*g*) *Griffith* v. *Spratley* (1787), 1 Cox, Eq. Cas. 383 (in the Exchequer); *Naylor*

it may be an element in establishing such fraud as will avoid the transaction (*h*), or the transaction may be so unconscionable as to afford in itself evidence of fraud (*i*). But, in order that relief may be given, it must be possible for the parties to be restored to their former position, and hence a marriage settlement cannot be set aside (*k*).

Voluntary settlement.

A voluntary settlement may be set aside if its effect was not properly understood by the settlor, and when it contains no power of revocation, his attention should be expressly called to the omission and his instructions obtained and recorded. But the absence of a power of revocation, and the failure to draw attention to it, do not make the settlement invalid. They are merely circumstances to be considered (*l*).

Surprise.

16. The fact that a party has acted without due deliberation, or under a misapprehension of his rights or of the effect of the transaction, is not a ground for relief in equity, unless the case is one in which relief can be afforded on the ground of mistake; but if by the conduct of the other party he has been taken unawares, and has acted without due deliberation, and under confused and sudden impressions, this is a case of surprise against which equity will relieve (*m*). But the relief is given on the ground of the fraud attending the surprise (*n*), and in general there are other circumstances, such as weakness of mind, or poverty, or inadequacy of consideration, which assist the result (*o*). If, however, surprise or mistake is set up as a ground for resisting specific performance of an agreement, the element of fraud need not be present (*p*).

(2) Undue influence.

17. A party to a transaction, though consenting to it, may not give a free consent, because he is exposed to such influence from the other party as to deprive him of the free use of his judgment; and in such a case equity will set the transaction aside, and if property has passed will order restitution, and if necessary follow it into the hands of innocent third parties (*q*). The evidence

v. *Winch* (1824), 1 Sim. & St. 555, 565; *Borell* v. *Dann* (1843), 2 Hare, 440; *Harrison* v. *Guest* (1860), 8 H. L. Cas. 481. As to inadequacy of consideration in bargains with expectant heirs, see p. 21, *post*.

(*h*) See *Aylesford (Earl)* v. *Morris* (1873), 8 Ch. App. 484, 490; *Fry* v. *Lane*, *Re Fry*, *Whittet* v. *Bush* (1888), 40 Ch. D. 312, 324.

(*i*) *Coles* v. *Trecothick* (1804), 9 Ves. 234, 246; *Copis* v. *Middleton* (1818), 2 Madd. 410; *Peacock* v. *Evans* (1809), 16 Ves. 512.

(*k*) *North* v. *Ansell* (1731), 2 P. Wms. 618, 619; *Campbell* v. *Ingilby* (1856), 21 Beav. 567, 576.

(*l*) *Hall* v. *Hall* (1873), 8 Ch. App. 430; see *Villers* v. *Beaumont* (1682), 1 Vern. 100; *Petre* v. *Espinasse* (1834), 2 My. & K. 496; *Bill* v. *Cureton* (1835), 2 My. & K. 503; *Harvey* v. *Mount* (1845), 8 Beav. 439, 451. A voluntary conveyance was formerly liable to be defeated by a subsequent conveyance for value (see *Buckle* v. *Mitchell* (1812), 18 Ves. 100); but this cannot result from any such conveyance made after June 29th, 1893 (Voluntary Conveyances Act, 1893 (56 & 57 Vict. c. 21)).

(*m*) Story, s. 120, n. (3); *Evans* v. *Llewellyn* (1787), 2 Bro. C. C. 150; see *Irnham (Lord)* v. *Child* (1781), 1 Bro. C. C. 92.

(*n*) *Bath (Earl)* v. *Mountague (Earl)* (1693), 3 Cas. in Ch. 55; 1 Fonblanque, Treatise of Equity, 5th ed., Vol. I., p. 122.

(*o*) *Pickett* v. *Loggon* (1807), 14 Ves. 215.

(*p*) *Townshend (Marquis)* v. *Stangroom* (1801), 6 Ves. 328.

(*q*) *Bridgeman* v. *Green* (1757), Wilm. 58.

SECT. 1. Nature and Extent of Equitable Jurisdiction.

may show that there was actual undue influence in the particular case (*r*); but in certain relations the existence of undue influence is presumed, and then the party seeking to uphold the transaction must give evidence rebutting the presumption (*s*). These relations are:—

Parent and child.

(1) Parent and child (*t*), especially where the child has only recently come of age and is still under parental control (*a*). The child is presumed to be under the exercise of parental influence as long as the dominion of the parent lasts (*b*); but if the exercise of parental influence is disproved—as by showing that the child had independent advice, and acted on it (*c*), or otherwise—and if the child understood the contents of the deed, then the gift from the child stands on the same footing as any other gift (*d*). The rule applies where a person who is or has been *in loco parentis* takes a benefit from the child (*e*). But it does not apply where the transaction is one for the settlement of property in which the parties are mutually interested; and such transactions are regarded by the court with favour (*f*). Consequently, a resettlement, under which a son's estate is cut down, will be upheld if he understood it, although he was not separately advised (*g*); parental influence is not a ground for interference when it is not exercised for the benefit of the parent (*h*).

Guardian and ward; trustee and *cestui que* trust.

(2) Guardian and ward; (3) Trustee and *cestui que trust* (*i*). In these relations the rule is similar to that in the case of parent and child, but is applied more strictly. On grounds of public policy the court raises a strong presumption of undue influence, even though there is no actual unfairness (*j*). And it applies both during the actual relation and afterwards as long as the influence resulting from the relation lasts (*k*); but when the relation and its influence have ceased, and in particular after accounts have been settled and

(*r*) See *Allcard* v. *Skinner* (1887), 36 Ch. D. 145, 171, C. A.; *Morley* v. *Loughnan*, [1893] 1 Ch. 736.

(*s*) *Huguenin* v. *Baseley* (1807), 14 Ves. 273.

(*t*) *Hoghton* v. *Hoghton* (1852), 15 Beav. 278; *Baker* v. *Bradley* (1855), 7 De G. M. & G. 597, C. A.; *Hoblyn* v. *Hoblyn* (1889), 41 Ch. D. 200; and see title INFANTS AND CHILDREN.

(*a*) *Archer* v. *Hudson* (1844), 7 Beav. 551.

(*b*) *Wright* v. *Vanderplank* (1856), 8 De G. M. & G. 133, C. A., *per* TURNER, L.J., at p. 146.

(*c*) *Powell* v. *Powell*, [1900] 1 Ch. 243.

(*d*) *Wright* v. *Vanderplank*, *supra*; *Turner* v. *Collins* (1871), 7 Ch. App. 329; see *Blackborn* v. *Edgley* (1719), 1 P. Wms. 600.

(*e*) *Archer* v. *Hudson*, *supra*; see *Dettmar* v. *Metropolitan and Provincial Bank* (1863), 1 Hem. & M. 641.

(*f*) *Baker* v. *Bradley*, *supra*, *per* TURNER, L.J., at p. 620; *Hoghton* v. *Hoghton*, *supra*, at p. 302; see title FAMILY ARRANGEMENTS.

(*g*) *Jenner* v. *Jenner* (1860), 2 De G. F. & J. 359; see *Cory* v. *Cory* (1747), 1 Ves. Sen. 19.

(*h*) *Hartopp* v. *Hartopp* (1856), 21 Beav. 259.

(*i*) See titles INFANTS AND CHILDREN and TRUSTS AND TRUSTEES respectively.

(*j*) *Hylton* v. *Hylton* (1754), 2 Ves. Sen. 547, as to guardians; see *Hunter* v. *Atkins* (1834), 3 My. & K. 113, 135; *Vaughton* v. *Noble* (1861), 30 Beav. 34, 39, as to trustees. The rule applies to a person assuming the office of guardian (*Griffin* v. *De Veiulle* (1781), cited in *Huguenin* v. *Baseley* (1807), 14 Ves. 273, 283).

(*k*) *Hatch* v. *Hatch* (1804), 9 Ves. 292; and see *Everitt* v. *Everitt* (1870), L. R. 10 Eq. 405, as to the guardian's influence being a ground for setting aside a voluntary settlement, although not in his favour.

the property handed over, a gift to the guardian or trustee in recognition of his trouble may be a very proper act (*l*).

(4) Solicitor and client. This relation raises so strong a presumption of undue influence that it has been said to be almost impossible for a gift made by a client to a solicitor to stand (*m*). The presumption, however, is not irrebuttable. It can be rebutted, in case of a gift, by proving that the solicitor was not acting as such in the matter of the gift, and that the donor had competent independent advice of such a nature as to show that the influence of the solicitor was not operative (*n*); and it can be rebutted, in case of a sale, by showing that the client was fully informed, that he had competent independent advice, and that the price was fair (*o*).

Solicitor and client.

The presumption of undue influence arises also in other confidential relations, such as physician and patient (*p*), and religious superior and inferior (*q*), but not, apparently, in the case of husband and wife (*r*).

18. Where a party to a transaction enters into it under duress in the strict sense—that is, where he is compelled to it by bodily restraint or fear of bodily harm—the transaction is void at law (*s*), and in such case it will be set aside in equity (*t*). But relief is also granted in equity where the compulsion is not of this extreme nature, and to avoid the transaction it is sufficient that there were such circumstances of pressure as to prevent the party being a free agent (*u*). Similarly, where a transaction is voidable, a confirmation of it procured by terror is of no effect (*v*).

Duress.

(*l*) *Hylton* v. *Hylton* (1754), 2 Ves. Sen. 547; *Hatch* v. *Hatch* (1804), 9 Ves. 292; see as to accounts being unsettled and property retained, *Pierse* v. *Waring* (1745), 1 P. Wms. 121, n. (1); *Hamilton* v. *Mohun* (1710), 1 P. Wms. 118.

(*m*) *Hatch* v. *Hatch, supra*; *Hunter* v. *Atkins* (1834), 3 My. & K. 113, 135.

(*n*) *Rhodes* v. *Bate* (1866), 1 Ch. App. 252; *Liles* v. *Terry*, [1895] 2 Q. B. 679, C. A.; *Wright* v. *Carter*, [1903] 1 Ch. 27, C. A. And the rule applies if the gift is to a near relation of the solicitor (*Barron* v. *Willis*, [1900] 2 Ch. 121, C. A.); and as between counsel and client (*Broun* v. *Kennedy* (1864), 4 De G. J. & Sm. 217, C. A.). See also titles BARRISTERS, Vol. II., p. 392; SOLICITORS.

(*o*) *Gibson* v. *Jeyes* (1801), 6 Ves. 266, 277; *Wright* v. *Carter, supra, per* STIRLING, L.J., at p. 60; *Re Haslam and Hier-Evans*, [1902] 1 Ch. 765, 770, C. A.

(*p*) *Mitchell* v. *Homfray* (1881), 8 Q. B. D. 587, C. A. See title MEDICINE AND PHARMACY.

(*q*) *Allcard* v. *Skinner* (1887), 36 Ch. D. 145, C. A.; *Morley* v. *Loughnan*, [1893] 1 Ch. 736; compare *Fulham* v. *McCarthy* (1848), 1 H. L. Cas. 703.

(*r*) *Howes v. Bishop*, [1909] 2 K. B. 390, C. A., where *Chaplin & Co.* v. *Brammall*, [1908] 1 K. B. 233, C. A., is distinguished. See title HUSBAND AND WIFE.

(*s*) See title CONTRACT, Vol. VII., p. 356.

(*t*) *Hawes* v. *Wyatt* (1790), 3 Bro. C. C. 156, 158; *Scott* v. *Scott* (1847), 11 I. Eq. R. 74. The fact that a conveyance or contract was made in prison with a view to procuring release is not a ground for avoiding it, if it is fair and is made on proper advice (*Hinton* v. *Hinton* (1755), 2 Ves. Sen. 631, 635; *Brinkley* v. *Hann* (1843), 1 Drury *temp.* Sug. 175); and so as to bail given while under arrest by process of law (*Roy* v. *Beaufort* (*Duke*) (1741), 2 Atk. 190, 193; *Liverpool Marine Credit Co.* v. *Hunter* (1868), 3 Ch. App. 479, disapproving *Talleyrand* v. *Boulanger* (1797), 3 Ves. 447). But if, owing to the arrest, there is no free consent, the court will relieve, notwithstanding that the arrest was lawful (*Nicholls* v. *Nicholls* (1737), 1 Atk. 409; *Falkner* v. *O'Brien* (1812), 2 Ball & B. 214.

(*u*) *A.-G.* v. *Sothon* (1705), 2 Vern. 497; *Williams* v. *Bayley* (1866), L. R. 1 H. L. 200; *Ellis* v. *Barker* (1871), 7 Ch. App. 104; compare *Barnes* v. *Richards* (1902), 50 W. R. 363.

(*v*) *Crowe* v. *Ballard* (1790), 1 Ves, 215, 220.

SECT. 1. Nature and Extent of Equitable Jurisdiction.

(3) Injury to third parties.

19. A transaction will be relieved against in equity where it involves an injury to third parties; and this rule has been established on grounds of public policy (*w*). Instances are afforded by marriage brokage contracts (*x*); by secret contracts which defeat the purpose of agreements or arrangements made on the occasion of a marriage, or the proper expectation of either spouse (*a*); and by secret agreements between a debtor and one of his creditors which give such creditor some advantage which he would not obtain under an arrangement treating all the creditors equally and fairly (*b*).

(4) Unconscionable bargains with expectant heirs and others.

20. Relief is given in equity against unconscionable bargains made with heirs and other persons on the security of their expectant or reversionary interests in property—catching bargains, as they have been called, with heirs, reversioners, and expectants during the lives of their parents or other ancestors (*c*). These cases

(*w*) *Chesterfield* (*Earl*) v. *Janssen* (1751), 2 Ves. Sen. 125, *per* Lord HARDWICKE, L.C., at p. 156: "Particular persons in contracts shall not only transact *bonâ fide* between themselves, but shall not transact *malâ fide* in respect of other persons who stand in such a relation to either as to be affected by the contract, or the consequences of it; and as the rest of mankind, beside the parties contracting, are concerned, it is properly said to be governed on public utility."

(*x*) *Hall* v. *Potter* (1695), Show. Parl. Cas. 76; *Drury* v. *Hooke* (1686), 1 Vern. 412; *Roberts* v. *Roberts* (1730), 3 P. Wms. 66; *Cole* v. *Gibson* (1750), 1 Ves. Sen. 503, 506; *Shirley* v. *Martin* (1779), referred to in *Roche* v. *O'Brien* (1810), 1 Ball & B. 330, 358. Equity relieves against a bond, even though given after the marriage (*Williamson* v. *Gihon* (1805), 2 Sch. & Lef. 357), and orders money already paid to be refunded (*Smith* v. *Bruning* (1700), 2 Vern. 392; *Hermann* v. *Charlesworth*, [1905] 2 K. B. 123); and see title CONTRACT, Vol. VII., p. 397.

(*a*) Such as a security by husband or wife to return property provided on the marriage to the person providing it (*Turton* v. *Benson* (1718), 1 P. Wms. 496; *Redman* v. *Redman* (1685), 1 Vern. 348; *Gale* v. *Lindo* (1687), 1 Vern. 475; *Neville* v. *Wilkinson* (1782), 1 Bro. C. C. 543; *Palmer* v. *Neave* (1805), 11 Ves. 165). The fraud in these cases consists "in affecting to put the party contracting for the marriage in one situation by the articles, and putting that party in another and a worse situation by private agreement" (*per* GRANT, M.R., in *Palmer* v. *Neave*, *supra*). The relief being based on public policy, it is no objection that the party claiming relief was *particeps criminis* (*Redman* v. *Redman*, *supra*; *Vauxhall Bridge Co.* v. *Spencer* (*Earl*) (1821), Jac. 64, 67). The same principle is applied in cases where a woman about to marry makes a disposition of her property in fraud of her husband's marital rights (*Strathmore* (*Countess*) v. *Bowes* (1789), 1 Ves. 22; 1 White & Tud. L. C., 7th ed., p. 613).

(*b*) *Chesterfield* (*Earl*) v. *Janssen*, *supra*; *Jackman* v. *Mitchell* (1807), 13 Ves. 581. Here, too, since relief is given on grounds of public policy, a person *particeps criminis* may obtain it (*Jackman* v. *Mitchell*, *supra*). A bond given for such purpose came to be recognised as bad at law, but this did not oust the jurisdiction in equity (*ibid.*, at p. 586). In modern practice the principle is well established (*Mare* v. *Sandford* (1859), 1 Giff. 288; *McKewan* v. *Sanderson* (1873), L. R. 15 Eq. 229, 235; (1875), L. R. 20 Eq. 65); and money paid by the debtor under the arrangement can be recovered (*Re Lenzberg's Policy* (1877), 7 Ch. D. 650). So, too, a general deed of compromise can be repudiated by a creditor if he discovers that other creditors have been induced to execute it by a secret bargain to their advantage (*Dauglish* v. *Tennent* (1866), L. R. 2 Q. B. 49; *Re Milner*, *Ex parte Milner* (1885), 15 Q. B. D. 605, C. A.). But the principle only applies where there has been a common basis of consent between the creditors; not where their debts have been bought up separately (*Re Levita's Claim*, [1894] 3 Ch. 365, C. A.). See title FRAUDULENT AND VOIDABLE CONVEYANCES.

(*c*) *Chesterfield* (*Earl*) v. *Janssen*, *supra*; *Twistleton* v. *Griffith* (1716), 1 P. Wms. 310; *Gwynne* v. *Heaton* (1778), 1 Bro. C. C. 1, 9; *Gowland* v. *De Faria*

sometimes show actual fraud ; but, without this, they contain various elements which afford a recognised ground for relief—the inequality of the parties, the intrinsic unconscionableness of the bargain, and the defeating of the intentions of the ancestor (*d*).

Formerly mere inadequacy of price was a ground for setting aside such a bargain, and the onus of proving that the price was fair was imposed on the person who had dealings with the expectant heir or reversioner (*e*). In the case of loans the transaction might also be void as being in breach of the usury laws. Mere inadequacy of price is no longer a ground for equitable relief (*f*) ; but neither this change in the law, nor the repeal of the usury laws, has affected the general principles as to relief of expectant heirs (*g*). The knowledge of, and want of protest by, the person from whom the expectancy is derived, and *à fortiori* his sanction, removes a chief objection to the bargain, and in general will validate it (*h*).

Apart from the fraud on the ancestor, the doctrine is founded on pressure upon the heir, or the distress of the party disposing of his expectancy (*i*). If, when this is removed, he confirms the bargain it will stand (*k*).

Where the contract is set aside, it will be set aside on equitable terms, that is, the plaintiff must repay the money he has actually received, with interest at the rate of £5 per cent. per annum, and must pay any sums properly expended on the property and costs (*l*), unless the misconduct of the defendant in the matter has been such as to disentitle him to costs (*m*).

Upon the same principle equity interferes generally to set

(1811), 17 Ves. 20 ; *Davis* v. *Marlborough* (*Duke*) (1819), 2 Swan. 108, 139, n. (a) ; Fonblanque, Treatise of Equity, 5th ed., Vol. I., p. 134. Possibly the rule originally applied only to expectant heirs and not to reversioners (*Wood* v. *Abrey* (1818), 3 Madd. 417, 423). See also title INFANTS AND CHILDREN.

(*d*) *Chesterfield* (*Earl*) v. *Janssen* (1751), 2 Ves. Sen. 125.

(*e*) *Peacock* v. *Evans* (1809), 16 Ves. 512, 514; *Bawtree* v. *Watson* (1834), 3 My. & K. 339 ; *Aldborough* (*Earl*) v. *Trye* (1840), 7 Cl. & Fin. 436, H. L. ; *King* v. *Savery* (1853), 1 Sm. & G. 271 ; *sub nom. Savery* v. *King* (1856), 5 H. L. Cas. 627 ; *Edwards* v. *Burt* (1852), 2 De G. M. & G. 55, C. A. ; *Bromley* v. *Smith* (1859), 26 Beav. 644. The onus was discharged by showing that the sale had been by auction, provided the auction was *bonâ fide* (*Shelly* v. *Nash* (1818), 3 Madd. 232 ; *Fox* v. *Wright* (1821), Madd. & G. 111).

(*f*) Sales of Reversions Act, 1867 (31 & 32 Vict. c. 4).

(*g*) *Aylesford* (*Earl*) v. *Morris* (1873), 8 Ch. App. 484 ; see *Croft* v. *Graham* (1863), 2 De G. J. & Sm. 155, C. A. ; *Miller* v. *Cook* (1870), L. R. 10 Eq. 641, 646 ; *Tyler* v. *Yates* (1870), L. R. 11 Eq. 265 ; affirmed (1871), 6 Ch. App. 665 ; *Beynon* v. *Cook* (1875), 10 Ch. App. 389 ; *Fry* v. *Lane*, *Re Fry*, *Whittet* v. *Bush* (1888), 40 Ch. D. 312, 324. The doctrine also applies to a loan on unconscionable terms to one who has only general expectations of benefiting on the death of another (*Nevill* v. *Snelling* (1880), 15 Ch. D. 679). See also title MONEY AND MONEY-LENDING.

(*h*) *King* v. *Hamlet* (1834), 2 My. & K. 456, 474 ; approved, Story, s. 339 ; questioned, Sugden, Vendors and Purchasers, 11th ed., p. 316.

(*i*) *King* v. *Hamlet*, *supra*, *per* Lord BROUGHAM, L.C., at p. 480. While this continues he is treated as an infant (*Gwynne* v. *Heaton* (1778), 1 Bro. C. C. 1, 9).

(*k*) *Cole* v. *Gibbons* (1734), 3 P. Wms. 290 ; *Chesterfield* (*Earl*) v. *Janssen*, *supra*.

(*l*) *Gwynne* v. *Heaton* (1778), 1 Bro. C. C. 1 ; *Twistleton* v. *Griffith* (1716), 1 P. Wms. 310 ; *Peacock* v. *Evans*, *supra* ; *Bawtree* v. *Watson*, *supra*, at p. 341 ; *Miller* v. *Cook*, *supra*, at p. 647 ; compare *Barker* v. *Vansommer* (1782), 1 Bro. C. C. 149.

(*m*) *Gowland* v. *De Faria* (1811), 17 Ves. 20 ; *Morony* v. *O'Dea* (1809), 1 Ball

SECT. 1. Nature and Extent of Equitable Jurisdiction.

aside transactions by way of sale and otherwise where, on account of poverty, ignorance, under-value, and lack of independent advice, the transaction is unconscionable (*n*).

(iv.) *Mistake* (*o*).

Mistake.

21. Mistake was a ground for relief both at law and in equity, and hence the jurisdiction was classed as concurrent, but there were differences as regards the nature of the relief and the circumstances in which it was given.

Money paid by mistake was in general only recoverable in equity if paid under a mistake of fact (*p*). The rule was the same at law (*q*), and on this point law and equity were practically the same, since the appropriate legal action, an action for money had and received, was in its nature an equitable action (*r*). But where money was paid under a mistake of law, the plaintiff in equity might obtain relief if there were special circumstances which made it inequitable that the party who had received the money should retain it (*s*).

Mistake in language of agreement.

22. A mistake in an executory agreement may be either in the language of the agreement, or in regard to circumstances inducing the agreement. There is a mistake in the language when it does not represent the actual intention of one or both parties. If the parties had the same intention, but by mistake this has not been expressed, equity, upon proof of such intention, will rectify the agreement at the instance of either party (*t*). If, in a written agreement, only one party has used language which does not express his intention, he is without remedy at law, since he cannot give parol evidence to contradict the written instrument (*a*). But he

& B. 109; *Benyon* v. *Fitch* (1866), 35 Beav. 570, 578; *Tyler* v. *Yates* (1870), L. R. 11 Eq. 265; *Bromley* v. *Smith* (1859), 26 Beav. 644.

(*n*) *Longmate* v. *Ledger* (1860), 2 Giff. 157; *Clark* v. *Malpas* (1862), 4 De G. F. & J. 401, C. A.; *Baker* v. *Monk* (1864), 4 De G. J. & Sm. 388, C. A.; *Prees* v. *Coke* (1871), 6 Ch. App. 645; *Fry* v. *Lane*, *Re Fry*, *Whittet* v. *Bush* (1888), 40 Ch. D. 312, 322; *James* v. *Kerr* (1889), 40 Ch. D. 449, 460; *Rees* v. *De Bernardy*, [1896] 2 Ch. 437. As to circumstances not sufficient to set aside a conveyance, see *Harrison* v. *Guest* (1860), 8 H. L. Cas. 481.

(*o*) See title MISTAKE.

(*p*) *Rogers* v. *Ingham* (1876), 3 Ch. D. 351, C. A.

(*q*) *Bilbie* v. *Lumley* (1802), 2 East, 469, 472; *Kelly* v. *Solari* (1841), 9 M. & W. 54; *Durrant* v. *Ecclesiastical Commissioners* (1880), 6 Q. B. D. 234.

(*r*) *Moses* v. *Macferlan* (1760), 2 Burr. 1005, 1012.

(*s*) *Rogers* v. *Ingham*, *supra*. A trustee in bankruptcy who receives money paid under a mistake of law must, as an officer of the court, set an example by repaying it (*Re Condon*, *Ex parte James* (1874), 9 Ch. App. 609, 614); see *Re Tyler*, *Ex parte Official Receiver*, [1907] 1 K. B. 865, C. A. And in equity relief can be given against mistakes of law (*Stone* v. *Godfrey* (1854), 5 De G. M. & G. 76, 90; *Re Saxon Life Assurance Society* (1862), 2 John. & H. 408, 412). See generally title MISTAKE.

(*t*) *Henkle* v. *Royal Exchange Assurance Co.* (1749), 1 Ves. Sen. 317; *Shelburne* v. *Inchiquin* (1784), 1 Bro. C. C. 338; affirmed *sub nom. Inchiquin* v. *Fitzmaurice* (1785), 5 Bro. Parl. Cas. 166; *Townshend* (*Marquis*) v. *Stangroom* (1801), 6 Ves. 328; *Paget* v. *Marshall* (1884), 28 Ch. D. 255; see note (*q*), p. 24, *post*. But not after the agreement has been construed by the court, and executed by payment of money under the judgment of the court (*Caird* v. *Moss* (1886), 33 Ch. D. 22, C. A.).

(*a*) *Druiff* v. *Parker* (*Lord*) (1868), L. R. 5 Eq. 131. See title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 444. In equity parol evidence of mistake

will be relieved in equity (*b*) if the mistake was caused by the other party, or if it involves serious hardship (*c*) and was not due to mere carelessness (*d*).

Where a party is entitled to relief against a unilateral mistake, the court may go so far as to hold that there was no contract because the parties were not *ad idem* (*e*). But usually the mistake can only be set up as a defence to an action for specific performance. Formerly a successful defence would still have left the mistaken party liable to an action at law, and this result is in effect preserved by the present rule that the court which refuses specific performance can give the damages, if any, to which the plaintiff may be entitled (*f*). If the words are capable of a double meaning, a party may first set up his own construction as being the right one, and, if he fails, may then seek relief on the ground of mistake (*g*). But if the words are clear, the party cannot have relief on the ground that he was mistaken as to their legal effect (*h*), or as to the nature of the obligations which he has undertaken (*i*), unless the mistake has been induced by the other party (*k*).

Unilateral mistake.

23. If the mistake lies in some circumstance which induced the agreement, the general rule is that relief will be given if the mistake was as to a matter of fact, but not if it was a mistake of law. But "law" in this connection means a general principle of law, and not that particular application of law to fact which determines the private right of the party in the subject-matter of the contract. Such private right is a matter of fact, and an agreement made under a mistake as to the interest of the parties, or one of them, in the subject-matter will be rescinded (*l*).

Mistake in circumstance inducing agreement.

can be given to resist specific performance (*Townshend* (*Marquis*) v. *Stangroom* (1801), 6 Ves. 328), but not to obtain it (*Higginson* v. *Clowes*) (1808), 15 Ves. 516).

(*b*) *Webster* v. *Cecil* (1861), 30 Beav. 62 (mistake in price); *Manser* v. *Back* (1848), 6 Hare, 443 (mistake in not reserving a right of way); *Hickman* v. *Berens*, [1895] 2 Ch. 638, C. A. (mistake in description of intended subject-matter of compromise); see *Wilding* v. *Sanderson*, [1897] 2 Ch. 534, C. A.

(*c*) *Higginson* v. *Clowes* (1808), 15 Ves. 516; *Preston* v. *Luck* (1884), 27 Ch. D. 497, C. A.; *Goddard* v. *Jeffreys* (1881), 30 W. R. 269.

(*d*) *Tamplin* v. *James* (1880), 15 Ch. D. 215, C. A.; *Van Praagh* v. *Everidge*, [1902] 2 Ch. 266; reversed on another ground, [1903] 1 Ch. 434, C. A.; see *Swaisland* v. *Dearsley* (1861), 29 Beav. 430, 433; *Goddard* v. *Jeffreys*, *supra*.

(*e*) *Hickman* v. *Berens*, *supra*; *Paget* v. *Marshall* (1884), 28 Ch. D. 255. And at law a mistake as to the very subject-matter of the contract, and not as to some incident of it, is a ground for holding that there was no contract (*Kennedy* v. *Panama etc. Mail Co.* (1867), L. R. 2 Q. B. 580), provided, that is, that evidence of the mistake is admissible; but not a mistake as to quality, not induced by the vendor, although known to him (*Smith* v. *Hughes* (1871), L. R. 6 Q. B. 597). But instead of treating the contract as a nullity, the court may give the defendant the option of taking what the plaintiff meant to give (*Paget* v. *Marshall*, *supra*).

(*f*) *Tamplin* v. *James*, *supra*; see p. 12, note (*g*), *ante*.

(*g*) *Wilding* v. *Sanderson*, *supra*; or he can elect to enforce the contract according to the construction admitted by the other side (*Preston* v. *Luck*, *supra*); see *Rich* v. *Jackson* (1794), cited in *Townshend* (*Marquis*) v. *Stangroom* (1801), 6 Ves. 328, at p. 334.

(*h*) *Powell* v. *Smith* (1872), L. R. 14 Eq. 85.

(*i*) *Stewart* v. *Kennedy* (1890), 15 App. Cas. 108, 118, 121.

(*k*) *Wilding* v. *Sanderson*, *supra*, at p. 550.

(*l*) *Cooper* v. *Phibbs* (1867), L. R. 2 H. L. 149, *per* Lord WESTBURY, at p. 170;

SECT. I.
Nature and Extent of Equitable Jurisdiction.

Compromise made under mistake.

24. Special considerations apply to a compromise entered into under a mistake of fact or law. A compromise assumes that the rights of the parties are doubtful, and the compromise is effected for the purpose of settling their interests in property, or their claims against each other, without resorting to or without continuing litigation; and, in general, it would defeat the object of the compromise if it could be set aside on the ground of mistake.

So far as the rights depend on matters of fact, it is the duty of each party to disclose to the other all relevant facts known to himself (*m*); and if, owing to a failure in this respect, either party enters into the compromise under a mistake of fact, it will be set aside. And, generally, it appears that a compromise can be set aside, like other contracts, for mistake of fact, unless the doubtfulness of the fact was the ground of compromise (*n*).

So far as the rights depend on questions of law, there is a distinction according as the law is clear or doubtful. If the law is clear and the facts are admitted, the rights are not in doubt; the basis for a compromise does not exist, and a compromise entered into in such circumstances will be set aside (*o*). But if the rights depend upon doubtful law, or upon the doubtful construction of a document, mistake as to these rights is no ground for setting the compromise aside (*p*).

Mistake in executed transaction.

25. Where a transaction has been completed by the execution of a deed or other instrument, but the instrument does not carry out the common intention of the parties, it will be rectified if evidence of such intention can be produced (*q*). A common error

Beauchamp (*Earl*) v. *Winn* (1873), L. R. 6 H. L. 223; *Allcard* v. *Walker*, [1896] 2 Ch. 369, 381; see *Jones* v. *Clifford* (1876), 3 Ch. D. 779, 792. As to setting aside a consent order on the ground of mistake, see *Huddersfield Banking Co., Ltd.* v. *Henry Lister & Son, Ltd.*, [1895] 2 Ch. 273, C. A.

(*m*) *Gordon* v. *Gordon* (1821), 3 Swan. 400; *Harvey* v. *Cooke* (1827), 4 Russ. 34, 58; *Smith* v. *Pincombe* (1852), 3 Mac. & G. 653; *Greenwood* v. *Greenwood* (1863), 2 De G. J. & Sm. 28, C. A. In cases of compromise the withholding of knowledge by one side amounts in the view of a court of equity to fraud (*Brooke* v. *Mostyn* (*Lord*) (1864), 2 De G. J. & Sm. 373, 416, C. A.). As to what facts are relevant, see *Maynard* v. *Eaton* (1874), 9 Ch. App. 414. Perhaps the duty of disclosure is confined to cases of compromise by way of family arrangement (see *Turner* v. *Green*, [1895] 2 Ch. 205; and title FAMILY ARRANGEMENTS).

(*n*) See Vaizey, Settlement of Property, Vol. II., p. 1502; and title MISTAKE.

(*o*) *Naylor* v. *Winch* (1824), 1 Sim. & St. 555; *Lansdown* v. *Lansdown* (1730), Mos. 364; 2 Jac. & W. 205, n.; *Gibbons* v. *Caunt* (1799), 4 Ves. 840, 849; *Stockley* v. *Stockley* (1812), 1 Ves. & B. 23, 31. But if the point of law was known to the party's legal adviser, the compromise will not be set aside (*Stewart* v. *Stewart* (1839), 6 Cl. & Fin. 911, H. L.); *contra*, if it was entered into in consequence of an erroneous view of the facts or of the law taken by the solicitor acting for all parties (*Re Roberts*, *Roberts* v. *Roberts*, [1905] 1 Ch. 704, C. A.).

(*p*) *Cann* v. *Cann* (1721), 1 P. Wms. 723; *Hotchkis* v. *Dickson* (1820), 2 Bli. 303, 348, H. L.; *Stewart* v. *Stewart*, *supra*, at pp. 966—970; see *Miles* v. *New Zealand Alford Estate Co.* (1886), 32 Ch. D. 266, 291, C. A. And it is sufficient if the parties *bonâ fide* consider the question in dispute to be doubtful (*Lucy's Case* (1853), 4 De G. M. & G. 356, C. A.).

(*q*) In the case of a deed *inter partes* it is necessary both to show that there has been a mistake by all parties and also to show what was intended to be done (*Bentley* v. *Mackay* (1862), 4 De G. F. & J. 279, C. A.); as to marriage

as to parcels can be amended by rectification of the conveyance (*r*). But if, under a mistake of law, the parties have intentionally executed the instrument in a particular form, it will not be rectified so as to incorporate provisions which they would have inserted had they known the law (*s*).

A unilateral mistake, whether of fact (*t*) or of law, in a deed or other instrument of conveyance is not in general a ground for setting aside the instrument, unless the mistake has been induced by fraud. In the case of a defect in title being overlooked by mistake, the remedy, as between vendor and purchaser, is on the vendor's covenants (*a*). But there is an exception in the case of a conveyance to the purchaser of property which was already his own. In such a case the purchase-money is recoverable (*b*).

(v.) *Accident.*

Accident.

26. Equity afforded relief in certain cases of accident, and since the jurisdiction was exercised in respect of claims which were also enforceable at law, it was classed as concurrent. But it was not concurrent in the sense that the plaintiff could at his option sue either at law or in equity. If he had an action at law, he was confined to that remedy; but if by accident his legal remedy was not available, then equity supplied a corresponding remedy to take its place. The term "accident" includes not merely inevitable casualty, or what is known as *vis major*, but such unforeseen events, misfortunes, losses, acts, or omissions as are not the result of any negligence or misconduct of the party claiming relief (*c*).

Loss or destruction of documents.

27. Cases of accident arise where documents required to establish a personal claim, or a title to land or other property, have been lost or destroyed. In the case of a bond, profert of the bond was originally necessary at law, and the loss or destruction of the bond made the action at law impossible; hence the obligee was allowed a remedy in equity in place of that which he had lost at law. Proceedings in equity had the further advantage that the

settlements, see *Bold* v. *Hutchinson* (1855), 5 De G. M. & G. 558; that is, it must be possible to show clearly what ought to be the amended form of the deed (*Fowler* v. *Fowler* (1859), 4 De G. & J. 250, 274). After the death of one party rectification may be ordered on the parol evidence of another (*Wollaston* v. *Tribe* (1869), L. R. 9 Eq. 44), though this is exceptional (*Tucker* v. *Bennett* (1887), 38 Ch. D. 1, C. A.). Where in a voluntary deed poll a power of revocation is omitted by mistake, the deed can be rectified; but in the absence of mistake, the settlor cannot revoke it because he mistook the law (*Worrall* v. *Jacob* (1817), 3 Mer. 256).

(*r*) *Beale* v. *Kyte*, [1907] 1 Ch. 564, questioning *Bloomer* v. *Spittle* (1872), L. R. 13 Eq. 427.

(*s*) *Irnham* (*Lord*) v. *Child* (1781), 1 Bro. C. C. 92; see *Pullen* v. *Ready* (1743), 2 Atk. 587, 591.

(*t*) *Brownlie* v. *Campbell* (1880), 5 App. Cas. 925, 937.

(*a*) See *Clayton* v. *Leech* (1889), 41 Ch. D. 103, C. A.; *Debenham* v. *Sawbridge*, [1901] 2 Ch. 98, 109.

(*b*) *Bingham* v. *Bingham* (1748), 1 Ves. Sen. 126; Belt's Sup. 79; see *Cooper* v. *Phibbs* (1867), L. R. 2 H. L. 149, 164; *Jones* v. *Clifford* (1876), 3 Ch. D. 779, 791; but see *Stewart* v. *Stewart* (1839), 6 Cl. & Fin. 911, 968, H. L.

(*c*) Story, s. 78. As to cases of accident recognised at law, see 3 Bl. Com. 431.

SECT. 1. Nature and Extent of Equitable Jurisdiction.

terms of the indemnity to be given by the plaintiff could be satisfactorily settled, and that all parties liable, whether as principals or sureties, could be brought before the court and their rights and liabilities adjusted (*d*).

Instruments under hand.

In the case of instruments under hand, profert was not necessary; but where the instrument was lost, equity exercised jurisdiction, since it had the means of requiring an indemnity (*e*); and in the case of a lost negotiable instrument there was the further reason that no remedy at law was available (*f*). In the case of the destruction of the instrument the legal remedy was available, and, since an indemnity was not required, equity declined jurisdiction (*g*).

Title deeds.

28. As regards lost or destroyed title deeds equitable remedies were available as follows:—(1) Where the plaintiff was out of possession, and could show that deeds had been destroyed or were concealed by the defendant, he was put in possession until the defendant produced the deeds (*h*); (2) where the plaintiff was in possession, but feared future attacks on his title, he might obtain a decree establishing his possession (*i*); (3) and, generally, he might sue in equity if there were independent equities calling for the action of the court (*j*).

(*d*) *East India Co.* v. *Boddam* (1804), 9 Ves. 464. The requirement of profert was at length dispensed with at law (*Read* v. *Brookman* (1789), 3 Term Rep. 151), a change which was not favourably regarded in equity, since the procedure in equity was more suitable for such cases (*Ex parte Greenway* (1802), 6 Ves. 812); but it did not take away the jurisdiction in equity (*Atkinson* v. *Leonard* (1791), 3 Bro. C. C. 218; *Toulmin* v. *Price* (1800), 5 Ves. 235, 239; *Bromley* v. *Holland* (1802), 7 Ves. 3, 19; *Kemp* v. *Pryor* (1802), 7 Ves. 237, 249).

(*e*) *Walmsley* v. *Child* (1749), 1 Ves. Sen. 341. In all cases of a claim in equity for relief on the ground of the loss or destruction of an instrument the plaintiff had to annex to his bill an affidavit of such loss or destruction in order to found the jurisdiction; but this was not necessary if he came for discovery only, and not for substantial relief (*ibid.*); compare *Whitfield* v. *Fausset* (1750), 1 Ves. Sen. 387, 392; Belt's Sup. 163.

(*f*) In *Mossop* v. *Eadon* (1810), 16 Ves. 430, where no indemnity was necessary, relief was refused in equity, since it was supposed that an action on the instrument, half of which was lost, would lie at law (see *Glynn* v. *Bank of England* (1750), 2 Ves. Sen. 38). In *Hansard* v. *Robinson* (1827), 7 B. & C. 90, however, it was held that an action at law would not lie, because the plaintiff was not in a position to deliver up the instrument on payment (see *Crowe* v. *Clay* (1854), 9 Exch. 604). In consequence of this, equity assumed jurisdiction in the case of lost instruments on the ground of the failure of the remedy at law, and quite apart from the question of indemnity (*Macartney* v. *Graham* (1828), 2 Sim. 285). The decision in *Hansard* v. *Robinson, supra,* was also based on the consideration that equity was the proper tribunal in the case of lost instruments, since it could require indemnity. By the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 87, power to require this was conferred on the common law courts (*King* v. *Zimmerman* (1871), L. R. 6 C. P. 466; Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 70). In the case of a lost insurance policy the decree of the court directing payment is a sufficient indemnity to the office, and no indemnity from the payee can be required (*England* v. *Tredegar (Lord)* (1866), L. R. 1 Eq. 344).

(*g*) *Wright* v. *Maidstone (Lord)* (1855), 1 K. & J. 701.

(*h*) *R.* v. *Arundel (Countess)* (1616), Hob. 109; *Whitfield* v. *Fausset* (1750), 1 Ves. Sen. 387, 392.

(*i*) *Walmsley* v. *Child* (1749), 1 Ves. Sen. 341; *Dalston* v. *Coatsworth* (1721), 1 P. Wms. 731.

(*j*) *Dormer* v. *Fortescue* (1744), 3 Atk. 124, 132.

SECT. 1
Nature and Extent of Equitable Jurisdiction.

29. Equity does not relieve against contracts which, owing to circumstances which might have been provided against, prove unexpectedly burdensome to one of the parties. In such cases equity follows the law, and acts on the legal effect of the contract (*k*). And where the parties have arranged a certain mode—*e.g.* arbitration—for settling certain terms of a contract, and the mode fails, the court does not interfere to complete the terms, and make a contract in equity when there is none at law (*l*). And there is no equitable relief in case of accidental omission to make a voluntary disposition of property—*e.g.*, to make a will (*m*). But in certain cases equity relieves against the defective execution, though not against the non-execution, of a power (*n*); and an executor is not charged in equity with the accidental loss of assets (*o*).

Limits of equitable relief.

(vi.) *Account and Apportionment.*

30. The facilities afforded by the Court of Chancery for taking accounts largely contributed to the extension of its jurisdiction. Where there was a liability to account, either by virtue of a legal relation, as guardian in socage, or of contract, as bailiff or receiver, an action of account lay at law (*p*). But it was dilatory and troublesome and fell into disuse (*q*). Apart from this special form of action, matters of account arising on contract might be determined in an action of *assumpsit* for the balance due (*r*), but this again was impracticable if the accounts were too complicated for a jury. In equitable matters the Court of Chancery took any necessary accounts (*s*), and for the sake of affording a more adequate remedy it assumed a concurrent jurisdiction in common law matters (*t*). But where the claim was a legal one, the mere fact

Accounts.

(*k*) Thus, when demised buildings are destroyed by fire, the rent is not suspended in equity (*Leeds* v. *Cheetham* (1827), 1 Sim. 146, 150), and a fixed coal-mining rent is payable notwithstanding deficiency in the coal (*Mellers* v. *Devonshire* (*Duke*) (1852), 16 Beav. 252).

(*l*) *Cooth* v. *Jackson* (1801), 6 Ves. 12, 34; *Blundell* v. *Brettargh* (1810), 17 Ves. 232, 243.

(*m*) *Whitton* v. *Russell* (1739), 1 Atk. 448.

(*n*) See title POWERS.

(*o*) *Jones* v. *Lewis* (1751), 2 Ves. Sen. 240; *Job* v. *Job* (1877), 6 Ch. D. 562; and as to the personal representative being exonerated as regards matters done in the regular course of business, see *Clough* v. *Bond* (1838), 3 My. & Cr. 490, 497. See also title EXECUTORS AND ADMINISTRATORS.

(*p*) Co. Litt. 90 b, 172 a; *Devonshire's* (*Earl*) *Case* (1607), 11 Co. Rep. 89 a; and see title ACTION, Vol. I., p. 36.

(*q*) Lee, Dictionary of Practice, 1825, p. 8; Bac. Abr. tit. "Accompt." "The writ of account at common law did not exclude, but rather was superseded by, the jurisdiction of the courts of equity on this subject; because the proceeding in equity was found to be the more convenient mode of calling parties to an account—partly on account of the difficulty attending the process under the old writ of account, but chiefly from the advantage of compelling the party to account upon oath, according to the practice of courts of equity" (*A.-G.* v. *Dublin Corporation* (1827), 1 Bli. (N. S.) 312, H. L., *per* Lord REDESDALE, at p. 337). See *Ex parte Bax* (1751), 2 Ves. Sen. 388.

(*r*) *Tomkins* v. *Willshear* (1814), 5 Taunt. 431; 2 Wms. Saund. 127, n. (f).

(*s*) See Story, s. 454. See the statement of the equitable jurisdiction in account in the judgment of LINDLEY, L.J., in *London, Chatham and Dover Rail. Co.* v. *South Eastern Rail. Co.*, [1892] 1 Ch. 120, 140, C. A.

(*t*) *Carlisle Corporation* v. *Wilson* (1807), 13 Ves. 276, 278.

SECT. 1. Nature and Extent of Equitable Jurisdiction.

that an account was asked for did not justify the plaintiff in filing a bill; and, even though he had to come into equity for discovery, it did not follow that equity would also take the account (*u*). If the account was mutual, or was so complicated as to be unfit to be submitted to a jury, then it was proper to file a bill in equity (*v*); but otherwise the plaintiff was confined to his remedy at law (*w*). And where an action involving an account had already been commenced at law, it was not restrained at the instance of the defendant unless there were strong considerations of convenience in favour of taking the account in equity (*a*). An action was not withdrawn from a court of law merely because it might originally have been commenced in equity (*b*).

Apportionment.

31. The general rule of the common law was to refuse to recognise the possibility of apportionment, whether of contracts and payments under them, or of rent, interest, and annuities; and in this respect equity followed the law, only venturing to differ on some minor points. A contract is usually indivisible; and, on the one hand, payment under it is not due until the service which earns the payment has been entirely performed; while, on the other hand, when a payment has been already made, a part of it cannot be recovered because the contract has not been wholly performed. And where there is no apportionment of such payments at law, there is none in equity (*c*).

Interest.

Interest accrued from day to day and was therefore apportionable (*d*), but rents and annuities and other periodical payments

(*u*) There was at one time a strong tendency to make the account in equity consequential on discovery (*Barker* v. *Dacie* (1802), 6 Ves. 681, 688; *Adley* v. *Whitstable Co.* (1810), 17 Ves. 315, 324; *Mackenzie* v. *Johnston* (1819), 4 Madd. 373); but this did not prevail (*Foley* v. *Hill* (1848), 2 H. L. Cas. 28, 37, 42; *Phillips* v. *Phillips* (1852), 9 Hare, 471; compare *Pearce* v. *Creswick* (1843), 2 Hare, 286, 293). In addition to the right of discovery there must have been some special reason of convenience in taking the account in equity (*Shepard* v. *Brown* (1862), 4 Giff. 208).

(*v*) *O'Connor* v. *Spaight* (1804), 1 Sch. & Lef. 305, 309; *Taff Vale Rail. Co.* v. *Nixon* (1847), 1 H. L. Cas. 111; *Phillips* v. *Phillips, supra.* To constitute mutual accounts there must be receipts and payments on both sides, not merely receipts and payments on one side, in which case it is a mere question of set-off (*Phillips* v. *Phillips, supra*).

(*w*) *Foley* v. *Hill, supra;* see *Dinwiddie* v. *Bailey* (1801), 6 Ves. 136; *Courteney* (*Lord*) v. *Godschall* (1804), 9 Ves. 473; *Ambrose* v. *Dunmow Union* (1846), 9 Beav. 508; *Phillips* v. *Phillips, supra; Smith* v. *Leveaux* (1863), 2 De G. J. & Sm. 1, C. A.; *Harrington* v. *Churchward* (1860), 6 Jur. (N. S.) 576; *Flockton* v. *Peake* (1864), 12 W. R. 562; *Dabbs* v. *Nugent* (1865), 11 Jur. (N. S.) 943.

(*a*) *North Eastern Rail. Co.* v. *Martin* (1848), 2 Ph. 758; see *Martin* v. *Powning* (1869), 4 Ch. App. 356, 370.

(*b*) *South Eastern Rail. Co.* v. *Brogden* (1850), 3 Mac. & G. 8.

(*c*) At one time it was considered that apprenticeship premiums could be apportioned, and a part recovered on the death of the master during the term (*Hirst* v. *Tolson* (1850), 2 Mac. & G. 134); but there is no debt in such a case at law (*Whincup* v. *Hughes* (1871), L. R. 6 C. P. 78), nor is there any debt in equity (*Ferns* v. *Carr* (1885), 28 Ch. D. 409). The bankruptcy of the master was treated as a case of accident, and a part of the premium was recoverable in equity (*Hale* v. *Webb* (1786), 2 Bro. C. C. 78, 80; *Ex parte Sandby* (1745), 1 Atk. 149; see now Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 41).

(*d*) As to interest on mortgages, see *Edwards* v. *Warwick* (*Countess*) (1723),

were not apportionable at law (*e*), and therefore not in equity; so that where a lessor, whose estate determined with his life, died between two rent days, his executors were not entitled to any rent, and since the lease was at an end the lessee was not bound to pay any (*f*); though if he held till next rent-day, and then paid the whole rent to the successor, the latter was bound in equity to account for a proportionate part to the lessor's executors (*g*). And though annuities and dividends were not in general apportionable (*h*), an exception was made in equity where they were given for the maintenance of an infant (*i*), or of a married woman living apart from her husband (*j*). At the present time rents, annuities, and other periodical payments are apportionable by statute (*k*).

Rent.

Annuities.

Rent, though not apportionable in respect of time, was in some cases apportionable at law in respect of estate, *e.g.*, on the lawful eviction of the tenant from part of the land (*l*); and apparently an interference with enjoyment, without actual eviction, was a ground for apportionment in equity, as where a right of common was established on part of the land (*m*). Rent service was apportionable upon a severance of the reversion, whether by act of the parties or of law (*n*).

When rent apportioned.

A rentcharge, on the other hand, though apportionable if part of the lands vested in the owner of the rentcharge by act of law, was not apportionable, but was extinguished at law, if part of the lands was purchased by the owner of the rentcharge (*o*). In equity, however, the rentcharge was apportioned in this latter case as well (*p*).

Rentcharge.

2 P. Wms. 171; *Pearly* v. *Smith* (1745), 3 Atk. 260; *Wilson* v. *Harman* (1755), 2 Ves. Sen. 672; on bonds, *Banner* v. *Lowe* (1806), 13 Ves. 135.

(*e*) *Clun's Case* (1613), 10 Co. Rep. 127 a, as to rents; and as to annuities and other periodical payments, see cases cited in note to *Ex parte Smyth* (1818), 1 Swan. 337.

(*f*) *Jenner* v. *Morgan* (1717), 1 P. Wms. 392. Under the Distress for Rent Act, 1737 (11 Geo. 2, c. 19), s. 15, the executors of the tenant for life were entitled to a proportion of the rent; as to the equitable extension of the statute to tenants in tail, see *Paget* v. *Gee* (1753), Amb. 198; App. (F), p. 807; *Vernon* v. *Vernon* (1782), 2 Bro. C. C. 659); and as to leases of tithes, *Bentham* v. *Alston* (1690), 2 Vern. 204.

(*g*) *Paget* v. *Gee*, *supra*.

(*h*) *Pearly* v. *Smith*, *supra*; *Sherrard* v. *Sherrard* (1747), 3 Atk. 502.

(*i*) *Hay* v. *Palmer* (1728), 2 P. Wms. 501; *Sheppard* v. *Wilson* (1845), 4 Hare, 392, 395.

(*j*) *Howell* v. *Hanforth* (1775), 2 Wm. Bl. 1016; *Anderson* v. *Dwyer* (1804), 1 Sch. & Lef. 301.

(*k*) Apportionment Act, 1870 (33 & 34 Vict. c. 35). See title RENTCHARGES AND ANNUITIES.

(*l*) *Smith* v. *Malings* (1607), Cro. Jac. 160. See title LANDLORD AND TENANT.

(*m*) *Jew* v. *Thackwell* (1663), 3 Rep. Ch. 7, 11; 1 Cas. in Ch. 31; Freem. (CH.) 174; but a subsequent diminution in the value of the premises was no ground for reducing the rent (*Duckenfield* v. *Whichcott* (1674), 2 Cas. in Ch. 204).

(*n*) Littleton's Tenures, s. 222; Co. Litt. 148 a; *Collins and Harding's Case* (1597), 13 Co. Rep. 57; *Salts* v. *Battersby* (1910), 102 L. T. 730.

(*o*) Co. Litt. 148 a.

(*p*) *Slater* v. *Buck* (1730), Mos. 256; see *Anon.* v. *Hawkes* (1676), 1 Cas. in Ch. 273; extinguishment of rights by acceptance of an estate was not allowed in equity (*Elliot* v. *Hancock* (1690), 2 Vern. 143); see title RENTCHARGES AND ANNUITIES.

SECT. 1.

Nature and Extent of Equitable Jurisdiction.

(vii.) *Contribution* (*q*).

Contribution.

32. In matters of contribution equity exercised jurisdiction concurrent with that at law (*r*), but the procedure in equity was more convenient, chiefly because all parties liable to contribute could be brought before the court at once. This both avoided multiplicity of suits and enabled the mutual liabilities to be more completely adjusted (*s*). Contribution, though its extent may be modified by contract (*t*), is based not on contract, but on principles of natural justice (*a*). Payment by one person liable releases the others from the principal demand, and they are required to contribute as a return for this benefit. But the principle in this shape does not apply unless all the parties are liable to a common demand, and such liability, therefore, is a condition of contribution (*b*). As between the principal debtor liable under a bond and a surety, the surety, on paying the debt, becomes only a simple contract creditor of the principal (*c*), unless he procures an assignment of the bond (*d*).

(viii.) *Administration* (*e*).

Administration.

33. The Court of Chancery acquired jurisdiction in the administration of the estates of deceased persons in consequence of the defective remedies afforded in the common law and the

(*q*) See title GUARANTEE.

(*r*) In numerous cases contribution was recognised in early times at law, and after judgment against one party contribution was enforced against others by proceedings taken on the judgment, namely, by writ of *audita querela* or *scire facias* (*Harbert's Case* (1584), 3 Co. Rep. 11 b; *Dering* v. *Winchelsea* (*Earl*) (1787), 1 Cox, Eq. Cas. 318). Then it came to be enforced at law, as between co-sureties, in *assumpsit* on the footing of implied contract, but this involved a separate judgment against each surety (*Cowell* v. *Edwards* (1800), 2 Bos. & P. 268; *Craythorne* v. *Swinburne* (1807), 14 Ves. 160, 164; *Wolmershausen* v. *Gullick*, [1893] 2 Ch. 514, 519; and see 1 Wms. Saund. 264 c, n. (e); *Re Snowdon, Ex parte Snowdon* (1881), 17 Ch. D. 44, C. A.). Actions for contribution between partners were also entertained at law, but this did not oust the jurisdiction in equity (*Wright* v. *Hunter* (1801), 5 Ves. 792).

(*s*) Thus at law a co-surety who has paid the whole debt can recover from each of the others only an aliquot part according to the whole number of sureties, and if one is insolvent he has no further right against the rest (*Cowell* v. *Edwards, supra; Browne* v. *Lee* (1827), 6 B. & C. 689, 697). But in equity he can make the solvent sureties contribute rateably to the entire debt (*Peter* v. *Rich* (1629), 1 Rep. Ch. 19, [34]; *Hole* v. *Harrison* (1675), 1 Cas. in Ch. 246; *Hitchman* v. *Stewart* (1855), 3 Drew. 271). And the latter rule now prevails (*Lowe* v. *Dixon* (1885), 16 Q. B. D. 455). Again, at law the death of a surety puts an end to his liability to contribute, but in equity the liability can be enforced against his estate (*Primrose* v. *Bromley* (1739), 1 Atk. 89).

(*t*) *Swain* v. *Wall* (1641), 1 Rep. Ch. 80 [149]; *Dering* v. *Winchelsea* (*Earl*), *supra*; *Craythorne* v. *Swinburne*, *supra*.

(*a*) *Dering* v. *Winchelsea* (*Earl*), *supra*; *Stirling* v. *Forrester* (1821), 3 Bli. 575, 596, H. L.

(*b*) *Johnson* v. *Wild* (1890), 44 Ch. D. 146. Hence there is no contribution where each surety undertakes a distinct part of the principal debt (*Coope* v. *Twynam* (1823), Turn. & R. 426).

(*c*) *Copis* v. *Middleton* (1823), Turn. & R. 224.

(*d*) *Hodgson* v. *Shaw* (1834), 3 My. & K. 183; and see Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 5.

(*e*) See also title EXECUTORS AND ADMINISTRATORS.

ecclesiastical courts. A creditor could sue the personal representative at law and recover judgment for his debt; but he could not obtain discovery or an account of the assets, nor could these be made available for all the creditors in a due course of administration; and although the estate was to some extent under the control of the ecclesiastical court in which the will was proved or administration granted, yet a creditor could not contest the inventory exhibited by the personal representative (*f*), nor could he take advantage of a breach of the administrator's bond (*g*).

Creditors' suits.

Consequently it became the practice for the creditor to proceed in equity for discovery and an account of the assets, and equity, having possession of the cause for these purposes, in order to avoid multiplicity of actions gave substantial relief also and decreed payment of the debt (*h*). At first the creditor sued only for his own debt, and obtained a decree for an account of the assets come to the hands of the personal representative, and for payment of his debt in a due course of administration (*i*). Subsequently he sued on behalf of all the creditors, and the decree was for an account of debts and of assets, and for payment of the debts (*k*). Until decree he remained *dominus litis*, and could dismiss the bill; and the executor, on paying his debt and costs, was entitled to have it dismissed (*l*). But after decree he could not deprive other persons of the benefit of the decree if they wished to prosecute it (*m*).

Legatees' suits.

34. The intervention of equity was necessary also on behalf of legatees and next of kin. A legatee could sue at law for a specific legacy on the executor assenting to the bequest, since the assent vested the legal title in him, but he could not sue for a pecuniary legacy (*n*); and though he could sue in the ecclesiastical court, yet

(*f*) *Canterbury* (*Archbishop*) v. *Wills* (1707), 1 Salk. 315; this was on the ground that his proper remedy was at law.

(*g*) The bond was intended for the benefit of the legatees and next of kin (*Wallis* v. *Pipon* (1753), Amb. 183; see *Ashley* v. *Baillie* (1751), 2 Ves. Sen. 368). A creditor who took an assignment of the bond from the ordinary would be restrained in equity from suing on it, upon terms of the personal representative accounting, and of the bond being a security for costs at law and in equity (*Thomas* v. *Canterbury* (*Archbishop*) (1787), 1 Cox, Eq. Cas. 399, explaining *Greerside* v. *Benson* (1745), 3 Atk. 248; and see *Bolton* v. *Powell* (1852), 2 De G. M. & G. 1, 21, C. A.).

(*h*) *Morrice* v. *Bank of England* (1735), 3 P. Wms. 402, n.; (1736) 3 Swan. 573; (1737) 2 Bro. Parl. Cas. 465; *Barker* v. *Dumeres* (1740), Barn. (CH.) 277; see *Alexander* v. *Alexander* (1669), 2 Rep. Ch. 20, [37]. Moreover, at law the creditor reached only legal assets (*Cox's* (*Sir Charles*) *Creditors' Case* (1734), 3 P. Wms. 341; p. 34, *post*).

(*i*) *A.-G.* v. *Cornthwaite* (1788), 2 Cox, Eq. Cas. 44; in such administration all debts of a higher or equal nature might be paid by the executor, and were allowed to him in his discharge (see *Anon.* (1747), 3 Atk. 572).

(*k*) Legislative sanction was given to administration decrees as to personal estate, and facility conferred for obtaining them, by the Court of Chancery Procedure Act, 1852 (15 & 16 Vict. c. 86) (now repealed), and since then the action has ceased to be brought on behalf of all creditors, unless real estate also is involved (*Re Greaves, deceased, Bray* v. *Tofield* (1881), 18 Ch. D. 551,554; see *Wooldridge* v. *Norris* (1868), L. R. 6 Eq. 410, 414).

(*l*) *Pemberton* v. *Topham* (1838), 1 Beav. 316; *Re Greaves, deceased, Bray* v. *Tofield, supra.*

(*m*) *Handford* v. *Storie* (1825), 2 Sim. & St. 196; see *Re Alpha Co., Ltd., Ward* v. *Alpha Co., Ltd.*, [1903] 1 Ch. 203.

(*n*) *Deeks* v. *Strutt* (1794), 5 Term Rep. 690; see *Brown* v. *Elton* (1733), 3

SECT. 1. Nature and Extent of Equitable Jurisdiction.

the machinery of that court was not adapted for securing a due distribution of the estate among the persons entitled. In particular, if there was an undisposed-of residue, the ecclesiastical court could not direct distribution among the next of kin (*o*). Consequently the jurisdiction of equity in administration extended to the distribution of the estate among the persons beneficially entitled (*p*). At first a legatee could sue for his own legacy solely (*q*), but the proceedings came to be enlarged in their scope as in the case of a creditor's action. If the executor admitted assets, the legatee continued to be entitled to a decree for payment (*r*). But otherwise an account of all the legacies was directed, with an order for payment rateably (*s*). The action involved an account of the personal estate, and also, since debts had priority over legacies, an account of debts, and hence a creditor could make his claim in the action (*t*). To a bill by a specific or pecuniary legatee neither the residuary legatees nor other legatees were necessary parties; but on a bill by one of several residuary legatees all other persons interested in the residue, after satisfaction of creditors and specific and pecuniary legatees, had to be brought before the court (*a*). Until decree other legatees or creditors could take proceedings in equity (*b*).

Restraining proceedings at law.

35. The jurisdiction of equity in administration being concurrent with that at law and in the ecclesiastical courts, simultaneous proceedings in these different courts had to be prevented. After the filing of a bill in equity a legatee was restrained from proceeding in the ecclesiastical court (*c*), and thus the Court of Chancery acquired exclusive control of the administration so far as legatees were concerned. Actions by creditors at common law were not restrained until there was a decree for general administration, and till such decree a creditor was entitled to proceed to judgment, and so obtain priority. As regards priority a decree in equity was

P. Wms. 202. But after executors had presented an account showing money to be in their hands on behalf of the legatee, they were liable to be sued at law (*Topham* v. *Morecraft* (1858), 8 E. & B. 972; see *Harding* v. *Harding* (1886), 17 Q. B. D. 442).

(*o*) Unless the will showed an intention that the executors should take the undisposed-of residue beneficially, they were trustees for the next of kin, but the ecclesiastial court could not enforce the execution of a trust (*Farrington* v. *Knightly* (1721), 1 P. Wms. 544, 549, 550, n. (1)).

(*p*) In *Adair* v. *Shaw* (1803), 1 Sch. & Lef. 243, 262, Lord REDESDALE, L.C. based the whole jurisdiction of equity in administration on the duty of the court to enforce the execution of trusts; but this was incorrect. The duties of a personal representative are to a large extent legal duties, and equity recognises this in requiring legal assets to be distributed in accordance with legal rules. The jurisdiction of equity was based on the superior advantages afforded by discovery, by the taking of accounts, and by the adjudication on the claims of creditors and beneficiaries in one action.

(*q*) *Haycock* v. *Haycock* (1682), 2 Cas. in Ch. 124.

(*r*) *Boys* v. *Ford* (1819), 4 Madd. 40.

(*s*) Mitford on Pleadings, 4th ed., p. 168.

(*t*) See *Sims* v. *Ridge* (1817), 3 Mer. 458.

(*a*) Mitford on Pleadings, p. 168, n. (p).

(*b*) *Handford* v. *Storie* (1825), 2 Sim. & St. 196, 198; *Martin* v. *Martin* (1749), 1 Ves. Sen. 211.

(*c*) *Stonehouse* v. *Stonehouse* (1745), 1 Dick. 98; *Smith* v. *Kempson* (1790), 2 Dick. 769.

equivalent to a judgment at law; and consequently a creditor suing for himself alone gained priority by the decree over a subsequent judgment creditor (*d*), provided the decree was for an ascertained sum, and not merely for an account with consequential direction for payment (*e*).

But where a general decree for administration was made, this operated as a judgment in favour of all the creditors who came in under it (*f*), and creditors were restrained from proceeding at law after such a decree (*g*); though, to prevent abuse in consequence of a decree being obtained by a friendly creditor, the executor, as a condition of the injunction, was required to make an affidavit of assets (*h*). A creditor, who had obtained judgment at law before the decree for administration, was *primâ facie* entitled to levy execution, either on the goods of the testator if the judgment was *de bonis testatoris*, or on the goods of the executor as well if it was also *de bonis propriis*. But in the former case the execution would be restrained, the creditor being at the same time allowed his legal priority as against the assets (*i*); in the latter case it seems that the execution against the assets of the testator would not be restrained, since this would prejudice the recourse to the goods of the executor (*k*).

Legal and equitable assets.

36. Formerly there was a difference between the rules of common law and equity with regard to the order of payment of debts. At common law specialty debts had priority over simple contract debts; in equity both were payable *pari passu* (*l*). And this difference gave importance to the distinction between legal and equitable assets. Legal assets were subject to the common law rule both when they were being dealt with at common law and in equity, since, as to them, equity followed the law (*m*). Equitable assets

(*d*) *Morrice* v. *Bank of England* (1736), 3 Swan. 573, 576 *et seq.*

(*e*) *Perry* v. *Phelips* (1804), 10 Ves. 34.

(*f*) *Paxton* v. *Douglas* (1803), 8 Ves. 520.

(*g*) This was necessary, since the decree was not recognised at law (*Paxton* v. *Douglas*, *supra*), and was justified on the ground that, since the court had taken the administration into its own hands, the executor must be protected in obeying the decree (*Kenyon* v. *Worthington* (1786), 2 Dick. 668; *Brooks* v. *Reynolds* (1782), 1 Bro. C. C. 183; see *Martin* v. *Martin* (1749), 1 Ves. Sen. 211; *Goate* v. *Fryer* (1789), 3 Bro. C. C. 23).

(*h*) *Paxton* v. *Douglas*, *supra*; *Gilpin* v. *Southampton* (*Lady*) (1812), 18 Ves. 469.

(*i*) *Clarke* v. *Ormonde* (*Earl*) (1821), Jac. 108, 124 (though see *Lee* v. *Park* (1836), 1 Keen, 714, 724); and the creditor was entitled to the fruits of an execution levied and in the hands of the sheriff before decree (*Re Skiggs, Marriage* v. *Skiggs* (1859), 4 De G. & J. 4, C. A.).

(*k*) *Lee* v. *Park* (1836), 1 Keen, 714; *Drewry* v. *Thacker* (1819), 3 Swan. 529; *Lord* v. *Wormleighton* (1821), Jac. 148; see *Re Womersley, Etheridge* v. *Womersley* (1885), 29 Ch. D. 557, 559. Where judgment has not been obtained, see *Re Stubbs' Estate, Hanson* v. *Stubbs* (1878), 8 Ch. D. 154.

(*l*) See *Cox's* (*Sir Charles*) *Creditors' Case* (1734), 3 P. Wms. 341; *Turner* v. *Turner* (1819), 1 Jac. & W. 39, 45. "A debt without specialty is as much as a debt *jure naturali*, and in conscience as a debt by specialty, and therefore shall have an equality with debts by specialty where conscience is the judge" (*Hixon* v. *Wytham* (1675), 1 Cas. in Ch. 248).

(*m*) But if a specialty creditor had been partly paid out of legal assets, he was not allowed to participate in equitable assets until the other creditors had

SECT. 1. Nature and Extent of Equitable Jurisdiction.

were dealt with only in equity, and were subject to the equitable rule.

The distinction between legal and equitable assets referred to the remedies of the creditor, and not to the nature of the property. Assets which the creditor could make available for the satisfaction of his debt in an action at law were legal assets (*n*). These included all assets which an executor could recover *virtute officii*, notwithstanding that the executor might have to sue for them in equity, since at law the creditor could charge the executor with all such assets (*o*). Assets which a creditor could only reach by a suit in equity were equitable assets; of this nature were the proceeds of sale of land devised on trust for, or charged with, payment of the testator's debts (*p*).

Land as assets for payment of debts.

Before 1833, unless land was made liable by the testator for payment of his debts, it did not constitute assets available for creditors generally, though it was liable in the hands of the heir or devisee to specialty debts by which the heirs were bound (*q*). By

received a like proportion (*Morrice* v. *Bank of England* (1736), Cas. *temp.* Talb. 217, 220; *Wride* v. *Clarke* (1766), 1 Dick. 382).

(*n*) *Cook* v. *Gregson* (1856), 3 Drew. 547, 549.

(*o*) See *Wilson* v. *Fielding* (1718), 2 Vern. 763; *Cox's* (*Sir Charles*) *Creditors' Case* (1734), 3 P. Wms. 341; *A.-G.* v. *Brunning* (1860), 8 H. L. Cas. 243, 258, 259.

(*p*) *Silk* v. *Prime* (1768), cited 1 Bro. C. C. 138, n.; *Foly's Case* (1679), Freem. (CH.) 49. It was at one time a question whether a devise to executors, or a power for them, to sell for payment of debts made the proceeds legal or equitable assets. At first they were treated as legal assets, since the proceeds came to the hands of the executors (*Blatch* v. *Wilder* (1738), West *temp.* Hard. 322); later a devise to executors made the land equitable assets, since the executors were treated, for the purpose of the devise, as trustees (*Silk* v. *Prime*, *supra*), and apparently a mere power for them to sell also made the land equitable assets (*Newton* v. *Bennet* (1782), 1 Bro. C. C. 135; *Barker* v. *Boucher* (1784), 1 Bro. C. C. 140, n. (4)). There was also an opinion that land was not made equitable assets unless the descent was broken, so that land charged with debts in the hands of the heir was legal assets, but this was overruled (*Bailey* v. *Ekins* (1802), 7 Ves. 319; *Shiphard* v. *Lutwidge* (1802), 8 Ves. 26; *Clay* v. *Willis* (1823), 1 B. & C. 364; *Barker* v. *May* (1829), 9 B. & C. 489). As to the whole subject see note to *Blatch* v. *Wilder*, *supra*.

Separate estate of a married woman was from its nature equitable assets since it was not recognised at law (*Anon.* (1811), 18 Ves. 258; *Re Poole's Estate*, *Thompson* v. *Bennett* (1877), 6 Ch. D. 739); see *Owens* v. *Dickenson* (1849), Cr. & Ph. 48, 54. It appears to have been formerly considered that personal property, subject to a general power of appointment by will, became on appointment equitable assets, the appointee being treated as a trustee for the creditors (*Jenney* v. *Andrews* (1822), Madd. & G. 264; *Pardo* v. *Bingham* (1869), L. R. 6 Eq. 485); see *Townshend* (*Lord*) v. *Windham* (1750), 2 Ves. Sen. 1, 11. But such property is assets for payment of debts in the hands of the executor, and is, consequently, legal assets (*Re Hadley*, *Johnson* v. *Hadley*, [1909] 1 Ch. 20, C. A., *per* COZENS-HARDY, M.R., at p. 32; *per* FARWELL, L.J., at p. 36); see *Beyfus* v. *Lawley*, [1903] A. C. 411). Under the Administration of Estates Act, 1833 (3 & 4 Will. 4, c. 104), real estate, subject to a general power of appointment by will, became, like real estate of the testator, assets for payment of his debts (*Fleming* v. *Buchanan* (1853), 3 De G. M. & G. 976, C. A.).

(*q*) Stat. (1691) 3 Will. & Mar. c. 14, repealed and re-enacted in altered form by the Debts Recovery Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 47). A devise in trust for payment of debts took the land out of these statutes and made it equitable assets (*Spackman* v. *Timbrell* (1837), 8 Sim. 253; *Bailey* v. *Ekins*, *supra*). In proceedings at law to charge the lands in the hands of a devisee the heir was a necessary party, and, since proceedings in equity for the sale

the Administration of Estates Act, 1833, it was made liable, in proceedings in a court of equity, to specialty and simple contract debts generally, but the priority of specialty debts by which the heirs were bound was preserved (*r*). The effect was that land became assets to be dealt with in a court of equity in accordance with the statute (*s*), but if it had been made liable to debts by the will of the testator, it continued to be equitable assets apart from the statute (*t*). By the Administration of Estates Act, 1869 (*u*), specialty debts of all kinds and simple contract debts were put on the same footing for the purpose of administration, and the distinction between legal and equitable assets lost most of its importance.

Judgment against testator.

37. A judgment obtained against a testator ranks before specialty and simple contract debts, and the executor cannot, as against a judgment creditor, discharge himself by showing payment of debts of an inferior nature. Originally this was so whether the executor had actual notice of the judgment or not, since he was presumed to have notice; and decrees in equity had the like priority, regardless also of actual notice (*a*). Then under successive statutes ending with the Law of Property Amendment Act, 1860 (*b*), judgments at law and decrees in equity had no priority unless they were registered (*c*). The repeal of the relevant sections of this Act has perhaps had the effect of reviving the priority of unregistered judgments (*d*).

Judgment against executor.

38. Formerly a judgment obtained against the executor gave the judgment creditor priority in his own class—that is, a judgment specialty creditor had priority as regards legal assets over other specialty creditors; and similarly for simple contract creditors. And a decree in equity for payment of an ascertained sum had a like effect (*e*), while a decree for general administration prevented any further priority from being gained. To obtain priority it was not necessary for the judgment or decree to be registered (*f*). The effect of placing specialty and simple contract debts on the same footing has been to give judgment creditors of either class priority

purpose followed the analogy of the statute, he was a necessary party there also (*Gawler* v. *Wade* (1707), 1 P. Wms. 99).

(*r*) 3 & 4 Will. 4, c. 104 (Sir John Romilly's Act). There is no charge of debts on real estate under this statute till judgment for administration of the real estate has been obtained (*Re Moon, Holmes* v. *Holmes*, [1907] 2 Ch. 304).

(*s*) *Re Illidge, Davidson* v. *Illidge* (1884), 27 Ch. D. 478, 484, C. A.

(*t*) The Act is expressly confined to real estate which the testator had not by will charged with, or devised subject to, the payment of his debts (see *Ball* v. *Harris* (1839), 4 My. & Cr. 264). Compare *Turner* v. *Cox* (1853), 8 Moo. P. C. C. 288.

(*u*) 32 & 33 Vict. c. 46, known as Hinde Palmer's Act.

(*a*) *Searle* v. *Lane* (1688), 2 Vern. 88.

(*b*) 23 & 24 Vict. c. 38, ss. 3, 5, repealed by the Land Charges Act, 1900 (63 & 64 Vict. c. 26), which transferred the registry of judgments to the Land Registry Office, and made an order of the Court necessary for entries in the register.

(*c*) See *Van Gheluve* v. *Nerinckx* (1882), 21 Ch. D. 189.

(*d*) See Land Charges Act, 1900 (63 & 64 Vict. c. 26), ss. 2 (3), 5; and compare *Fuller* v. *Redman* (No. 1) (1859), 26 Beav. 600.

(*e*) *Morrice* v. *Bank of England* (1736), Cas. *temp.* Talb. 217.

(*f*) *Jennings* v. *Rigby* (1863), 33 Beav. 198.

SECT. 1. Nature and Extent of Equitable Jurisdiction.

over all other specialty and simple contract creditors alike (*g*); save in the administration of an insolvent estate by the court, and then the judgment creditors have no priority (*h*).

Executor's right of preference.

39. An executor has always been entitled to pay creditors of the same class in such order as he pleases, although there may not be enough to pay all, and this is known as his right of preference (*i*). And now, under the Administration of Estates Act, 1869 (*j*), he can prefer a simple contract creditor to a specialty creditor (*k*). If a creditor commenced an action at law against the executor, the right of preference was stopped as against him as soon as the executor had notice of the action; but it was not stopped by proceedings in equity until decree (*l*). Since the Judicature Acts the equitable rule has prevailed, and the right of preference continues until a creditor has obtained judgment either in the Chancery or King's Bench Division (*m*). But a creditor who has been preferred as to part of his debt cannot receive anything further in an administration action until the other creditors have received the like proportion (*n*).

Executor's right of retainer.

40. Similar to the right of preference is the executor's right to retain out of the assets sufficient to satisfy a debt due to himself. It is a right of preferring himself, and has been also based on the impossibility of his suing himself (*o*). It is exercisable only out of legal assets (*p*), and as against creditors of the same degree. The Administration of Estates Act, 1869 (*q*), has not altered this rule. The entire assets are apportioned between the specialty and simple contract creditors, and the executor can retain his debt out of the part apportioned to debts of the same nature. If he is a simple contract creditor he gains incidentally through the fund available

(*g*) *Re Williams' Estate, Williams* v. *Williams* (1872), L. R. 15 Eq. 270.

(*h*) This is the result of s. 10 of the Judicature Act, 1875 (38 & 39 Vict. c. 77) (*Re Whitaker, Whitaker* v. *Palmer*, [1901] 1 Ch. 9, C. A.; *M'Causland* v. *O'Callaghan*, [1904] 1 I. R. 376, C. A. (overruling in effect *Re Maggi, Winehouse* v. *Winehouse* (1882), 20 Ch. D. 545)).

(*i*) *Lyttleton* v. *Cross* (1824), 3 B. & C. 317, 322; see title EXECUTORS AND ADMINISTATORS.

(*j*) 32 & 33 Vict. c. 46; see p. 35, *ante*.

(*k*) *Re Samson, Robbins* v. *Alexander*, [1906] 2 Ch. 584, C. A., overruling *Re Hankey, Cunliffe Smith* v. *Hankey*, [1899] 1 Ch. 541, and approving *Re Orsmond, Drury* v. *Orsmond* (1887), 58 L. T. 24. Formerly a payment to a simple contract creditor was only good as against a specialty debt of which the executor had no notice (*Hawkins* v. *Day* (1753), Amb. 160).

(*l*) *Orford (Earl)* v. *Daston* (1702), Colles, 229; *Maltby* v. *Russel* (1825), 2 Sim. & St. 227.

(*m*) *Re Radcliffe, deceased, European Assurance Society* v. *Radcliffe* (1878), 7 Ch. D. 733; *Vibart* v. *Coles* (1890), 24 Q. B. D. 364, C. A.

(*n*) *Wilson* v. *Paul* (1836), 8 Sim. 63; *Mitchelson* v. *Piper* (1836), 8 Sim. 64.

(*o*) The heir-at-law has no right of retainer out of proceeds of real estate or rents for a simple contract debt, since he could not be sued for a debt of the same nature owing by the testator (*Re Illidge, Davidson* v. *Illidge* (1884), 27 Ch. D. 478, C. A.); but he may retain in respect of specialty debts in which the heir is bound (*Solley* v. *Gower* (1688), 2 Vern. 62; *Loomes* v. *Stotherd* (1823), 1 Sim. & St. 458), though not where the legal right to sue is in trustees (*Re Hayward, Tweedie* v. *Hayward*, [1901] 1 Ch. 221); see title EXECUTORS AND ADMINISTRATORS.

(*p*) *Anon.* (1681), 2 Cas. in Ch. 45; see *Walters* v. *Walters* (1881), 18 Ch. D. 182.

(*q*) 32 & 33 Vict. c. 46.

for simple contract debts being thus increased (*r*). The right of retainer is not stopped by an administration judgment and may be exercised against funds in court, if paid in by or on behalf of the executor (*s*). And it is exercisable as against a superior debt of which the executor has no notice (*t*).

Order of liability of assets as between beneficiaries.

41. As regards the creditors all the assets of a deceased person are liable for the satisfaction of their debts in the manner above stated, subject to payment in the first instance of funeral and testamentary expenses out of the personal estate (*u*); but as regards the persons beneficially entitled to the assets, certain assets are liable before others, and the order of liability has been settled, in accordance with the presumed intention of the testator, as follows (*a*):—(1) the residuary personal estate; (2) real estate devised in trust for payment of debts; (3) real estate descended; (4) real estate devised and charged with payment of debts (*b*); (5) general pecuniary legacies; (6) specific legacies, and real estate devised specifically or by way of residue, and not charged with payment of debts; (7) real or personal estate expressly appointed under a general power of appointment (*c*). When the assets have not been applied in this order to the payment of debts, then the disappointed beneficiaries are entitled to have the assets marshalled, so that the actual incidence of the debts shall be in accordance with the due priority of liability. Thus, where debts are charged on real estate, but are in fact paid out of personalty, with the result that pecuniary legatees are disappointed, the legatees are entitled to have the assets marshalled so as to render the real estate charged with debts available for their legacies (*d*).

Under the Land Transfer Act, 1897 (*e*), the whole real and personal estate is subject to administration by the personal representatives of the deceased, but the order in which real and personal assets respectively are applicable in or towards the payment of funeral and testamentary expenses, debts or legacies, or the liability of real estate to be charged with the payment of legacies, is not altered. Consequently the assets can be applied in the above

(*r*) *Wilson* v. *Coxwell* (1883), 23 Ch. D. 764; approved in *Re Jones, Calvert* v. *Laxton* (1885), 31 Ch. D. 440; *Re Jennes, Oetzes* v. *Jennes* (1909), 53 Sol. Jo. 376.

(*s*) *Chissum* v. *Dewes* (1828), 5 Russ. 29; *Langton* v. *Higgs* (1832), 5 Sim. 228; *Richmond* v. *White* (1879), 12 Ch. D. 361; *Pulman* v. *Meadows*, [1901] 1 Ch. 233

(*t*) *Re Fludyer, Wingfield* v. *Erskine*, [1898] 2 Ch. 562.

(*u*) See *Re Pullen, Parker* v. *Pullen*, [1910] 1 Ch. 564.

(*a*) See title EXECUTORS AND ADMINISTRATORS.

(*b*) The effect for this purpose of a charge of debts is preserved, notwithstanding that under the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 2 (3), the charge is no longer necessary (*Re Kempster, Kempster* v. *Kempster*, [1906] 1 Ch. 446).

(*c*) *Fleming* v. *Buchanan* (1853), 3 De G. M. & G. 976, 980; *Beyfus* v. *Lawley*, [1903] A. C. 411.

(*d*) *Re Stokes, Parsons* v. *Miller* (1892), 67 L. T. 223; *Re Salt, Brothwood* v. *Keeling*, [1895] 2 Ch. 203; *Re Roberts, Roberts* v. *Roberts*, [1902] 2 Ch. 834; *Re Kempster, Kempster* v. *Kempster*, [1906] 1 Ch. 446; *Re Bate, Bate* v. *Bate* (1890), 43 Ch. D. 600, *contra*, is overruled; see pp. 144, 145, *post*. And as to marshalling so as to throw estate duty in respect of specific legacies on descended real estate, see *Re Pullen, Parker* v. *Pullen*, *supra*.

(*e*) 60 & 61 Vict. c. 65, s. 2 (3).

SECT. 1. Nature and Extent of Equitable Jurisdiction.

order by the personal representatives without the assistance of the Court.

(ix.) *Partnership* (*f*).

42. The Court of Chancery exercised jurisdiction in matters of partnership in consequence of the manifest superiority of the remedies which it could give over those available at law.

Partnership.

At law the only remedies open to a partner were an action of covenant or of *assumpsit* for breach of the partnership agreement, and an action of account (*g*). The former remedies did not suitably provide for all the questions which might arise as between the partners *inter se*, and as between the partners and their joint and separate creditors; and the action of account was open to objections which made it an impracticable remedy (*h*).

Rights of partners *inter se*.

In equity the special remedies and doctrines of the jurisdiction were and still are available in a variety of ways to adjust the rights and liabilities of partners. Although specific performance of an agreement to enter into partnership was not as a rule decreed, for the reason that a partnership could not be expected to be successful if it commenced in mutual distrust, dissatisfaction, or enmity (*i*), yet where the agreement was for a fixed term and had been already partly performed, and where it was necessary that the status of the partners should be determined, then the agreement would be specifically enforced (*j*). When a partnership had been established, discovery might be wanted to prove the fact of partnership, or to procure information of the partnership transactions. If there were reasons which prevented the effective carrying on of the partnership, there was jurisdiction in equity to order a dissolution although the stipulated period had not expired (*k*). Where a dissolution had occurred, the procedure in equity allowed of the partnership accounts being taken, and this might be done, if necessary, even without a dissolution (*l*). Both during the partnership and after its dissolution, the appointment of a receiver, or a receiver and manager, might be expedient (*m*), or it might be proper to restrain one of the partners by injunction from acting in violation of the partnership contract, or contrary to the interests of the other partners (*n*).

Rights of creditors.

And the interference of equity was necessary when questions aros

(*f*) See title PARTNERSHIP.
(*g*) As to the action of account between partners, see Co. Litt. 172 a.
(*h*) See p. 27, *ante*.
(*i*) Story, s. 666.
(*j*) *Buxton* v. *Lister* (1746), 3 Atk. 383; *Crawshay* v. *Maule* (1818), 1 Swan. 495, 509, n. (a); *England* v. *Curling* (1844), 8 Beav. 129; *Scott* v. *Rayment* (1868), L. R. 7 Eq. 112.
(*k*) *Waters* v. *Taylor* (1813), 2 Ves. & B. 299; *Anon.* (1856), 2 K. & J. 441, 447; *Jones* v. *Lloyd* (1874), L. R. 18 Eq. 265, 274.
(*l*) Lord ELDON refused an account unless a dissolution was prayed (*Forman* v. *Homfray* (1813), 2 Ves. & B. 329; see *per* SHADWELL, V.-C., in *Loscombe* v. *Russell* (1830), 4 Sim. 8; *contra*, *per* LEACH, V.-C., in *Harrison* v. *Armitage* (1819), 4 Madd. 143; *per* Lord COTTENHAM in *Wallworth* v. *Holt* (1841), 4 My. & Cr. 619, 635—639). As to the cases in which an account will now be ordered without a dissolution, see title PARTNERSHIP.
(*m*) See title RECEIVERS.
(*n*) See title INJUNCTION.

between partners and their creditors. A judgment creditor of one partner could take in execution, not his share in the partnership chattels, but only his interest after the accounts had been taken and the partnership liabilities provided for (*o*), and this could only be effectively done in equity. Equitable doctrines, moreover—*e.g.*, the doctrine of marshalling—were required to give joint creditors a preference against the joint assets, and separate creditors against the separate assets (*p*); and in equity a joint covenant by partners was treated as several on the death of a partner, so that the covenantee could recover against his estate (*q*). In addition, real estate of the partnership, which was vested in one of the partners, or in the partners jointly, was treated as partnership assets, and the beneficial interest of the partners devolved as personalty (*r*). These were some of the reasons which gave equity a concurrent, and in practice almost an exclusive, jurisdiction in partnership matters (*s*); and which led to the assignment of such matters to the Chancery Division of the High Court.

(x.) *Determination of Boundaries.*

Determination of boundaries.

43. The Court of Chancery exercised from early times a jurisdiction to determine boundaries where the lands of adjoining proprietors had become confused, and where there was also some special reason for the assistance of equity (*a*). To give jurisdiction the plaintiff must have shown, either by the defendant's admission or by evidence, that he had a clear legal title to some part of the land the boundaries of which were said to be confused (*b*), and further that the defendant was in possession of part of the land (*c*).

(*o*) *Waters* v. *Taylor* (1813), 2 Ves. & B. 299, 301; *Re Wait* (1820), 1 Jac. & W. 605, 608; see *West* v. *Skip* (1749), 1 Ves. Sen. 239; *Dutton* v. *Morrison* (1810), 17 Ves. 193, 206; *Habershon* v. *Blurton* (1847), 1 De G. & Sm. 121.

(*p*) *Twiss* v. *Massey* (1737), 1 Atk. 67; *Dutton* v. *Morrison*, *supra*, at p. 209.

(*q*) *Devaynes* v. *Noble* (1816), 1 Mer. 530, 539; *Devaynes* v. *Noble* (1831), 2 Russ. & M. 495; *Wilkinson* v. *Henderson* (1833), 1 My. & K. 582; *Thorpe* v. *Jackson* (1837), 2 Y. & C. (EX.) 553; *Kendall* v. *Hamilton* (1878), 3 C. P. D. 403, 407, C. A., affirmed (1879), 4 App. Cas. 504, 517; *Re McRae*, *Forster* v. *Davis*, *Norden* v. *McRae* (1883), 25 Ch. D. 16, 19, C. A.; *Re Hodgson*, *Beckett* v. *Ramsdale* (1885), 31 Ch. D. 177, C. A.; *Re Doetsch*, *Matheson* v. *Ludwig*, [1896] 2 Ch. 836, 839; see *Ex parte Kendall* (1811), 17 Ves. 514.

(*r*) *Lake* v. *Craddock* (1732), 3 P. Wms. 158; *Jackson* v. *Jackson* (1804), 9 Ves. 591, 597, citing *Elliot* v. *Brown* (1791), unreported; *Houghton* v. *Houghton* (1841), 11 Sim. 491; *Davies* v. *Games* (1879), 12 Ch. D. 813. But as to the limits of this application of the doctrine of conversion, see *Randall* v. *Randall* (1835), 7 Sim. 271; Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 20 (3); *Davis* v. *Davis*, [1894] 1 Ch. 393.

(*s*) Story, s. 683.

(*a*) See title BOUNDARIES AND FENCES, Vol. III., pp. 116 *et seq.*, and the following cases:—*Spyer* v. *Spyer* (1631), Nels. 14; *Lethieullier* v. *Castlemain* (*Lord*) (1726), Dick. 46; *Darlington* (*Earl*) v. *Bowes* (1759), 1 Eden, 270; *Lascelles* v. *Butt* (1876), 2 Ch. D. 588; *A.-G.* v. *Fullerton* (1813), 2 Ves. & B. 263; *Aston* v. *Exeter* (*Lord*) (1801), 6 Ves. 288; *Leeds* (*Duke*) v. *Strafford* (*Earl*) (1798), 4 Ves. 180; *St. Luke's*, *Old Street* v. *St. Leonard's*, *Shoreditch* (1779), 1 Bro. C. C. 40.

(*b*) *Godfrey* v. *Littel* (1831), 2 Russ. & M. 630.

(*c*) *A.-G.* v. *Stephens* (1855), 6 De G. M. & G. 111, 149. See *Basingstoke Corporation* v. *Bolton* (*Lord*) (1852), 1 Drew 270, 289; (1854) 3 Drew. 50, 63; *Hicks* v. *Hastings* (1857), 3 K. & J. 701.

SECT. 1.

Nature and Extent of Equitable Jurisdiction.

Partition.

(xi.) *Partition* (*d*).

44. The Court of Chancery assumed from early times a concurrent jurisdiction in partition (*e*). This was due partly to the inadequacy, and partly to the inconvenience, of the remedy at law (*f*). The writ of partition at law was originally only available for parceners (*g*), and though it was made available for joint tenants and tenants in common of estates of inheritance by 31 Hen. 8, c. 1, and for joint tenants and tenants in common for lives or years by 32 Hen. 8, c. 32, s. 1 (*h*), the extension of the remedy did not meet the objection that the remedy itself was difficult to apply. Accordingly the jurisdiction of the court was based not upon any equity, but upon the principle of convenience (*i*)—upon the extreme difficulty attending the process of partition at law (*k*).

The superiority of equity was shown in the facility for making inquiry into the titles of the persons interested (*l*) and for ascertaining the value of the different properties (*a*); in the power of awarding a sum to be paid for owelty of partition (*b*); and in the power

(*d*) See title PARTITION. As a rule a sale is now directed in lieu of partition under the Partition Acts, 1868 (31 & 32 Vict. c. 40) and 1876 (39 & 40 Vict. c. 17).

(*e*) Co. Litt. 169 a, Hargrave's note, referring to *Speke* v. *Walrond* (1598), Toth. 155; this learned writer seems to have regarded the jurisdiction as a usurpation; see 1 Fonblanque, Treatise of Equity, 5th ed., Vol. I., p. 9; Story, ss. 646, 647.

(*f*) See Mitford on Pleadings, p. 120.

(*g*) Littleton's Tenures, s. 264.

(*h*) *Baring* v. *Nash* (1813), 1 Ves. & B. 551; 555; *Miller* v. *Warmington* (1820), 1 Jac. & W. 484, 493.

(*i*) *Calmady* v. *Calmady* (1795), 2 Ves. 568, 570; *Strickland* v. *Strickland* (1842), 6 Beav. 77, 81.

(*k*) *Agar* v. *Fairfax*, *Agar* v. *Holdsworth* (1811), 17 Ves. 533, *per* Lord ELDON, L.C., at p. 552; *Manaton* v. *Squire* (1677), Freem. (CH.) 26. But the Court of Chancery had no jurisdiction to decree partition of copyholds (*Horncastle* v. *Charlesworth* (1840), 11 Sim. 315), or customary freeholds (*Jope* v. *Morshead* (1843), 6 Beav. 213), till jurisdiction was expressly conferred by the Copyhold Act, 1841 (4 & 5 Vict. c. 35), s. 85 (now repealed, and re-enacted by the Copyhold Act, 1894 (57 & 58 Vict. c. 46), s. 87). As to leaseholds, see *Baring* v. *Nash* (1813), 1 Ves. &. B. 551. The writ of partition was abolished by the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 36; and from that time equity had technically, as before it had practically, exclusive jurisdiction in partition (see *Leigh* v. *Dickeson* (1884), 15 Q. B. D. 60, 65, C. A.; *Mayfair Property Co.* v. *Johnston*, [1894] 1 Ch. 508, 513). An attempt had been made by stat. (1696) 8 & 9 Will. 3, c. 31 (now repealed), to remove some of the difficulties at law; see as to the operation of this statute in equity, *Story* v. *Johnson* (1837), 2 Y. & C. (EX.) 586, 605.

(*l*) *Agar* v. *Fairfax*, *Agar* v. *Holdsworth*, *supra*. It is the duty of the court to ascertain the proportions and rights of the parties, and when that is done the duty of the commissioners begins, to make the division in those ascertained proportions (*ibid.*, *per* GRANT, M.R., at p. 543). A tenant for life might represent unborn remaindermen (*Gaskell* v. *Gaskell* (1836), 6 Sim. 643). The plaintiff had to show a title to his share before he could get a decree for partition (*Jope* v. *Morshead* (1843), 6 Beav. 213).

(*a*) *Calmady* v. *Calmady*, *supra*.

(*b*) This could not be done at law, since the exigency of the judgment required that the lands should be divided by the sheriff according to the oath of twelve men of the bailiwick (Littleton's Tenures, s. 248); and in equity it had to be

to direct conveyances (*c*). Originally the practice was to ascertain the interests and then issue a commission. Subsequently the commission was usually dispensed with to save expense and the partition made in chambers (*d*).

Partition was a matter of right, however difficult the actual partition might be (*e*), but it was not necessary to divide each separate property. The several properties included in the joint ownership might be assigned in their entirety among the co-owners (*f*); and in making the division regard might be paid to the circumstances of the owners and of the properties, so as to secure to each owner the greatest convenience and advantage (*g*). In partition, moreover, an account of rents and profits may be decreed against a co-owner who has been in possession of the whole or of more than his share (*h*), but who, on the other hand, may be entitled to a lien for money expended on improvements (*i*).

(xii.) *Dower* (*k*).

45. In dower the Court of Chancery exercised a jurisdiction concurrent with that at law. This was based upon the difficulties which the widow might encounter if she was left to her remedy at law. She required discovery of the lands in the possession of the heir, and valuation of the different parts; and there might be legal impediments to her recovery of dower at law—such as the existence

Dower.

done by the court, not by the commission (*Mole* v. *Mansfield* (1845), 15 Sim. 41; see *Lister* v. *Lister* (1839), 3 Y. & C. (EX.) 540, 545).

(*c*) *Whaley* v. *Dawson* (1805), 2 Sch. & Lef. 367, 371; see *Anon.* (1742), 3 Swan. 139, n. This was said in *Miller* v. *Warmington* (1820), 1 Jac. & W. 484, 493, to be a reason for requiring the legal title to be before the court; but apparently the court would proceed on an equitable title in the plaintiff, on the ground that otherwise he would be without remedy (*Cartwright* v. *Pultney* (1742), 2 Atk. 380); and an outstanding legal title affecting the whole estate, as that of a mortgagee (*Swan* v. *Swan* (1819), 8 Price, 518; *Waite* v. *Bingley* (1882), 21 Ch. D. 674), need not be before the court, though the entire estate in a particular share should be (*Cornish* v. *Gest* (1788), 2 Cox, Eq. Cas. 27).

(*d*) *Greenwood* v. *Percy* (1859), 26 Beav. 572; *Clarke* v. *Clayton* (1860), 2 Giff. 333.

(*e*) *Parker* v. *Gerrard* (1754), Amb. 236; *Warner* v. *Baynes* (1750), Amb. 589; *Turner* v. *Morgan* (1803), 8 Ves. 143; *Mayfair Property Co.* v. *Johnston*, [1894] 1 Ch. 508.

(*f*) *Clarendon* (*Earl*) v. *Hornby* (1718), 1 P. Wms. 446; *Story* v. *Johnson* (1837), 2 Y. & C. (EX.) 586, 611.

(*g*) *Story* v. *Johnson* (1835), 1 Y. & C. (EX.) 538; (1837) 2 *ibid.*, 586; *Lister* v. *Lister* (1839), 3 Y. & C. (EX.) 540; *Canning* v. *Canning* (1854), 2 Drew. 434, 436. If there was nothing to guide the commissioners, as a last resort they might draw lots (*ibid.*).

(*h*) *Lorimer* v. *Lorimer* (1820), 5 Madd. 363; *Hill* v. *Fulbrook* (1822), Jac. 574; *Hill* v. *Hickin*, [1897] 2 Ch. 579, 581. But a tenant in common in occupation of the entirety is not chargeable with an occupation rent (*M'Mahon* v. *Burchell* (1846), 5 Hare, 322; 2 Ph. 127); unless he has excluded the others (*Pascoe* v. *Swan* (1859), 27 Beav. 508; see *Porter* v. *Lopes* (1877), 7 Ch. D. 358).

(*i*) *Swan* v. *Swan, supra*; *Hill* v. *Hickin, supra*; *Leigh* v. *Dickeson* (1884), 15 Q. B. D. 60, C. A.; see *Re Leslie, Leslie* v. *French* (1883), 23 Ch. D. 552, 564. But a tenant in common in possession of more than his share cannot be allowed for improvements unless he is charged with an occupation rent (*Teasdale* v. *Sanderson* (1864), 33 Beav. 534; see *Re Jones, Farrington* v. *Forrester*, [1893] 2 Ch. 461. 477—479).

(*k*) See title HUSBAND AND WIFE.

SECT. 1. Nature and Extent of Equitable Jurisdiction.

of a mortgage for a term of years (*l*), or a satisfied term (*m*) —which only equity could remove. In strictness these were grounds for the auxiliary jurisdiction of equity; but, dower being favoured in equity, the Court of Chancery gave substantial relief as well, and assigned to the widow her lands in dower, without sending her to recover final relief at law (*n*); though, if there were any doubt as to her legal title, this was a matter which had to be decided on an issue sent to law (*o*). A further reason for entertaining the claim in equity was that rents and profits from the death of the husband were only given at law as damages under the Statute of Merton, and the liability and the claim to damages were personal, and died respectively with the heir and the widow; but in equity an account was decreed against or in favour of the representatives, as might be necessary (*p*). A widow's title was legal, and hence she could recover in equity against a purchaser for value without notice, notwithstanding that he had got in the legal estate; but she was not entitled as against him to any special equitable relief, such as discovery (*q*).

SUB-SECT. 5.—*The Auxiliary Jurisdiction in Equity.*

The auxiliary jurisdiction.

46. The Court of Chancery exercised jurisdiction in aid of or supplementary to the jurisdiction at law for the purpose of (1) procuring or preserving evidence; (2) facilitating or restraining proceedings at law, as the justice of the case might require; (3) restraining the assertion of doubtful rights; (4) preventing instruments which were void or voidable from being a continuing source of peril; (5) providing for the safety of property either pending litigation or when it was in the hands of accounting parties or limited owners; (6) enforcing judgments obtained at law; (7) preventing injury to third persons by the assertion of conflicting claims; and (8) avoiding multiplicity of suits in respect of the same right. This jurisdiction was exercised by the following proceedings:—discovery, perpetuation of testimony, suits *de bene esse*, and commissions to take evidence abroad; injunctions and *quia timet* suits; the cancelling and delivery up of documents; receivers; interpleader; and bills of peace (*r*). The use of injunctions to prevent the oppressive enforcement of judgments at law may for convenience be classed under this head of the jurisdiction, though in effect it constituted an overriding jurisdiction. The procedure in

(*l*) See Co. Litt. 208 a, Butler's note (105).

(*m*) But the court would not remove a term of years as against a purchaser, even though he took an assignment of the term with notice of the right to dower (*Radnor (Countess)* v. *Vandebendy* (1697), Show. Parl. Cas. 69; *Mole* v. *Smith* (1822), Jac. 490, 497).

(*n*) *Curtis* v. *Curtis* (1789), 2 Bro. C. C. 620, see judgment of Lord ALVANLEY, M.R., at pp. 630—634; *Pulteney* v. *Warren* (1801), 6 Ves. 72, 89; *Strickland* v. *Strickland* (1842), 6 Beav. 77, 81; Mitford on Pleadings, p. 123.

(*o*) Park on Dower, ch. 15, p. 329.

(*p*) *Curtis* v. *Curtis, supra; Dormer* v. *Fortescue* (1744), 3 Atk. 124, 130; and see *Williams* v. *Thomas*, [1909] 1 Ch. 713, 720, C. A.

(*q*) *Williams* v. *Lambe* (1791), 3 Bro. C. C. 264; *Collins* v. *Archer* (1830), 1 Russ. & M. 284; see p. 77, *post*.

(*r*) The writ of *ne exeat regno* also is for convenience treated under this head, though not strictly auxiliary to proceedings at law (see p. 59, *post*).

these matters was of course equally applicable when the rights in question were equitable, but in this case the procedure was available in the principal suit.

Where relief in equity depended upon a legal right, the Court of Chancery usually referred the ascertainment of the right to a court of law (*s*), and in such case the decision at law was binding in equity (*t*); but even in matters purely equitable an issue at law might be directed, or the opinion of a court of law taken, and then the object was to inform the conscience of the court, and the decision at law was not binding (*a*). In 1862 the Court of Chancery was empowered (*b*) to determine questions of law or fact on which the title to equitable relief depended; and now such power is vested in each Division of the High Court by the Judicature Act, 1873 (*c*). But in matters of legal right the principles of law still prevail (*d*).

(i.) *Discovery* (*e*).

Discovery.

47. One of the defects in proceedings at law arose from the want of power to compel the parties to an action to give discovery of the material facts in controversy, and of the documents in their power relating to the subject-matter of the action (*f*). Jurisdiction to compel such discovery on the oath of the defendant was assumed by equity (*g*), and formed one of the foundations on which equitable jurisdiction rested. In certain cases—in particular, in cases of account, accident, fraud, and mistake—the Court of Chancery, having acquired cognisance of the suit for the purpose of discovery, entertained the suit in its entirety, and, in order to avoid multiplicity of action, gave the substantial relief which was suitable (*h*).

(*s*) *Rigby* v. *Great Western Rail. Co.* (1846), 2 Ph. 44.

(*t*) *Coker* v. *Farewell* (1729), 1 Swan, 390, n. A right was not determined so as to be a ground for a perpetual injunction by one trial at law, except on an issue directed by the court (*Robinson* v. *Byron* (*Lord*) (1788), 2 Cox, Eq. Cas. 4). A verdict on such issue was not disturbed unless there was substantial ground for believing that, on a second trial, other weighty countervailing evidence would be produced (*Waters* v. *Waters* (1848), 2 De G. & Sm. 591, 618).

(*a*) *Coker* v. *Farewell, supra; Lansdowne* (*Marchioness*) v. *Lansdowne* (*Marquis*) (1820), 2 Bli. 60, 86, H. L.

(*b*) By the Chancery Regulation Act, 1862 (25 & 26 Vict. c. 42), known as Rolt's Act, now repealed by the Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Vict. c. 49).

(*c*) 36 & 37 Vict. c. 66; see p. 61, *post*.

(*d*) *Colls* v. *Home and Colonial Stores, Ltd.*, [1904] A. C. 179, 188.

(*e*) See title DISCOVERY, Vol. XI., pp. 36 *et seq.*

(*f*) 3 Bl. Com. 381, 382; Story, s. 1484.

(*g*) As to the dangers of the system, see Fonblanque, Treatise of Equity, 5th ed., Vol. II., p. 482; and as to bills for discovery, see Bray on Discovery, pp. 609—619.

(*h*) Fonblanque, Treatise of Equity, 5th ed., Vol. I., p. 9. See *Jesus College* v. *Bloom* (1745), 3 Atk. 262; "The right to discovery carries along with it the right to relief in equity" (*Adley* v. *Whitstable Co.* (1810), 17 Ves. 315, *per* Lord ELDON, L.C., at p. 324); "When it is admitted that a party comes here properly for the discovery, the court is never disposed to occasion a multiplicity of suits by making him go to a court of law for the relief" (*Ryle* v. *Haggie* (1820), 1 Jac. & W. 234, *per* PLUMER, M.R., at p. 237). A further reason for giving relief as well as discovery was that the discovery would otherwise be in any event at the cost of the plaintiff (*Mackenzie* v. *Johnston* (1819), 4 Madd. 373, 376). But the above *dicta* went beyond the actual practice; the necessity of coming into equity for discovery was only a circumstance to be regarded in

SECT. 1. Nature and Extent of Equitable Jurisdiction.

In a sense every bill in equity was a bill of discovery, since it sought disclosure from the defendant on his oath of the truth of the circumstances constituting the plaintiff's case as stated in his bill; but a bill of discovery proper was one in which the plaintiff asked for no relief, and simply sought discovery of facts in the knowledge of the defendant, or of documents in his power, which were necessary to maintain the plaintiff's rights in another court (*i*). It followed from the nature of the bill that, when discovery had been obtained by the defendant's answer, there were no further proceedings (*k*).

To maintain the bill in equity it was in general necessary that an action at law should have been commenced to which it could be auxiliary, or that it was intended to bring such an action (*l*); and it was necessary that it should clearly appear on the bill that the plaintiff had an interest in the subject-matter of the discovery capable of assertion before a judicial tribunal (*m*). But the discovery of facts was limited to the material facts relating to the plaintiff's case, it did not extend to the discovery of the defendant's evidence, nor to the means by which he intended to establish his case (*n*). Discovery was allowed in aid of proceedings in equity, or of an action to maintain a civil right in a court of common law, but not to aid or defend an indictment, information, prohibition, or mandamus (*o*).

Where the claim was to recover property, and the defence was based on purchase for valuable consideration without notice, the Court of Chancery, in its regard for this defence, declined to compel the defendant to make any discovery which would hazard his title; and hence, provided the consideration had been actually paid, he might object to a bill of discovery that he was a purchaser for valuable consideration without notice, even though he had not obtained the legal estate (*p*).

(ii.) *Perpetuation of Testimony and Suits de bene esse* (*q*).

Suits to perpetuate testimony.

48. The Court of Chancery entertained suits the sole object of which was to obtain and perpetuate testimony in danger of being

deciding on the question of equitable jurisdiction to grant full relief (*Pearce* v. *Creswick* (1843), 2 Hare, 286, 294); see also title DISCOVERY, Vol. XI., pp. 37—39.

(*i*) Mitford on Pleadings, pp. 53, 183—185; Story, ss. 689, 1483. It has been pointed out that the true distinction was between bills for discovery only and bills for discovery and relief (Wigram, Law of Discovery, 2nd ed., p. 46).

(*k*) Mitford on Pleadings, p. 16; *Shaftesbury* (*Lady*) v. *Arrowsmith* (1798), 4 Ves. 66, 71.

(*l*) *London Corporation* v. *Levy* (1803), 8 Ves. 398, 404; Story, s. 1483.

(*m*) Mitford on Pleadings, pp. 154, 157; *Brownsword* v. *Edwards* (1751), 2 Ves. Sen. 243, 247.

(*n*) See Wigram, Law of Discovery, p. 261.

(*o*) *Montague* (*Lord*) v. *Dudman* (1751), 2 Ves. Sen. 396, 398.

(*p*) "It is an infallible rule that a purchaser for valuable consideration shall never without notice discover anything to hurt himself" (*Perrat* v. *Ballard* (1681), 2 Cas. in Ch. 72, *per* Lord NOTTINGHAM, L.C., at p. 73); see *Collet* v. *De Gols* (1734), Cas. *temp.* Talb. 65, 69; *Jerrard* v. *Saunders* (1794), 2 Ves. 454, 458; Mitford on Pleadings, 199; Story, s. 1502; and p. 76, *post*.

(*q*) See title EVIDENCE, *post*.

lost before the matter to which it related could be made the subject of judicial investigation (*r*). Hence it was in general essential for the maintenance of the suit that the plaintiff was not able to institute proceedings to have the matter in controversy immediately determined—where, for instance, he was in enjoyment of a right, such as a right of fishery, and feared that it might in the future be contested (*s*); and it was also essential that the matter should not be the subject of an existing action or suit against the plaintiff (*a*). If the matter was capable of immediate decision, the ground for the suit to perpetuate testimony failed (*b*). The bill prayed for no relief, but only for a commission for the examination of witnesses (*c*), and it was terminated by the examination and never brought to a hearing (*d*). There was no restriction as to age, health, or otherwise, on the witnesses who might be examined, the object being to preserve any available testimony which might be lost; but the depositions were sealed up, and only used if the witnesses were not alive or capable of giving *viva voce* evidence at the time of the trial (*e*).

A suit to perpetuate testimony could be maintained in aid of any estate or interest in property, whether in possession or reversion, and whether vested or contingent (*f*); but not in respect of a mere *spes successionis* or expectation of an interest (*g*), nor of an interest which was liable to be immediately barred (*h*). Hence issue in tail could not maintain the suit in the lifetime of the ancestor (*i*). The procedure was extended to claims to titles, and was expressly applied by statute (*k*) to estates and interests in property depending on any future event. The same object may sometimes be obtained by an application for a declaration of legitimacy under the Legitimacy Declaration Act, 1858 (*l*). At the present time

(*r*) Story, s. 1505. The procedure appears to have been most frequently used when a devisee of land in possession desired to preserve evidence of the validity of the will for use in the event of any future claim by the heir-at-law (3 Bl. Com. 450).

(*s*) *Dorset* (*Duke*) v. *Girdler* (1720), Prec. Ch. 531; *Angell* v. *Angell* (1822), 1 Sim. & St. 83, 89; *Brooking* v. *Maudslay, Son, and Field* (1888), 38 Ch. D. 636, 644; *West* v. *Sackville* (*Lord*), [1903] 2 Ch. 378, 384, C. A.; Story, s. 1508.

(*a*) *Spencer* (*Earl*) v. *Peek* (1867), L. R. 3 Eq. 415.

(*b*) *Ellice* v. *Roupell* (No. 1) (1863), 32 Beav. 299.

(*c*) *Dorset* (*Duke*) v. *Girdler, supra;* see *Dew* v. *Clarke* (1822), 1 Sim. & St. 108, 110. The defendant was also entitled to examine witnesses (*Abergavenny* (*Earl*) v. *Powell* (1816), 1 Mer. 434; *Skrine* v. *Powell* (1845), 15 Sim. 81).

(*d*) Mitford on Pleadings, 51.

(*e*) *Spencer* (*Earl*) v. *Peek, supra.* Hence the depositions were not published while the witness was alive (*Barnsdale* v. *Lowe* (1831), 2 Russ. & M. 142), unless he was unable to travel (*Morrison* v. *Arnold* (1817), 19 Ves. 670; *Biddulph* v. *Camoys* (*Lord*) (1855), 20 Beav. 402).

(*f*) *Dursley* (*Lord*) v. *Fitzhardinge Berkeley* (1801), 6 Ves. 251.

(*g*) *Smith* v. *A.-G.* (1777), cited 6 Ves. 260; 15 Ves. 133, 136; *Re Parsons, Stockley* v. *Parsons* (1890), 45 Ch. D. 51, 57.

(*h*) *Dursley* (*Lord*) v. *Fitzhardinge Berkeley, supra.*

(*i*) *Allan* v. *Allan* (1808), 15 Ves. 130.

(*k*) Stat. (1842) 5 & 6 Vict. c. 69, repealed by the Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Vict. c. 49); see *The Townshend Peerage* (1843), 10 Cl. & Fin. 289; *Campbell* v. *Dalhousie* (*Earl*) (1869), L. R. 1 Sc. & Div. 462.

(*l*) 21 & 22 Vict. c. 93; and where the question can be at once disposed of

SECT. 1. Nature and Extent of Equitable Jurisdiction.

any person who would, in the circumstances alleged by him to exist, become entitled, upon the happening of any future event, to any honour, title, dignity, or office, or to any estate or interest in any property, real or personal, the right or claim to which cannot be brought to trial before the happening of such event, may commence an action to perpetuate the testimony material for establishing the right or claim (*m*).

Proceedings to perpetuate testimony are commenced by action, and are subject to the same principles as a suit for the purpose under the former practice (*n*).

Suits *de bene esse* and for commissions.

49. Where an action at law had been commenced, and witnesses were too old or infirm to attend to give evidence, or where there was only a single witness as to a material point, the Court of Chancery entertained a bill *de bene esse* to enable depositions to be taken immediately for use at the trial (*o*); and where the witnesses were abroad, it entertained a suit for a commission to examine them abroad, and restrained by injunction the proceedings at law until the return of the commission. This jurisdiction was said to be based on accident (*p*). At law there was originally no power to issue such a commission, and when the common law courts interfered, they did so only with the consent of the adverse party (*q*). This interference did not lessen the jurisdiction in equity (*r*). Depositions taken in a suit *de bene esse* could not be used unless, when the cause came on for trial, the attendance of the witness could not in fact be then procured (*s*).

(iii.) *Injunction* (*t*).

Injunction.

50. The remedy by injunction was one of the foundations of the jurisdiction in equity, and cannot be classed exclusively under

under this statute perpetuation of testimony will not usually be granted (*West* v. *Sackville* (*Lord*), [1903] 2 Ch. 378, C. A.). A question of the legitimacy of one of several children can also be determined by settling property on the children, and then perpetuating testimony as to the right of the child whose legitimacy is disputed to share (*Re Stoer* (1884), 9 P. D. 120).

(*m*) R. S. C., Ord. 37, r. 35, reproducing stat. (1842) 5 & 6 Vict. c. 69; as to making the Attorney-General a defendant, see r. 36.

(*n*) *Ibid.*, r. 37; see *Brooking* v. *Maudslay, Son, and Field* (1888), 38 Ch. D. 636; *West* v. *Sackville* (*Lord*), *supra*. As to the procedure where the defendant is in default in delivery of his defence, see *Bute* (*Marquis*) v. *James* (1886), 33 Ch. D. 157. The examination is referred to one of the examiners of the court, and not to a special examiner (*ibid.*).

(*o*) *Angell* v. *Angell* (1822), 1 Sim. & St. 83; Story, s. 1513.

(*p*) *Macaulay* v. *Shackell* (1827), 1 Bli. (N. S.) 96, 119, 130—132, H. L.

(*q*) *Angell* v. *Angell*, *supra*.

(*r*) *Macaulay* v. *Shackell*, *supra*, at p. 132. As to publication of the depositions in suits to perpetuate testimony, and suits *de bene esse*, see *Harris* v. *Cotterell* (1808), 3 Mer. 678, 680; *Ellice* v. *Roupell* (No. 1) (1863), 32 Beav. 299, 304; *Vane* v. *Vane* (1876), 24 W. R. 565; and as to publishing depositions in an ancient suit for the purpose of a modern suit, see *Moggridge* v. *Hall*, *Llanover* (*Lady*) v. *Homfray*, *Phillips* v. *Llanover* (*Lady*) (1879), 13 Ch. D. 380; *Llanover* v. *Homfray*, *Phillips* v. *Llanover* (*Lady*) (1881), 19 Ch. D., 224, C. A.; and see *Evans* v. *Merthyr Tydvil Urban Council*, [1899] 1 Ch. 241, C. A.

(*s*) Story, s. 1516. And as to evidence on commission, see title EVIDENCE, *post*.

(*t*) See title INJUNCTION.

either the exclusive, or the concurrent, or the auxiliary jurisdiction. One use of the remedy, indeed, added a fourth head of jurisdiction, since by means of injunctions the Court of Chancery exercised in substance, though not in form, a jurisdiction to override judgments at common law when they were made the instrument of oppression (*u*). Apart from this overriding jurisdiction, equity interfered in legal claims either to assist the prosecution of the claim, or to prevent irreparable injury or multiplicity of suits. When it did not itself decide upon the legal claim, this jurisdiction was auxiliary; when it decided on the rights in the subject-matter of the legal claim the jurisdiction was concurrent; and when an injunction was granted in a trust or other matter of cognisance only in equity, the jurisdiction was exclusive. For practical purposes it is sufficient to regard injunctions as having been designed (1) to prevent the improper use of legal proceedings, or to remove technical impediments to their proper use; and (2) to prevent the infringement of public or private rights, either temporarily before the right had been ascertained, or permanently after it had been ascertained. An injunction was granted only in negative terms, but the practice in this respect has been altered, and an injunction may now be mandatory in terms, as well as in substance (*a*).

Interference by injunction in legal proceedings.

51. The practical importance of the first head has disappeared with the fusion of law and equity under the Judicature Acts. One of the reasons of the growth of equity being the necessity for correcting the strictness of the law, it was inevitable that equity should have the power of preventing the plaintiff at law from profiting by that strictness, and this it did by forbidding him to proceed on his legal judgment. But equity did not impugn the legal judgment as such. It recognised the judgment, but prevented its unconscientious use (*b*).

Removing technical impediments.

The same principle enabled the Court of Chancery to remove technical impediments to prosecuting an action at law—as by preventing an outstanding term from being set up against a claim in ejectment (*c*)—and to prevent the prosecution of legal claims where they conflicted with the procedure or principles of equity (*d*).

Restraining proceedings at law.

Thus, where an estate had fallen within the cognisance of the Court of Chancery by the making of an administration decree,

(*u*) Thus, where a judgment was obtained against conscience, equity would decree the party to acknowledge satisfaction, though he had received nothing; and if a fine had been obtained by fraud, equity would decree the party to be a trustee (*Barnesly* v. *Powel* (1749), 1 Ves. Sen. 284; see *Baker* v. *Beaumont* (1663), 3 Rep. Ch. 7 [13]).

(*a*) *Jackson* v. *Normanby Brick Co.*, [1899] 1 Ch. 438, C. A.; compare *Davies* v. *Gas Light and Coke Co.*, [1909] 1 Ch. 708, C. A.; and see title INJUNCTION.

(*b*) *Oxford's* (*Earl*) *Case* (1615), 1 Rep. Ch. 1; 1 White & Tud. L. C., 7th ed., p. 730; *Bushby* v. *Munday* (1821), 5 Madd. 297, 307.

(*c*) Mitford on Pleadings, p. 134.

(*d*) Equity did not interfere directly with other courts, but acted on the defendant in equity by punishing him for his contempt in disobeying its own decree (*Bushby* v. *Munday*, *supra*).

SECT. 1. Nature and Extent of Equitable Jurisdiction.

proceedings at law were restrained (*e*); and in numerous cases the application of equitable doctrines required that parties should be restrained from enforcing their strict legal rights (*f*). Examples are furnished by the principles applicable in cases of fraud (*g*), of representation (*h*), of standing by (*i*), of accident (*k*), of marshalling assets and securities, of suretyship (*l*); and generally where it was necessary to make an equitable title prevail over a legal right (*m*), and the reason which gave the equitable title was not available at law (*n*); or where it was necessary to delay proceedings at law until after discovery or the examination of witnesses abroad (*o*).

Interference only on special grounds.

But in matters of concurrent jurisdiction the Court of Chancery did not usually restrain proceedings in other courts. This was only done where, for some special reason, it was necessary to resort to equity; *e.g.*, to obtain discovery or to secure protection for infants (*p*). And equity did not claim jurisdiction to retry matters which had been the subject of investigation at law in the ordinary way: thus a judgment at law was not interfered with merely on the ground of its being incorrect or of an omission to raise a particular defence (*q*). Relief, however, was granted where a receipt was discovered after judgment for a debt (*r*). And since equity, in restraining proceedings in other courts, acted *in personam*, it could grant an injunction against proceedings in a foreign court where the claim was unconscientious (*s*).

Legal remedy lost through interference of equity.

Where a defendant had lost his legal remedy in consequence of a restraint put upon him in equity, the Court of Chancery gave him a remedy equivalent to that which he had lost (*t*). And though a plaintiff suing on a bond could not, either at law or in equity (*a*), recover in respect of principal and interest beyond the amount of

(*e*) See *Perry* v. *Phelips* (1804), 10 Ves. 34; see p. 33, *ante*.

(*f*) Story, s. 584.

(*g*) See *Lloyd* v. *Clark* (1843), 6 Beav. 309.

(*h*) That is, where the defendant is bound on equitable grounds to make good a representation as to existing facts: *Piggott* v. *Stratton* (1859), 1 De G. F. & J. 33, C. A.; see *Jorden* v. *Money* (1854), 5 H. L. Cas. 185.

(*i*) *Nicholson* v. *Hooper* (1838), 4 My. & Cr. 179.

(*k*) As where an executor lost assets through destruction by fire, but remained liable at law to creditors (*Croft's* (*Lady*) *Executors* v. *Lyndsey* (1676), Freem. (CH.) 1; see *Crosse* v. *Smith* (1806), 7 East, 246, 258). And now both at law and in equity an executor cannot be charged for loss of assets without wilful default (*Job* v. *Job* (1877), 6 Ch. D. 562; see p. 27, *ante*).

(*l*) Story, s. 883; see *Clarke* v. *Henty* (1838), 3 Y. & C. (EX.) 187.

(*m*) *Newlands* v. *Paynter* (1840), 4 My. & Cr. 408; see *Langton* v. *Horton* (1841), 3 Beav. 464.

(*n*) *Harrison* v. *Nettleship* (1833), 2 My. & K. 423. And a proceeding in equity might be restrained so as to compel interpleader (*Prudential Assurance Co.* v. *Thomas* (1867), 3 Ch. App. 74).

(*o*) See *Goldschmidt* v. *Marryat* (1809), 1 Camp. 559.

(*p*) *Rotherham* v. *Fanshaw* (1748), 3 Atk. 628.

(*q*) *Bateman* v. *Willoe* (1803), 1 Sch. & Lef. 201; Mitford on Pleadings, pp. 131, 132.

(*r*) *Gainsborough* (*Countess*) v. *Gifford* (1727), 2 P. Wms. 424, 426.

(*s*) *Portarlington* (*Lord*) v. *Soulby* (1834), 3 My. & K. 104, overruling *Lowe* v. *Baker* (1665), Freem. (CH.) 125; see *Carron Iron Co.* v. *Maclaren* (1855), 5 H. L. Cas. 416, 439; *Hope* v. *Carnegie* (1866), 1 Ch. App. 320.

(*t*) *Brown* v. *Newell* (1837), 2 My. & Cr. 558, 572; see *Bond* v. *Hopkins* (1802), 1 Sch. & Lef. 413, and title LIMITATION OF ACTIONS.

(*a*) *Clarke* v. *Seton* (1801), 6 Ves. 411.

the penalty, yet he was allowed to do so if he had been restrained from suing while the amount due was under the penalty (*b*). And as regards accounts of rents and profits (*c*), and interest (*d*), he was saved from any statutory bar which the delay had created.

Restraining infringement of rights.

52. Under the procedure of the Court of Chancery an injunction could in certain circumstances be obtained to restrain the infringement of public or private rights. But it was essential that the injunction should be specifically asked for by the bill (*e*), this being an exception to the efficacy of a general prayer for relief (*f*).

When injunction granted.

53. Injunctions to prevent the infringement of rights were granted in cases of waste, public and private nuisance, trespass, interference with easements, and infringements of patents and copyright, and of negative stipulations in contracts (*g*). In cases of waste equity interfered in aid of legal rights, on the ground of the inadequacy of the remedy at law (*h*), and it extended the remedy by injunction both to cases of legal titles where there was no remedy at law, and to cases where the waste—under the name of equitable waste—was only recognised in equity (*i*). In cases of public (*k*) and private nuisance, and of trespass (*l*), equity originally interfered either to prevent a multiplicity of suits or to prevent irreparable injury (*m*). The recurrent nature of the damage would have necessitated continual litigation if the wrongful act could not be stopped by injunction (*n*). But, apart from this, the plaintiff was entitled to an injunction if the injury would be irreparable, that is, if he could

(*b*) *Duvall* v. *Terrey* (1694), Show. Parl. Cas. 15; *Grant* v. *Grant* (1830), 3 Sim. 340; (1827), 3 Russ. 598, 607.

(*c*) *Pulteney* v. *Warren* (1801), 6 Ves. 73.

(*d*) *Hull and Selby Rail. Co.* v. *North-Eastern Rail. Co.* (1854), 5 De G. M. & G. 872, C. A.

(*e*) *Savory* v. *Dyer* (1749), Amb. 70; see *Grimes* v. *French* (1740), 2 Atk. 141; see also title INJUNCTION.

(*f*) See *Cook* v. *Martyn* (1737), 2 Atk. 2; *Dormer* v. *Fortescue* (1744), 3 Atk. 124, 132; *Manaton* v. *Molesworth* (1757), 1 Eden, 18, 26.

(*g*) Save in cases of contract, the right to an injunction depends on proprietary rights, see *Baird* v. *Wells* (1890), 44 Ch. D. 661. The use of injunctions in libel is an innovation introduced under the Judicature Acts; the Court of Chancery did not restrain a libel, apparently, because a libel was a crime, and it did not interfere in regard to crimes by injunction (*Gee* v. *Pritchard* (1818), 2 Swan. 402, 413).

(*h*) As to the remedy at law, see *Jefferson* v. *Durham* (*Bishop*) (1797), 1 Bos. & P. 105, 120.

(*i*) Mitford on Pleadings, pp. 138—140; Story, ss. 913, 914; *Garth* v. *Cotton* (1750), 1 Ves. Sen. 524, 555 (legal remedy not applicable); *Vane* v. *Barnard* (*Lord*) (1716), 2 Vern. 738; *Morris* v. *Morris* (1847), 15 Sim. 505 (equitable waste).

(*k*) As to the jurisdiction in case of public nuisances, see *A.-G.* v. *Cleaver* (1811), 18 Ves. 211, 217; as to apprehended public or private nuisance, see *A.-G.* v. *Manchester Corporation*, [1893] 2 Ch. 87.

(*l*) Injunction against trespass was a late development of equity; originally the party was left to his action at law (see *Mogg* v. *Mogg* (1786), 2 Dick. 670; *Mortimer* v. *Cottrell* (1789), 2 Cox, Eq. Cas. 205), unless the trespass was repeated (*Weller* v. *Smeaton* (1784), 1 Bro. C. C. 572; Story, s. 928; Ashb., p. 9). See also *Lowndes* v. *Bettle* (1864), 33 L. J. (CH.) 451.

(*m*) See *Welby* v. *Rutland* (*Duke*) (1773), 2 Bro. Parl. Cas. 39.

(*n*) See *Broadbent* v. *Imperial Gas Co.* (1857), 7 De G. M. & G. 436, 462, C. A.

SECT. 1. Nature and Extent of Equitable Jurisdiction.

not be adequately compensated in damages (*o*); and this latter reason was the ground of the jurisdiction as regards interference with easements—such as rights of light—and infringements of patents and copyrights.

Legal right must be established.

As to all these matters, the general rule was that the plaintiff in equity must have established his right at law before he could be entitled to an injunction (*p*); and an injunction was not granted before this was done, if the plaintiff could be sufficiently protected by directing the defendant to keep an account (*q*); but an injunction might be granted before answer, and before the title was established at law, if the result of the defendant's conduct would be to inflict irreparable injury on the plaintiff (*a*). And though the High Court has now all the jurisdiction of the Court of Chancery and the several courts of law, yet so far as the right in question is a legal right, the court in the exercise of its jurisdiction must be guided by the principles established at law (*b*). An injunction may be refused in the case of trespass if no injury is in fact done to the landowner (*c*). An interim injunction is granted only on an undertaking as to damages (*d*).

Negative stipulations.

Equity interferes by injunction to enforce the observance of agreements which are in substance negative (*e*); and where an agreement contains a positive and a correlative negative stipulation, it will enforce the negative stipulation and thereby secure indirectly the performance of the positive stipulation (*f*). Where the

(*o*) *A.-G.* v. *Nichol* (1809), 16 Ves. 338, 342; *Wynstanley* v. *Lee* (1818), 2 Swan. 333, 335. The test of the right to an injunction in legal claims is whether the plaintiff could get damages (*White* v. *Mellin*, [1895] A. C. 154, 167). As to the present power of the court to grant damages in lieu of an injunction, see *Shelfer* v. *City of London Electric Lighting Co.*, *Meux's Brewery Co.* v. *Same*, [1895] 1 Ch. 287, C. A.; and as to injunction against a public body, see *A.-G.* v. *Birmingham etc. Drainage Board*, [1910] 1 Ch. 48.

(*p*) *Whitchurch* v. *Hide* (1742), 2 Atk. 391; *Bacon* v. *Jones* (1839), 4 My. & Cr. 433; *Imperial Gas Light and Coke Co.* (*Directors*) v. *Broadbent* (1859), 7 H. L. Cas. 600, 612; *Cardiff Corporation* v. *Cardiff Waterworks Co.* (1859), 4 De G. & J. 596, C. A. As to relaxations of this rule, see Ashb., p. 6, and as to the later extension of the auxiliary jurisdiction, *ibid.*, pp. 8—9. Under the Chancery Regulation Act, 1862 (25 & 26 Vict. c. 42), repealed Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Vict. c. 49), the Court of Chancery was empowered to determine legal questions on which equitable relief depended; see p. 43, *ante*.

(*q*) *Cory* v. *Yarmouth and Norwich Rail. Co.* (1844), 3 Hare, 593; *Spottiswoode* v. *Clarke* (1846), 2 Ph. 154; *Rigby* v. *Great Western Rail. Co.* (1846), 2 Ph. 44, 49.

(*a*) Immediate injunctions were granted in plain cases of waste (*Anon.* (1750), 1 Ves. Sen. 476); or nuisance (*A.-G.* v. *Doughty* (1752), 2 Ves. Sen. 453); see *Rushmer* v. *Polsue and Alfieri*, [1906] 1 Ch. 234. See also title INJUNCTION.

(*b*) *Colls* v. *Home and Colonial Stores Ltd.*, [1904] A. C. 179, 188.

(*c*) *Behrens* v. *Richards*, [1905] 2 Ch. 614.

(*d*) *Chappell* v. *Davidson* (1856), 8 De G. M. & G. 1, C. A. See *Oberrheinische Metallwerke* v. *Cocks*, [1906] W. N. 127.

(*e*) *Martin* v. *Nutkin* (1724), 2 P. Wms. 266; *Barrett* v. *Blagrave* (1800), 5 Ves. 555; *Catt* v. *Tourle* (1869), 4 Ch. App. 654; *Metropolitan Electric Supply Co.* v. *Ginder*, [1901] 2 Ch. 799. This is equivalent to specific performance. But the court interferes less readily where the negative covenant is not express, but is only inferred from a positive contract (*Peto* v. *Brighton etc. Rail. Co.* (1863), 32 L. J. (CH.) 677); see *Holford* v. *Acton Urban Council*, [1898] 2 Ch. 240; *Measures, Brothers, Ltd.* v. *Measures*, [1910] 2 Ch. 248.

(*f*) *Lumley* v. *Wagner* (1852), 1 De G. M. & G. 604; see *Whitwood Chemical Co.* v. *Hardman*, [1891] 2 Ch. 416, C. A.; *Davis* v. *Forman*, [1894] 3 Ch. 654.

agreement is restrictive of the user of land, the effect of the remedy is to create a negative easement (*g*).

Present jurisdiction.

54. Power to grant injunctions was given to the courts of common law by the Common Law Procedure Act, 1854 (*h*), and now all divisions of the High Court are empowered to grant an injunction by interlocutory order "in all cases in which it shall appear to the court to be just and convenient that such order should be made" (*i*). Power to give damages either in addition to or in substitution for an injunction was given by Lord Cairns' Act (*k*) in cases where the court had jurisdiction to entertain an application for an injunction. This Act has been repealed (*l*), but the jurisdiction under it has been preserved (*m*), and, apart from this special jurisdiction, the High Court, under its general jurisdiction to give all remedies to which the parties are entitled, may award damages, whether there is or is not a case for an injunction (*n*).

(iv.) *Quia Timet Actions.*

Quia timet actions.

55. It was recognised at common law that a man was entitled to be protected against unlawful disturbance of his rights and against vexatious litigation, and remedies in this respect were given by certain "writs of prevention" (*o*). To some extent the remedy in equity by injunction, and by the appointment of a receiver, had the same object; but in addition to these remedies a plaintiff might maintain a suit *quia timet* in order to secure himself against a future apprehended loss.

To protect surety.

Thus a surety might file a bill to compel the debtor on a bond in which he was joined to pay the debt when due, whether the surety had been actually sued for it or not; and upon a covenant of indemnity, a bill might be filed to relieve the covenantee under similar circumstances (*p*).

(*g*) *Re Nisbet and Potts' Contract*, [1906] 1 Ch. 386, C. A.

(*h*) 17 & 18 Vict. c. 125, ss. 79, 81, 82; repealed by Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Vict. c. 49).

(*i*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (8); see title INJUNCTION.

(*k*) Chancery Amendment Act, 1858 (21 & 22 Vict. c. 27), s. 2.

(*l*) Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Vict. c. 49).

(*m*) *Sayers* v. *Collyer* (1884), 28 Ch. D. 103, C. A. As to the principle on which damages are given in lieu of an injunction, see *Shelfer* v. *City of London Electric Lighting Co.*, *Meux's Brewery Co.* v. *Same*, [1895] 1 Ch. 287, C. A. In negative covenants an injunction is granted as a matter of course to secure the observance of the contract; in positive covenants, it is not granted if damages are a sufficient compensation (*Doherty* v. *Allman* (1878), 3 App. Cas. 709, 720; see *Kine* v. *Jolly*, [1905] 1 Ch. 480, 496, 504, C. A.; *Elliston* v. *Reacher*, [1905] 2 Ch. 374, 395). It has been held that damages in lieu of an injunction cannot be given where the injury is only threatened (*Dreyfus* v. *Peruvian Guano Co.* (1889), 43 Ch. D. 316, 333, C. A.); but this has been doubted (*Martin* v. *Price*, [1894] 1 Ch. 276, C. A.).

(*n*) *Elmore* v. *Pirrie* (1887), 57 L. T. 333.

(*o*) Co. Litt. 100 a. These writs were:— A writ of mesne, before the plaintiff be distrained; a *Warrantia Cartæ*, before he be impleaded; a *Monstraverunt*, before any distress or vexation; an *Audita Querela*, before any execution sued; a *Curia Claudenda*, before any default of inclosure; and a *Ne injuste vexes*, before any distress or molestation.

(*p*) Mitford on Pleadings, p. 148; *Ranelaugh* v. *Hayes* (1683), 1 Vern. 189; *Nisbet* v. *Smith* (1789), 2 Bro. C. C. 579; *Wooldridge* v. *Norris* (1868), L. R. 6 Eq. 410.

SECT. 1. Nature and Extent of Equitable Jurisdiction.

To preserve property.

56. A *quia timet* bill might also be filed to secure property which was not transferable or payable to the plaintiff till a future date, as in the case of a future legacy (*q*), or a future interest in personal property (*r*). But where, under covenant, money was payable *in futuro*, the court did not interfere unless the covenantor had in some way placed the future payment in hazard (*s*). Where an annual charge on land had to be kept down by a tenant for life, the reversioner might bring a bill *quia timet* to compel payment of arrears (*a*).

Present practice.

57. Relief of the nature of that obtainable in a *quia timet* suit is still afforded by the granting of an injunction (*b*), or the appointment of a receiver (*c*), or an order to pay a fund into court (*d*); and where the plaintiff is entitled to indemnity, whether as surety or under a contract of indemnity, he may maintain a *quia timet* action (*e*). But the debt or the liability against which he seeks to be indemnified must be actually due or have actually arisen (*f*). And if the debt is due and the surety admits liability, it is not necessary, in order to maintain the action, that the creditor shall have declined to sue the principal debtor (*g*). The action does not lie in respect of a future contingent liability, such as a liability on shares where there is no probability of a call being made (*h*); but it lies if a call is probable (*i*). And in general, in order to obtain this relief, which is not readily given, the plaintiff must be able to show imminent danger of a substantial kind for which damages will be no adequate redress (*k*).

(v.) *Delivery up and Cancelling of Documents.*

Instruments voidable for fraud etc.

58. The circumstances in which a document, whether a contract (including a negotiable instrument) or conveyance, has been obtained may be such as to entitle one party to it to have the transaction rescinded or set aside, and the document delivered up

(*q*) *Johnson* v. *Mills* (1749), 1 Ves. Sen. 282; *Green* v. *Pigot* (1781), 1 Bro. C. C. 103; see *Brown* v. *Dudbridge* (1788), 2 Bro. C. C. 321.

(*r*) See as to such interests 1 Eq. Cas. Abr. p. 360, pl. 4; Fearne, Contingent Remainders, 7th ed., pp. 401—415.

(*s*) *Flight* v. *Cook* (1755), 2 Ves. Sen. 619.

(*a*) *Hayes* v. *Hayes* (1673), 1 Cas. in Ch. 223.

(*b*) See *Siddons* v. *Short* (1877), 2 C. P. D. 572; *A.-G.* v. *Manchester Corporation*, [1893] 2 Ch. 87; *A.-G.* v. *Nottingham Corporation*, [1904] 1 Ch. 673.

(*c*) *Charrington & Co., Ltd.* v. *Camp*, [1902] 1 Ch. 386; *Leney & Sons, Ltd.* v. *Callingham and Thompson*, [1908] 1 K. B. 79, C. A. (receiver of licences and rents); *Dreyfus* v. *Peruvian Guano Co.* (1889), 42 Ch. D. 66 (receiver of cargo in action of trover or detinue brought *quia timet*).

(*d*) *Re Carroll, Brice* v. *Carroll*, [1902] 2 Ch. 175.

(*e*) *Ascherson* v. *Tredegar Dry Dock and Wharf Co., Ltd.*, [1909] 2 Ch. 401.

(*f*) *Dale* v. *Lolley* (1808), 2 Bro. C. C. (5th ed. by Belt), 582, n., 291; see *Wolmershausen* v. *Gullick*, [1893] 2 Ch. 514.

(*g*) *Mathews* v. *Saurin* (1893), 31 L. R. Ir. 181; *Ascherson* v. *Tredegar Dry Dock and Wharf Co., Ltd.*, *supra*, not following the limitation to this effect suggested in *Padwick* v. *Stanley* (1852), 9 Hare, 627.

(*h*) *Hughes-Hallett* v. *Indian Mammoth Gold Mines Co.* (1882), 22 Ch. D. 561.

(*i*) *Hobbs* v. *Wayet* (1887), 36 Ch. D. 256.

(*k*) *Fletcher* v. *Bealey* (1885), 28 Ch. D. 688; *A.-G.* v. *Manchester Corporation*, *supra*; see *Crowder* v. *Tinkler* (1816), 19 Ves. 617; *Pattisson* v. *Gilford* (1874), L. R. 18 Eq. 259.

to be cancelled. In cases of actual fraud the party defrauded can, under the fundamental jurisdiction of equity, maintain an action for this purpose; and in cases of constructive fraud, also—that is, where, on the ground of undue influence, unconscionable bargain, public policy, or otherwise, it is inequitable that the transaction should be allowed to stand—the party complaining of the transaction is entitled to be relieved against it in equity, and, as incidental to such relief, the document which is impeached may be ordered to be delivered up (*l*). In these cases the plaintiff has a right to equitable relief which he may assert at any time, provided (1) that he is not guilty of laches; (2) that he has not disqualified himself from suing by his own participation in the transaction (*m*), and (3) that he submits to any equitable terms which may be imposed upon him by the court (*n*).

An agreement will not be ordered to be delivered up merely because it is unenforceable. To justify this remedy there must either be fraud in obtaining it, or it must form a cloud upon the title to land (*o*).

Instrument void at law.

59. Where a transaction is void at law, because it is founded on an illegal consideration, or otherwise, and the defect appears on the face of the document, equity does not interfere to order the instrument to be cancelled (*p*). But where the defect does not appear on the face of the instrument, the party desiring to defeat it is not bound to wait till the instrument is used against him, but may anticipate this danger and institute an action to have the instrument delivered up to be cancelled (*q*); and upon such cancellation he will be put upon equitable terms to repay money provided by the other party (*r*).

(*l*) *Duncan* v. *Worrall* (1822), 10 Price, 31; *Brooking* v. *Maudslay, Son & Field* (1888), 38 Ch. D. 636, 643; Story, s. 695; see *Thornton* v. *Knight* (1849), 16 Sim. 509.

(*m*) *Franco* v. *Bolton* (1797), 3 Ves. 368; see note (*g*), p. 73, *post*.

(*n*) See p. 70, *post*.

(*o*) *Onions* v. *Cohen* (1865), 2 Hem. & M. 354; see *Hilton* v. *Barrow* (1791), 1 Ves. Jun. 284.

(*p*) *Simpson* v. *Howden* (*Lord*) (1837), 3 My. & Cr. 97; see *Gray* v. *Mathias* (1800), 5 Ves. 286; *Hoare* v. *Bremridge* (1872), 8 Ch. App. 22, 26.

(*q*) See with regard to negotiable instruments, *Winchester* (*Bishop*) v. *Fournier* (1752), 2 Ves. Sen. 445; *Bromley* v. *Holland* (1802), 7 Ves. 3, 20; *Jervis* v. *White* (1802), 7 Ves. 413; *Wynne* v. *Callander* (1826), 1 Russ. 293; with regard to a deed which might form a cloud upon title to land, *Hayward* v. *Dimsdale* (1810), 17 Ves. 111; *Bromley* v. *Holland*, *supra*, at p. 21; with regard to forged instruments, *Peake* v. *Highfield* (1826), 1 Russ. 559; with regard to policies of insurance, *Bromley* v. *Holland*, *supra*; *Kemp* v. *Pryor* (1802), 7 Ves. 237, 249. It was at one time doubtful whether equity would interfere to order delivery up of an instrument which was void at law (*Ryan* v. *Mackmath* (1789), 3 Bro. C. C. 15 (5th ed. by Belt), n. (1)), but the doubt has long been removed (see *Ryan* v. *Mackmath*, *supra*; *Davis* v. *Marlborough* (*Duke*) (1819), 2 Swan. 108, 157, note (b); Story, s. 700).

(*r*) As to the adjustment of payments by either party on setting aside an annuity deed, which was void for non-compliance with the statutory requirements as to registration, see *Byne* v. *Vivian* (1800), 5 Ves. 604; *Bromley* v. *Holland*, *supra*; *Holbrook* v. *Sharpey* (1812), 19 Ves. 13; *Davis* v. *Marlborough* (*Duke*), *supra*. Where a lease by charity trustees is set aside as improper, it is set aside *in toto*, and the personal covenants of the trustees are not preserved for the benefit of the lessee (*A.-G.* v. *Morgan* (1826), 2 Russ. 306).

SECT. 1. Nature and Extent of Equitable Jurisdiction.

In cases of illegal consideration the plaintiff will not be debarred from relief on the ground that he is *particeps criminis*, if the transaction is such that, on grounds of public policy, it ought not to stand (*s*).

Defence to instrument.

60. Where an instrument is neither void nor voidable, but a party has a good legal defence to any claim which may be made upon it, the proper remedy is not an action to have the instrument delivered up to be cancelled, but an action to perpetuate the testimony necessary for the defence (*t*).

(vi.) *Receivers.*

Receivers.

61. Equity exercised jurisdiction to preserve property in the interest of those entitled to it, either because it was in the hands of limited owners, or of trustees or other accountable persons, and was in danger of being lost, or because the right to it was the subject of pending litigation. In such cases courts of equity interfered, sometimes by the appointment of a receiver to receive rents or other income, sometimes by an order to pay a pecuniary fund into court, sometimes by directing security to be given, or money to be paid over, and sometimes by the mere granting of an injunction or other remedial process, thus adapting their relief to the precise nature of the particular case, and the remedial justice required by it (*a*).

Preservation of property.

62. Apart from orders for payment into court—a remedy specially applicable in the case of trustees and personal representatives—this jurisdiction to preserve property was usually exercised by the appointment of a receiver, and the Court of Chancery also appointed receivers for the purpose of enforcing equitable securities, and of giving effect to judgments at law where the remedy of the judgment creditor was hindered by a prior legal interest (*b*).

As regards the preservation of personal property pending litigation, the court readily appointed a receiver where no one was in lawful possession, as where litigation was pending in the ecclesiastical court with respect to the right to probate or administration (*c*). But

(*s*) *W.* v. *B.* (1863), 32 Beav. 574; see *St. John* (*Lord*) v. *St. John* (*Lady*) (1805), 11 Ves. 526, 535; and this is so in the case of instruments given in gambling transactions (*Wynne* v. *Callander* (1826), 1 Russ. 293; *Milltown* (*Earl*) v. *Stewart* (1837), 3 My. & Cr. 18; compare *Ayerst* v. *Jenkins* (1873), L. R. 16 Eq. 275, 282). Illegality of consideration is not necessarily a ground for setting aside a settlement where there has been an actual transfer of property (*Ayerst* v. *Jenkins*, *supra*).

(*t*) *Brooking* v. *Maudslay, Son, and Field* (1888), 38 Ch. D. 636; not following the *dictum* in *Cooper* v. *Joel* (1859), 27 Beav. 313, at p. 317, that "if there be a good legal defence, not appearing on the instrument itself, which the lapse of time may cause the person chargeable on the instrument, from loss of the evidence necessary for his defence at law, to be unable to make available, then this court will interfere and order the instrument to be delivered up to be cancelled"; and which Lord CAMPBELL, L.C., on the appeal in that case considered to go too far (1 De G. F. & J. 240). The difficulty arising from loss of evidence is met by perpetuation of testimony.

(*a*) Story, s. 826.

(*b*) For receivers generally, see title RECEIVERS; for receivers by way of equitable execution, see p. 56, *post*, and title EXECUTION.

(*c*) *Owen and Gutch* v. *Homan* (1853), 4 H. L. Cas. 997, *per* Lord CRANWORTH,

where the defendant was in possession, it exercised a discretion according to the circumstances of the case (*d*). As regards real property, if the plaintiff was claiming land under a legal title, the court did not interfere with the person in possession by appointing a receiver of the rents and profits, unless there was some matter, such as fraud, affecting the conscience of the defendant (*e*), or unless the court could see a reasonable probability that the plaintiff would ultimately succeed (*f*). And even if no one was in receipt of rents from the tenants, the court would not interfere in favour of a legal title supported by no special equity (*g*). At present the court can appoint a receiver if it is "just and convenient" to do so (*h*), and it interferes more readily than formerly in favour of a legal title (*i*).

The appointment of a receiver is for the benefit of the person ultimately found to be entitled, and does not at all affect the right (*k*); and when the receiver is in possession, he cannot be interfered with without the leave of the court, even by the commencement of an action of ejectment (*l*).

Enforcement of securities.

63. As regards the enforcement of securities by the appointment of a receiver, the Court of Chancery did not, except under special circumstances (*m*), act at the instance of a mortgagee having the legal estate, since he was sufficiently protected by his right to take possession under his legal title. But taking possession is burdensome, and since the Judicature Acts it has been the usual practice to grant a receiver at the instance of a legal mortgagee (*n*). If the legal mortgagee was not in possession, an appointment might be made at the instance of a subsequent incumbrancer, but subject to the legal mortgagee's right to possession (*o*). The court would not interfere with a mortgagee in possession, unless he declined to swear that anything was due to him (*p*).

L.C., at p. 1032: "Where the property is as it were *in medio*, in the enjoyment of no one, the court can hardly do wrong in taking possession. It is the common interest of all parties that the court should prevent a scramble" (see *Rendall* v. *Rendall* (1841), 1 Hare, 152, 154).

(*d*) *Owen and Gutch* v. *Homan* (1853), 4 H. L. Cas. 997.

(*e*) *Talbot* (*Earl*) v. *Hope Scott* (1858), 4 K. & J. 96, 112, 114.

(*f*) *Bainbrigge* v. *Baddeley* (1851), 3 Mac. & G. 413, 420.

(*g*) *Carrow* v. *Ferrior*, *Dunn* v. *Ferrior* (1868), 3 Ch. App. 719, 728.

(*h*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (8); see p. 56, *post*.

(*i*) See *Foxwell* v. *Van Grutten*, [1897] 1 Ch. 64, C. A.; *John* v. *John*, [1898] 2 Ch. 573, C. A., *per* LINDLEY, M.R., at p. 578.

(*k*) *Skip* v. *Harwood* (1747), 3 Atk. 564.

(*l*) *Angel* v. *Smith* (1804), 9 Ves. 335; *Lane* v. *Capsey*, [1891] 3 Ch. 411, 414.

(*m*) *Ackland* v. *Gravener* (1862), 31 Beav. 482; see *Fripp* v. *Chard Rail. Co.* (1853), 11 Hare, 241.

(*n*) *Re Pope* (1886), 17 Q. B. D. 743, 749, C. A.

(*o*) *Berney* v. *Sewell* (1820), 1 Jac. & W. 647; *Norway* v. *Rowe* (1812), 19 Ves. 144, 153; see *White* v. *Peterborough* (*Bishop*) (1818), 3 Swan. 109.

(*p*) *Quarrell* v. *Beckford* (1807), 13 Ves. 377; *Codrington* v. *Parker* (1810), 16 Ves. 469; see *Rowe* v. *Wood* (1822), 2 Jac. & W. 553. The rule was thus expressed in *Davis* v. *Marlborough* (*Duke*) (1819), 2 Swan. 108, by Lord ELDON, L.C., at p. 137: "The court will on motion appoint a receiver for an equitable creditor, or a person having an equitable estate, without prejudice to persons

SECT. 1. Nature and Extent of Equitable Jurisdiction.

Equitable execution.

64. The Court of Chancery enforced its own decrees by sequestration (*q*). But where there was a hindrance to legal execution, it lent its aid to enforce a judgment at law by appointing a receiver. This exercise of the jurisdiction was, however, strictly auxiliary to the legal remedy. The creditor was bound to show by his bill that he had proceeded at law to the extent necessary to give him a complete legal title to execution (*r*); consequently he could not obtain a receiver of his debtor's equitable interest in freehold estate without suing out an *elegit*, or, in the case of personalty, a *fi. fa.* (*s*). Since the Judicature Acts it has become unnecessary to sue out these writs (*t*), or to institute a fresh action, in order to obtain the benefit of equitable execution. The appointment of a receiver can be made on motion or summons in the action in which judgment was obtained (*u*). It may extend to a debtor's equitable reversionary interest (*a*). But notwithstanding the power of the court to appoint a receiver in all cases in which it shall appear "just and convenient" (*b*), a receiver will not be appointed by way of equitable execution except in a case where such an appointment could be made before the Acts—that is, where the only difficulty was an impediment which the Court of Chancery could remove (*c*)—and it is still necessary to show to the court "the existence of the circumstances creating the equity on which alone the jurisdiction arises" (*d*).

(vii.) *Interpleader* (*e*).

Interpleader.

Legal remedy.

65. The Court of Chancery exercised a jurisdiction in interpleader supplementary to that at law. At law the remedy by interpleader was confined to cases where property had been delivered on a joint bailment, to be held by the bailee until some condition or covenant had been performed by one of the bailors. Whether this performance had taken place was a question in which only the

who have prior estates; in this sense, without prejudice to persons having prior legal estates, that it will not prevent their proceeding to take possession if they think proper; and with regard to persons having prior equitable estates, the court takes care in appointing a receiver not to disturb prior equities, and for that purpose directs inquiries to determine priorities among equitable incumbrancers; permitting legal creditors to act against the estates at law, and settling the priorities of equitable creditors."

(*q*) See title EXECUTION.

(*r*) Mitford on Pleadings, p. 124.

(*s*) *Neate* v. *Marlborough (Duke)* (1838), 3 My. & Cr. 407; *Anglo-Italian Bank* v. *Davies* (1878), 9 Ch. D. 275, C. A., *per* JESSEL, M.R., at p. 283; see *Angell* v. *Draper* (1686), 1 Vern. 399; *Balch* v. *Wastall* (1718), 1 P. Wms. 445; *Shirley* v. *Watts* (1744), 3 Atk. 200.

(*t*) *Re Watkins, Ex parte Evans* (1879), 13 Ch. D. 252, C. A.

(*u*) *Smith* v. *Cowell* (1880), 6 Q. B. D. 75, C. A.; *Salt* v. *Cooper* (1880), 16 Ch. D. 544, 554, C. A.; *Holmes* v. *Millage*, [1893] 1 Q. B. 551, C. A.

(*a*) *Ideal Bedding Co., Ltd.* v. *Holland*, [1907] 2 Ch. 157, 169.

(*b*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (8).

(*c*) *Holmes* v. *Millage, supra*; *Cadogan* v. *Lyric Theatre, Ltd.*, [1894] 3 Ch. 338, C. A.; see *Manchester and Liverpool District Banking Co.* v. *Parkinson* (1888), 22 Q. B. D. 173, C. A.; *Harris* v. *Beauchamp Brothers*, [1894] 1 Q. B. 801, C. A.; *Edwards & Co.* v. *Picard*, [1909] 2 K. B. 903, C. A.

(*d*) *Re Shephard, Atkins* v. *Shephard* (1889), 43 Ch. D. 131, C. A., *per* FRY, L.J., at p. 138; see title EXECUTION.

(*e*) See title INTERPLEADER.

bailors were concerned; but in the event of dispute between them, each might bring an action of detinue claiming the property against the bailee. In such case the bailee might at law require them to settle the dispute between themselves; and the process of interpleader applied also in cases of finding, where two parties claimed the thing found against the finder (*f*). But the process was only available in detinue, and when detinue fell into disuse and was replaced by trover, interpleader at common law became still further restricted, and in practice recourse was had to the similar relief afforded in equity (*g*).

Equitable remedy.

66. Subject to certain restrictions as to the nature of the claims made against the person desiring to interplead, the Court of Chancery extended the remedy to all cases to which in conscience it ought to extend—that is, where a person not interested was exposed to conflicting claims (*h*)—whether an action or suit had been commenced by any claimant or only a claim made (*i*). Thus it applied to cases where two or more persons severally claimed delivery of the same property, or payment of the same debt, or rendering of the same duty, under different titles or in separate interests, from another person, and the latter did not know to which of the claimants he ought to deliver the property, or pay the debt, or render the duty (*k*). The jurisdiction in equity was supplementary to that at law in the sense that a bill of interpleader would not lie where there was a remedy by interpleader at law (*l*), and to some extent equity followed in interpleader the analogy of the remedy at law (*m*).

Cases of interpleader in equity.

67. To maintain a bill of interpleader it was necessary that the plaintiff should himself claim no interest in the subject-matter of the suit (*n*). And interpleader did not lie where the person holding the property, or owing the debt or duty, was under a contract with, or in a relation to, one of the claimants which rendered him personally liable to that claimant apart from the question of property (*o*). Thus it did not lie where an agent was exposed to claims by his principal and also by a third party (*p*), unless an

(*f*) Mitford on Pleadings, p. 141; *Crawshay* v. *Thornton* (1837), 2 My. & Cr. 1, 21.

(*g*) Story, s. 805; see as to interpleader at law, Reeves, History of English Law (Finlason), Vol. II., pp. 637 *et seq.*

(*h*) See *Langston* v. *Boylston* (1793), 2 Ves. 101.

(*i*) Mitford on Pleadings, p. 141; *Jones* v. *Thomas* (1854), 2 Sm. & G. 186. In *Pearson* v. *Cardon* (1831), 2 Russ. & M. 606, 613, Lord BROUGHAM described the jurisdiction in interpleader as strictly a concurrent jurisdiction; but there was no exact line of demarcation between the concurrent and auxiliary jurisdictions, and it is needless now to attempt to draw one.

(*k*) Story, s. 806; Mitford on Pleadings, p. 48; *Crawshay* v. *Thornton, supra,* at p. 21; *Glyn* v. *Duesbury* (1840), 11 Sim. 139, 147; *Sieveking* v. *Behrens* (1837), 2 My. & Cr. 581; *Hoggart* v. *Cutts* (1841), Cr. & Ph. 197; *Desborough* v. *Harris* (1855), 5 De G. M. & G. 439. As to conflicting claims to money due under a charterparty, see *Rusden* v. *Pope* (1868), L. R. 3 Exch. 269.

(*l*) *Langston* v. *Boylston, supra; Burnett* v. *Anderson* (1816), 1 Mer. 405.

(*m*) *Metcalf* v. *Hervey* (1749), 1 Ves. Sen. 248.

(*n*) *Mitchell* v. *Hayne* (1824), 2 Sim. & St. 63; *Moore* v. *Usher* (1835), 7 Sim. 383.

(*o*) See *per* Lord COTTENHAM, L.C., in *Crawshay* v. *Thornton, supra.*

(*p*) *Cooper* v. *De Tastet* (1829), Taml. 177; *Pearson* v. *Cardon* (1831), 2 Russ. & M. 606, 609; *Crawshay* v. *Thornton* (1837), 2 My. & Cr. 1, 22—24.

SECT. 1. Nature and Extent of Equitable Jurisdiction.

interest had been created by the principal in favour of the third party (*q*); or where a person claimed rent from a tenant adversely to the person whom the tenant had recognised as landlord (*r*), unless such claim arose derivatively out of the lessor's title (*s*). But interpleader lay in favour of a tenant where conflicting claims were made by persons entitled to annuities, or to divided parts of a rentcharge secured on the land (*a*). Interpleader lay also where one of the conflicting claims was legal and the other equitable; and where both were equitable (*b*). In the last case the proceedings were entirely in equity. Where the claims, or one of them, were legal, they were, as far as practicable, adjudicated upon in equity; but where necessary the parties were ordered to interplead at law, or an issue at law was directed (*c*).

(viii.) *Bills of Peace.*

Bills of peace.

68. The principle that the Court of Chancery would interfere to prevent multiplicity of suits was the foundation of the jurisdiction to entertain bills of peace. By a bill of peace the plaintiff sought to establish a right which was capable of being, or had actually been, disputed in several actions, and claimed a perpetual injunction against future litigation (*d*). It might be resorted to either where one person claimed or defended a right against many, or where many claimed or defended a right against one (*e*). It lay, for instance, where one person claimed a right of way extending over the lands of several landowners, and the bill might be filed before any action had been commenced at law (*f*). It was sufficient

(*q*) *Smith* v. *Hammond* (1833), 6 Sim. 10; *Wright* v. *Ward* (1827), 4 Russ. 215, 220. And if, after a deposit, the depositor assigned his interest, and a dispute as to the assignment arose between him and the assignee, the depositary might interplead (*Crawford* v. *Fisher* (1842), 1 Hare, 436, 440).

(*r*) *Metcalf* v. *Hervey* (1749), 1 Ves. Sen. 248; *Dungey* v. *Angove* (1794), 2 Ves. 304, 310; *Crawshay* v. *Thornton, supra*; *Suart* v. *Welch* (1839), 4 My. & Cr. 305, 316, 317; *Cook* v. *Rosslyn* (*Earl*) (1859), 1 Giff. 167. "The true doctrine, supported by the authorities, would seem to be, that in cases of adverse independent titles, the party holding the property must defend himself as well as he can at law; and he is not entitled to the assistance of a court of equity; for that would be to assume the right to try merely legal titles upon a controversy between different parties, where there is no privity of contract between them and the third person, who calls for an interpleader" (Story, s. 820).

(*s*) *Hodges* v. *Smith* (1787), 1 Cox, Eq. Cas. 357; *Clarke* v. *Byne* (1807), 13 Ves. 383; *Jew* v. *Wood* (1841), Cr. & Ph. 185.

(*a*) *Aldrich* v. *Thompson* (1787), 2 Bro. C. C. 149; *Angell* v. *Hadden* (1808), 15 Ves. 244; (1809), 16 Ves. 202; (1817), 2 Mer. 164; Mitford on Pleadings, p. 142, n. (p); Story, s. 811.

(*b*) Story, s. 808; *Paris* v. *Gilham* (1813), Coop. G. 56; *Bolton* (*Duke*) v. *Williams* (1793), 4 Bro. C. C. 297, 309; 2 Ves. 138, 151, 152; *Morgan* v. *Marsack* (1816), 2 Mer. 107; *Wright* v. *Ward* (1827), 4 Russ. 215; see *Martinius* v. *Helmuth* (1817), 2 Ves. & B. (2nd ed.) 412, n.

(*c*) Story, s. 822.

(*d*) Story, s. 853.

(*e*) Story, s. 854; Mitford on Pleadings, p. 146; *Tenham* v. *Herbert* (1742), 2 Atk. 483.

(*f*) *York Corporation* v. *Pilkington* (1737), 1 Atk. 282; see *Sheffield Waterworks* v. *Yeoman* (1866), 2 Ch. App. 8; *City of London Sewers Commissioners* v. *Glasse* (1872), 7 Ch. App. 456. A plaintiff could come into equity on a legal title before establishing his title at law, in order to prevent multiplicity of suits or irremediable injustice; otherwise he had to establish his title at law before

to make some only of the adverse claimants parties, and an issue was in general directed to settle the question of title at law. If the result was favourable to the plaintiff's title, a decree was made restraining further litigation upon it (*g*). Similarly, where some persons sued on behalf of themselves and others in respect of the same right, as where certain of the tenants of a manor sued the lord on behalf of all the tenants to establish a right of common (*h*).

In certain cases—notably in ejectment—the courts of common law did not treat one action as finally determining the right as between the parties or their successors in title, but allowed the same question to be repeatedly litigated (*i*). In equity, however, after a question had been satisfactorily settled at law, a perpetual injunction would be granted to restrain further litigation (*k*). And in suitable cases the remedy by injunction is still available to prevent vexatious litigation (*l*).

(ix.) *Ne exeat regno.*

Writ of *ne exeat regno.*

69. The writ of *ne exeat regno*, which was issued in certain cases to prevent a defendant from leaving the country during the pendency of the suit, was chiefly incidental to the exclusive jurisdiction. Formerly, where a claim was made at law, the plaintiff could arrest the defendant on mesne process and require him to give bail for his appearance (*m*). The writ of *ne exeat regno* was used for

obtaining relief in equity by way of perpetual injunction (*Welby* v. *Rutland* (*Duke*) (1773), 2 Bro. Parl. Cas. 39). Consequently where a legal right was in dispute between two only, one of them could not sue in equity to establish his right and be quieted in the possession of it (*Tenham* v. *Herbert* (1742), 2 Atk. 483; *Weller* v. *Smeaton* (1784), 1 Bro. C. C. 572).

(*g*) Story, s. 854.

(*h*) *Smith* v. *Brownlow* (*Earl*) (1870), L. R. 9 Eq. 241. It is sufficient if the plaintiffs sue in respect of a common right, although they may have different rights *inter se* (*Warrick* v. *Queen's College, Oxford* (1871), 6 Ch. App. 716, *per* Lord HATHERLEY, L.C., at p. 726). So, to prevent a multiplicity of suits, several copyholders might file a bill to be relieved from an excessive fine, though such a bill could not be filed by one only (*Cowper* v. *Clerk* (1732), 3 P. Wms. 155). A similar object is now attained by the joinder of plaintiffs or defendants under R. S. C., Ord. 16, rr. 1, 4; see title PRACTICE AND PROCEDURE.

(*i*) *Bath* (*Earl*) v. *Sherwin* (1706), Prec. Ch. 261, where Lord COWPER, L.C., considered that this was a grievance which Parliament, and not the Court of Chancery, should correct, but his refusal to interfere was overruled by the House of Lords (see next note).

(*k*) *Bath* (*Earl*) v. *Sherwin* (1709), 4 Bro. Parl. Cas. 373, n. In this case there had been five trials. In *Leighton* v. *Leighton* (1720), 1 P. Wms. 671; 4 Bro. Parl. Cas. 378, the injunction was granted after two trials, both adverse to the defendant in equity; see *Devonsher* v. *Newenham* (1804), 2 Sch. & Lef. 199, 208.

(*l*) *Grepe* (*J. S.*) v. *Loam*, *Bulteel* v. *Grepe* (*J.*) (1887), 37 Ch. D. 168, C. A.; *Kinnaird* (*Lord*) v. *Field*, [1905] 2 Ch. 306, C. A.; or an action may be dismissed on this ground (*Egbert* v. *Short*, [1907] 2 Ch. 205). See R. S. C., Ord. 25, r. 4; *Re Norton's Settlement*, *Norton* v. *Norton*, [1908] 1 Ch. 471, C. A.; *Re Page*, *Hill* v. *Fladgate*, [1910] 1 Ch. 489, C. A.

(*m*) Arrest on mesne process at law has been abolished, and a corresponding but more restricted process is given by s. 6 of the Debtors Act, 1869 (32 & 33 Vict. c. 62). Where a plaintiff at law proves on oath that he has a good cause of action for £50 or upwards against the defendant, and that there is probable cause for believing that the defendant is about to leave England, and that his absence will materially prejudice the plaintiff in the prosecution of the action, the

SECT. 1. Nature and Extent of Equitable Jurisdiction.

a corresponding purpose in equitable demands (*n*). It was only issued after a bill had been filed, and was not available in cases of legal demand (*o*), except where equity had concurrent jurisdiction, as in account (*p*). It thus constituted a species of equitable bail (*q*). For the writ to be issued it was essential that the claim should be a debt or pecuniary demand; certain in its nature and not contingent; and presently due. Hence the writ was not available where the claim was unliquidated or in the nature of damages (*r*). And it had to be clearly established by the evidence that the amount claimed was due (*s*), and that the defendant was about to leave the country (*t*). It was not necessary to show that he was going abroad to avoid the demand; it was sufficient if the debt would be in danger (*a*). The writ was also available for the purpose of enforcing alimony ordered to be paid by the Ecclesiastical Court, since that court could not compel the husband to find bail (*b*); but it was available only for arrears and costs (*c*).

The writ of *ne exeat regno* is, since the Judicature Acts, still available in the case of equitable claims, but apparently it is restricted to claims which, if they were legal, would fall within s. 6 of the Debtors Act, 1869 (*d*). Otherwise the principles governing the former practice prevail, and the writ is only issued where the demand is a liquidated pecuniary demand, not contingent, and presently payable (*e*); though, where a peremptory time for

defendant may be arrested and imprisoned for not more than six months till he gives security not to go out of England without the leave of the court. But he cannot be kept in prison after final judgment (*Hume* v. *Druyff* (1873), L. R. 8 Exch. 214). As to the practice, see R. S. C., Ord. 69; and title PRACTICE AND PROCEDURE.

(*n*) The writ was a prerogative writ, and was originally used for political purposes. In the sixteenth century it came to be used in equity in aid of civil process (Story, s. 1467); but it was applied in cases of private right with great caution and jealousy (*Tomlinson* v. *Harrison* (1802), 8 Ves. 32; see *Whitehouse* v. *Partridge* (1818), 3 Swan. 365, 379).

(*o*) *Ex parte Brunker* (1734), 3 P. Wms. 312; see *Jackson* v. *Petrie* (1804), 10 Ves. 164.

(*p*) *Jones* v. *Alephsin* (1810), 16 Ves. 470; *Flack* v. *Holm* (1820), 1 Jac. & W. 405, 414; *Lees* v. *Patterson* (1878), 7 Ch. D. 866. Since there was concurrent jurisdiction in matters of account, the writ was allowed in a case where the defendant admitted a balance to be due from him, though the plaintiff alleged that the amount due was greater (*Jones* v. *Sampson* (1803), 8 Ves. 593).

(*q*) *Etches* v. *Lance* (1802), 7 Ves. 417; see *Ex parte Brunker, supra.* After bail given at law, the writ was not issued (*Amsinck* v. *Barklay* (1803), 8 Ves. 594).

(*r*) *Cock* v. *Ravie* (1801), 6 Ves. 283; *Blaydes* v. *Calvert* (1820), 2 Jac. & W. 211.

(*s*) *Jenkins* v. *Parkinson* (1833), 2 My. & K. 5, 13; but with respect to the balance of an account, it was enough to swear to belief that a certain sum was due (*Hyde* v. *Whitfield* (1815), 19 Ves. 342; *Jenkins* v. *Parkinson, supra*).

(*t*) *Etches* v. *Lance, supra*; *Hyde* v. *Whitfield, supra*; *Jones* v. *Alephsin, supra.*

(*a*) *Tomlinson* v. *Harrison, supra.*

(*b*) *Vandergucht* v. *De Blaquiere* (1838), 8 Sim. 315, 322.

(*c*) *Dawson* v. *Dawson* (1803), 7 Ves. 173.

(*d*) *Drover* v. *Beyer* (1879), 13 Ch. D. 242, C. A., *per* JESSEL, M.R., at p. 243:—"Under the present practice the writ of *ne exeat regno* is not to be issued except in cases which come within the provisions of s. 6 of the Debtors Act, 1869." See title CONSTITUTIONAL LAW, Vol. VII., p. 84.

(*e*) *Colverson* v. *Bloomfield* (1885), 29 Ch. D. 341, C. A.

payment of money already due has been fixed by the court, this last requirement does not prevent the issue of the writ before that time (*f*).

SECT. 1. Nature and Extent of Equitable Jurisdiction.

SECT. 2.—*The Present Exercise of Equitable Jurisdiction by all Divisions of the High Court.*

Union of the Courts of Law and Equity.

70. The twofold system of jurisdiction at law and in equity was put an end to by the Judicature Act, 1873 (*g*). The general scope of the Act was to enable a suitor to obtain by one proceeding in one court the same ultimate result as he would previously have obtained either by having selected the right court, as to which there was frequently a difficulty, or after—as was sometimes necessary—having been to two courts in succession (*h*). This was effected by uniting the High Court of Chancery, the superior courts of common law, and the other superior courts into one Supreme Court of Judicature (*i*), which was divided into the High Court and the Court of Appeal (*k*), and transferring to the High Court the jurisdictions of these various courts, including the jurisdiction of the High Court of Chancery as a common law court as well as a court of equity (*l*). Certain matters, comprising the chief heads of the jurisdiction of the old Court of Chancery—administration of estates, partnerships, mortgages, raising of portions and other charges on land, realisation of property subject to liens and charges, execution of trusts, rectification and cancellation of deeds, specific performance, partition, and wardship of infants—were specially assigned to the Chancery Division of the High Court (*m*).

All remedies, legal and equitable, granted in same proceedings.

71. The fundamental idea of the Judicature Act, 1873, is to avoid multiplicity of proceedings (*n*). This is expressed in the provision that the High Court and Court of Appeal, in every cause or matter pending before them, shall grant all such remedies as any of the parties may appear to be entitled to in respect of every legal or equitable claim properly brought forward by them in the

(*f*) *Sobey* v. *Sobey* (1873), L. R. 15 Eq. 200. If the defendant does not move to discharge the writ, it will be deemed to have been properly issued, and he cannot recover damages for any irregularity (*Lees* v. *Patterson* (1878), 7 Ch. D. 866).

(*g*) 36 & 37 Vict. c. 66; and see title COURTS, Vol. IX., pp. 51—65.

(*h*) *Torkington* v. *Magee*, [1902] 2 K. B. 427, *per* CHANNELL, J., at p. 430.

(*i*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 3.

(*k*) *Ibid.*, s. 4. "The court is now not a court of law or a court of equity; it is a court of complete jurisdiction" (*Pugh* v. *Heath* (1882), 7 App. Cas. 235, *per* Earl CAIRNS, at p. 237); see *Salt* v. *Cooper* (1880), 16 Ch. D. 544, 553, C. A.; *Antrim Land etc. Co.* v. *Stewart*, [1904] 2 I. R. 357, C. A., *per* PALLES, C.B., at p. 364.

(*l*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 16.

(*m*) The effect of the Judicature Acts is frequently referred to as "the fusion of law and equity," but exception has been taken to the accuracy of this phrase. "It was not any fusion or anything of the kind; it was the vesting in one tribunal the administration of law and equity in every cause, action, or dispute which should come before that tribunal" (*Salt* v. *Cooper*, *supra*, *per* JESSEL, M.R., at p. 549).

(*n*) *McGowan* v. *Middleton* (1883), 11 Q. B. D. 464, C. A., *per* BRETT, M.R., at p. 468.

SECT. 2. Present Exercise of Equitable Jurisdiction of High Court.

cause or matter (*o*); so that, as far as possible, all the matters so in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided (*p*).

Claims which may be adjudicated on.

72. This general declaration of the policy of the Act is preceded by particular provisions: (1) that a plaintiff claiming to be entitled to any equitable estate or right, or to relief upon any equitable ground against any deed, instrument, or contract, or against any right, title, or claim asserted by the defendant, or to any relief founded on a legal right which formerly could only have been given in equity, shall receive in the High Court the same relief as would formerly have been given by the Court of Chancery (*q*); (2) that a defendant claiming to be entitled to any equitable estate or right, or to relief upon any equitable ground against any deed, instrument, or contract, or against any right, title, or claim asserted by the plaintiff, or alleging any ground of equitable defence to any claim of the plaintiff, may use such claim or such ground of equitable defence by way of defence to the claim of the plaintiff as effectively as he could have done in a suit in Chancery (*r*); (3) that a defendant may counterclaim in respect of

(*o*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24 (7); see *O'Keeffe* v. *Walsh*, [1903] 2 I. R. 681, C. A., *per* Lord O'BRIEN, C.J., at p. 709. But this clause does not extend the remedies previously available. It only enables the High Court and every branch of it to give effect to all the remedies which could have been given before the Act by any court which was made a member of the High Court (*The James Westoll*, [1905] P. 47, at p. 51); see *The Recepta*, [1893] P. 255.

(*p*) The provision of s. 24 (7) is expressed in wide terms, and applies to any remedy whatever, and to any claim, whether the original claim or not, which is brought forward in the cause and relates to the matter in dispute in the cause. The cause is pending so long as the final judgment remains unsatisfied, and hence a receiver may be appointed by way of equitable execution upon application in the action, although there was originally no claim for a receiver (*Salt* v. *Cooper* (1880), 16 Ch. D. 544, 550, C. A.). But this principle has not been applied to a charging order on shares obtained by a judgment creditor, and to enforce the order a new action must be brought (*Leggott* v. *Western* (1884), 12 Q. B. D. 287; *Kolchmann* v. *Meurice*, [1903] 1 K. B. 534, C. A.).

(*q*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24 (1). But an equitable claim is still subject to the rule that a plaintiff who comes for equity must do equity, and he may be put upon terms (*Lodge* v. *National Union Investment Co., Ltd.*, [1907] 1 Ch. 300); though he may get a declaration of his mere legal right without terms (*Chapman* v. *Michaelson*, [1909] 1 Ch. 238, C. A.; see note (*q*), p. 71, *post*).

(*r*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24 (2). Thus in a foreclosure action the mortgagor may raise questions as to the mortgagee's charges which would formerly have required the filing of a cross bill (*Eyre* v. *Hughes* (1876), 2 Ch. D. 148); in an action for a debt by a trustee, the defendant may set up a claim of his own against the *cestui que trust* (*Bankes* v. *Jarvis*, [1903] 1 K. B. 549); a legal right to possession of land cannot be enforced if the defendant has an equitable right to prevent its enforcement (*Warren* v. *Murray*, [1894] 2 Q. B. 648, C. A., *per* Lord ESHER, M.R., at p. 652); where there is an equitable claim by the defendant to have a deed set aside, the King's Bench Division can treat it as set aside for the purpose of the action, though an action in the Chancery Division must be brought to set it aside in the future (*Mostyn* v. *West Mostyn Coal and Iron Co.* (1876), 1 C. P. D. 145, 150); and the court, if there is evidence on which it can rectify an instrument on the ground of mistake, can treat it as rectified (*Breslauer* v. *Barwick* (1876), 24 W. R. 901), and order performance of an agreement thus rectified (*Olley* v. *Fisher* (1886), 34 Ch. D. 367).

SECT. 2. Present Exercise of Equitable Jurisdiction of High Court.

any equitable estate or right, or other matter of equity, and also in respect of any legal estate, right, or title, and may obtain relief accordingly to the same extent as in an action instituted by him against the plaintiff; and also may claim and obtain relief against other persons, whether already parties or not (*s*); (4) that the High Court shall recognise and take notice of equitable estates, titles, and rights, and equitable duties and liabilities appearing incidentally in the course of any cause or matter, in the same manner as the Court of Chancery would have recognised and taken notice of the same in a suit in Chancery (*a*). Since full legal and equitable relief can now be given in the same court, it follows that it is no longer necessary, as under the former practice (*b*), for a court administering equity to restrain by injunction the prosecution of proceedings at law; and injunctions for this purpose are accordingly abolished, it being provided that any matter of equity which would have afforded ground for an injunction may be relied on by way of defence (*c*); but the former right to apply for a stay of proceedings is preserved (*d*).

Borrowes v. *Delaney* (1889), 24 L. R. Ir. 503; *Shrewsbury and Talbot Cab and Noiseless Tyre Co.* v. *Shaw* (1890), 89 L. T. Jo. 274; doubted by NEVILLE, J., in *Thompson* v. *Hickman*, [1907] 1 Ch. 550, 561). But effect will be given to the defence only upon equitable terms. Thus a defendant setting up an equitable right to a lease must consent to accept a legal lease on the terms of the equitable lease (*Thellusson* v. *Liddard*, [1900] 2 Ch. 635, 646). And a defendant resorting to equity for his defence must take the equitable principles applicable to the circumstances in their entirety (*Steeds* v. *Steeds* (1889), 22 Q. B. D. 537, 541).

(*s*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24 (3). The mere fact that a defendant counterclaims in an action in the King's Bench Division for rectification of a deed or specific performance is not in itself a ground for transferring the action to the Chancery Division (*Storey* v. *Waddle* (1879), 4 Q. B. D. 289, C. A.); and as to counterclaims, see *McGowan* v. *Middleton* (1883), 11 Q. B. D. 464, C. A.

(*a*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24 (4). Thus, a legal right, such as that of an execution creditor, is subject to all equities affecting the property (*Simultaneous Colour Printing Syndicate* v. *Foweraker*, [1901] 1 K. B. 771; compare *Re Standard Manufacturing Co.*, [1891] 1 Ch. 627, 641, C. A.); where money is borrowed without authority, the equitable right of subrogation is recognised (*Bannatyne* v. *MacIver*, [1906] 1 K. B. 103, 109, C. A.); where an instrument has been obtained by undue influence, the equity arising therefrom renders it unenforceable (*Chaplin & Co., Ltd.* v. *Brammall*, [1908] 1 K. B. 233, C. A.); and effect is given to equities in interpleader proceedings (*Usher* v. *Martin* (1889), 24 Q. B. D. 272; *Jennings* v. *Mather*, [1901] 1 K. B. 108, 116).

(*b*) See p. 47, *ante*.

(*c*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24 (5); *Garbutt* v. *Fawcus* (1875), 1 Ch. D. 155, C. A.; *Wright* v. *Redgrave* (1879), 11 Ch. D. 24, C. A.; and this applies also to the Probate, Divorce and Admiralty Division; *Marshall* v. *Marshall* (1879), 5 P. D. 19 (defendant in a suit for restitution of conjugal rights setting up a deed binding the plaintiff not to sue).

(*d*) Proviso to Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24 (5). Consequently where an injunction could formerly have been obtained to restrain a suit, the defendant can now apply at once for an order staying the action instead of waiting till he has delivered his defence; see *White* v. *Harrow* (1901), 50 W. R. 166. But an injunction could not have been obtained if there was a good defence to the action at law; the plaintiff in equity was bound to show some equitable ground for relief; and, apparently, this is still necessary in order to procure a stay of proceedings (*Brooking* v. *Maudslay, Son and Field* (1888), 38 Ch. D. 636, 644). The proviso simply keeps alive the jurisdiction

SECT. 2.
Present Exercise of Equitable Jurisdiction of High Court.

Rules of equity to prevail.

73. The Judicature Act, 1873 (*e*), lays down certain rules, either varying or affirming the previous rules in equity or at law as to specific matters—administration of insolvent estates, exemption of express trusts from the Statutes of Limitation, equitable waste, merger, actions by mortgagors in respect of the mortgaged land, assignments of choses in action, stipulations not of the essence of a contract, injunctions and receivers, and the custody and education of infants; and then provides generally that in all other matters in which there is any conflict between the rules of equity and the rules of the common law, the rules of equity shall prevail (*f*). This provision relates to matters of substantive law and not of mere practice (*g*); it does not mean that the procedure of the Court of Chancery is to be followed in ordinary common law actions (*h*).

Distinction between legal and equitable rights not abolished.

74. It is not provided by the Act that legal and equitable rights shall be treated as identical (*i*); and the same distinction exists between legal and equitable estates and interests as before the Act (*k*).

which existed before the passing of the Act. It confers no new jurisdiction to stay proceedings (*The James Westoll*, [1905] P. 47, C. A.).

(*e*) 36 & 37 Vict. c. 66, s. 25 (1)—(8), (10); see *Torkington* v. *Magee*, [1902] 2 K. B. 430, 431. Sub-s. 1, as to the administration of insolvent estates, is replaced by s. 10 of the Judicature Act, 1875 (38 & 39 Vict. c. 77).

(*f*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (11); see *Pugh* v. *Heath* (1882), 7 App. Cas. 235, 237, where it was said that the effect of the Judicature Acts has not been to abolish the distinction between law and equity. Both legal and equitable principles are now administered by the same tribunal, and where the rules of equity and the rules of law are at variance with reference to the same matter, the rules of equity are to prevail. It has been questioned whether this provision has any substantial operation (Maitland, Equity, pp. 156—159), and in general the rules of equity are concerned with different matters from those at law and do not conflict with them; see *Powell* v. *Brodhurst*, [1901] 2 Ch. 160, 164, that payment of a debt to one of two joint creditors is still a discharge of the debt; but instances of the prevalence of an equitable rule will be found in *Job* v. *Job* (1877), 6 Ch. D. 562, p. 48, note (*k*), *ante*; *Lowe* v. *Dixon* (1885), 16 Q. B. D. 455, p. 30, note (*s*), *ante*; *Vibart* v. *Coles* (1890), 24 Q. B. D. 364, C. A., p. 36, note (*m*), *ante*; *Steeds* v. *Steeds* (1889), 22 Q. B. D. 537, p. 164, note (*q*), *post*; and in *Gibbs* v. *Guild* (1882), 9 Q. B. D. 59, C. A. (Statutes of Limitation excluded by fraud).

(*g*) *La Grange* v. *McAndrew* (1879), 4 Q. B. D. 210. "Practice" and "Procedure" denote the mode of proceeding by which a right is enforced, as distinguished from the law which gives or defines the right (*Poyser* v. *Minors* (1881), 7 Q. B. D. 329, 335, C. A.).

(*h*) *Harrison* v. *Rutland* (*Duke*), [1893] 1 Q. B. 142, 149, C. A. Thus, in an action on a money bond accord and satisfaction may now be pleaded without any release under seal, in accordance with the former rule in equity (*Steeds* v. *Steeds*, *supra*); and payment to one of two obligors is not necessarily a defence to a claim by the other, since in equity they are *primâ facie* interested as tenants in common (*Steeds* v. *Steeds*, *supra*; see *Powell* v. *Brodhurst*, *supra*).

(*i*) *Joseph* v. *Lyons* (1884), 15 Q. B. D. 280, 286, C. A.

(*k*) Thus, an assignment of after-acquired chattels still gives only an equitable interest (*Joseph* v. *Lyons*, *supra*; *Hallas* v. *Robinson* (1885), 15 Q. B. D. 288, C. A.); an equitable assignment of leaseholds does not operate as a legal assignment (*Gentle* v. *Faulkner*, [1900] 2 Q. B. 267, 275, 277, C. A.); the owner of an equity of redemption has, apart from statute, only equitable rights, and cannot enforce his rights against a tenant as though he were legal owner (*Matthews* v. *Usher*, [1900] 2 Q. B. 535, C. A.). Though, where a person entitled in equity to an interest in land under an agreement is also entitled to specific performance, and to have his interest turned into a legal interest, he will, in a court having jurisdiction to order specific performance, be treated as having

SECT. 2. Present Exercise of Equitable Jurisdiction of High Court.

Where the court is dealing with questions of legal right, the principles established at law prevail (*l*).

Moreover, relief on equitable grounds is only obtainable in cases where it would have been granted by a court of equity before the Act. Consequently the equitable doctrine that part performance will take a contract for sale of land out of the Statute of Frauds has not been extended by the Act to other contracts generally, such as a contract of service (*m*). But in matters of procedure a person equitably entitled may have an advantage by reason of the fusion of jurisdiction. Thus the plea of purchase for value without notice is now no bar to discovery in aid of the legal title (*n*).

Part II.—Principles Affecting Relief in Equity.

SECT. 1.—*Equity acts in Personam.*

Equity acts *in personam*.

75. A court of equity operates primarily *in personam* and not *in rem* (*o*); and in the exercise of its jurisdiction *in personam* it will compel the performance of contracts and trusts relating to property which is not locally within the jurisdiction (*p*). And actions for foreclosure of mortgages (*q*), or for accounts between

the rights of a legal owner (*Walsh* v. *Lonsdale* (1882), 21 Ch. D. 9, C. A.); see *Manchester Brewery Co.* v. *Coombs*, [1901] 2 Ch. 608, 617.

(*l*) *Colls* v. *Home and Colonial Stores, Ltd.*, [1904] A. C. p. 179, 188.

(*m*) *Britain* v. *Rossiter* (1879), 11 Q. B. D. 123, C. A. "The true construction of the Judicature Acts is that they confer no new rights; they only confirm the rights which previously were to be found existing in the courts either of law or of equity; if they did more, they would alter the rights of parties, whereas in truth they only change the procedure," *per* BRETT, L.J., at p. 129; and see *per* COTTON, L.J., at p. 131; *Stumore* v. *Campbell & Co.*, [1892] 1 Q. B. 314, 316, C. A. But the doctrine of part performance probably applies to all contracts of which the Court of Chancery would have granted specific performance, and apparently these were not confined to contracts for sale of land (*Maddison* v. *Alderson* (1883), 8 App. Cas. 467, 474; *McManus* v. *Cooke* (1887), 35 Ch. D. 681, 690).

(*n*) *Ind, Coope & Co.* v. *Emmerson* (1887), 12 App. Cas. 300; and see p. 78, *post*.

(*o*) See Ashb., p. 51. But the Court of Chancery found it necessary to enforce its decrees by process against the property of the defendant, and this it did by sequestration (*ibid.*, p. 41); and see title EXECUTION.

(*p*) *Archer* v. *Preston* (undated), cited in *Arglasse* v. *Muschamp* (1682), 1 Vern. 75, 77; *Penn* v. *Baltimore* (*Lord*) (1750), 1 Ves. Sen. 444; 1 White & Tud. L. C., 7th ed., p. 755 (as to the specific performance of a contract relating to land situate abroad); *Kildare* (*Earl*) v. *Eustace* (1686), 1 Vern. 419; *Ewing* v. *Orr Ewing* (1883), 9 App. Cas. 34, *per* Lord SELBORNE, L.C., at p. 40; *Re Clinton, Clinton* v. *Clinton* (1903), 51 W. R. 316 (as to the execution of trusts of property situate abroad). See notes to *Arglasse* v. *Muschamp, supra*; and see the statement of the limits of the doctrine in *Deschamps* v. *Miller*, [1908] 1 Ch. 856, *per* PARKER, J., at p. 863.

(*q*) *Toller* v. *Carteret* (1705), 2 Vern. 494 (foreclosure of mortgage of Island of Sark); *Paget* v. *Ede* (1874), L. R. 18 Eq. 118 (land in the West Indies); *Athol* (*Earl*) v. *Derby* (*Earl*) (1672), 1 Cas. in Ch. 220 (portions charged on Isle of Man); *Re Courtney, Ex parte Pollard* (1840), Mont. & Ch. 239 (enforcement of equitable mortgage of land in Scotland); *Duder* v. *Amsterdamsch Trustees Kantoor*, [1902] 2 Ch. 132 (equitable charge); compare *British South Africa Co.* v. *De Beers Consolidated Mines, Ltd.*, [1910] 1 Ch. 354 (clog on the equity of redemption of foreign property declared invalid); in C. A. (1910), 54 Sol. Jo. 679.

SECT. 1. Equity acts in Personam.

mortgagor and mortgagee (*r*), or for a receiver (*s*), are entertained in this country though the mortgaged property is out of the jurisdiction. The same is the case with regard to actions relating to property abroad in which relief is sought on the ground of fraud, since fraud is upon the conscience of the party (*a*); or where relief is sought on the ground that a judgment obtained abroad is being made the instrument of gross injustice (*b*).

Limits of the jurisdiction.

But the court will only intervene where the defendant is resident here (*c*); and where its order can be executed by the process of the court. Consequently there can be no order for partition of property abroad, since this would involve the sending of a commission out of the jurisdiction (*d*); nor can there be a decree for delivery of possession of land situated abroad (*e*), nor for recovery of a rentcharge, for which the proper remedy is a local action (*f*); nor would a court of equity under the former practice direct an issue at law to try the validity of a will of lands abroad (*g*); nor will it determine a claim depending on the title to land in a foreign country strictly so called —that is, being no part of the British dominions or possessions— simply because the parties happen to be here (*h*); unless, having jurisdiction as to personalty, it extends its jurisdiction to the realty because the two are so mixed together that it is impossible to separate them (*i*). And the court will not interfere where there is already litigation in the appropriate foreign court (*j*). Nor will it make an order which involves a breach of the foreign law properly governing the property or its disposition (*k*).

Where the relief prayed falls within the above principles, the jurisdiction is exercisable not only in respect of property in the dominions of the Crown, but also in foreign countries (*l*).

(*r*) *Scott* v. *Nesbitt* (1808), 14 Ves. 438; see also titles MORTGAGE; RECEIVERS.

(*s*) *Mercantile Investment Trust Co.* v. *River Plate Trust Co.*, [1892] 2 Ch. 303.

(*a*) *Angus* v. *Angus* (1737), West *temp.* Hard. 23; see *Arglasse* v. *Muschamp* (1862), 1 Vern. 75.

(*b*) *Cranstown (Lord)* v. *Johnston* (1796), 3 Ves. 170, 183.

(*c*) *Matthaei* v. *Galitzin* (1874), L. R. 18 Eq. 340; see *Coolkney* v. *Anderson* (1863), 1 De G. J. & Sm. 365.

(*d*) *Cartwright* v. *Pettus* (1675), 2 Cas. in Ch. 214; S. C., *sub. nom. Carteret* v. *Petty*, 2 Swan. p. 323, n.

(*e*) *Roberdeau* v. *Rous* (1738), 1 Atk. 543. Partly on account of the difficulty of dealing with the possession, an action does not lie here for trespass to land abroad (*British South Africa Co.* v. *Companhia de Moçambique*, [1893] A. C. 602, 625; and as to the jurisdiction in equity, see *per* Lord HERSCHELL, L.C., at p. 626); see also title ACTION, Vol. I., p. 51.

(*f*) *Whitaker* v. *Forbes* (1875), 1 C. P. D. 51, C. A.

(*g*) *Pike* v. *Hoare* (1763), 2 Eden, 182.

(*h*) *Re Hawthorne, Graham* v. *Massey* (1883), 23 Ch. D. 743. And the court will not make an order establishing a lien on foreign land (*Norris* v. *Chambres* (1861), 29 Beav. 246).

(*i*) *Re Clinton, Clinton* v. *Clinton* (1903), 51 W. R. 316.

(*j*) *Norton* v. *Florence Land and Public Works Co.* (1877), 7 Ch. D. 332.

(*k*) *Waterhouse* v. *Stansfield* (1851), 9 Hare, 234; see generally title CONFLICT OF LAWS, Vol. VI., pp. 798 *et seq.*

(*l*) *Angus* v. *Angus, supra*; though some of the cases confined the jurisdiction to dominions of the Crown by the principle that the different courts of equity derive their jurisdiction from the same source (*Foster* v. *Vassall* (1747), 3 Atk. 587); and as regards Ireland the additional reason was used that the English courts had a superintendent power over those in Ireland

SECT. 2.—*Equity gives Account of Profits, not Damages.*

SECT. 2. Equity gives Account of Profits, not Damages.

76. The principle underlying relief at law is that the plaintiff has suffered loss by the breach of contract or wrongful conduct of the defendant, and damages are awarded for the purpose of making good this loss. The principle underlying relief in equity is that the defendant has improperly received or withheld property, or profits from property—such property or profits belonging to the plaintiff—and he is required to restore the property, or to account for the profits (*m*). Thus at law the extent of the remedy is measured by the loss to the plaintiff, and this is covered by the damages awarded; in equity the extent of the remedy is measured by the gain to the defendant, and this is ascertained by directing an account against him (*n*). These two measures may have quite different results (*o*). Hence, where damages were claimed the appropriate remedy was at law, and equity declined jurisdiction (*p*); and *primâ facie* this was so in cases of breach of contract, and in ordinary cases of fraud (*q*). The remedy of specific performance in equity might carry, as incidental to it, a right to compensation (*r*); but, apart from statute, ordinary damages could not be given, either in substitution for or in addition to specific performance (*s*). So, a breach of trust does not give a remedy in damages, but a remedy by making the trustee restore the property with which he is chargeable, and account for profits which he has made, or which he is to be taken to have made (*t*). And an agent is

(*Fryer* v. *Bernard* (1724), 2 P. Wms. 261), a reason which of course is obsolete; see *Portarlington* (*Lord*) v. *Soulby* (1834), 3 My. & K. 104, 109.

(*m*) "The Court of Chancery never entertained a suit for damages occasioned by fraudulent conduct or for breach of trust. The suit was always for an equitable debt or liability in the nature of a debt. It was a suit for the restitution of the actual money or thing, or value of the thing, of which the cheated party had been cheated" (*Re Collie, Ex parte Adamson* (1878), 8 Ch. D. 807, 819, C. A.).

(*n*) See Ashb., p. 52.

(*o*) *Nelson* v. *Bridges* (1839), 2 Beav. 239, *per* Lord LANGDALE, M.R., at pp. 243, 244.

(*p*) *Clifford* v. *Brooke* (1806), 13 Ves. 131; *Blore* v. *Sutton* (1817), 3 Mer. 237, 248; Story, s. 794. Or equitable relief might be granted so far as appropriate without prejudice to an action for damages (*Gwillim* v. *Stone* (1807), 14 Ves. 128. Equity did not interfere with damages at law on the ground of their being excessive (*Hooker* v. *Arthur* (1671), 2 Rep. Ch. 33 [62]).

(*q*) *Newham* v. *May* (1824), 13 Price, 749, 752; see as to damages for loss caused by fraudulent prospectus, *Twycross* v. *Grant* (1877), 2 C. P. D. 469, C. A.

(*r*) *Newham* v. *May*, *supra*; though compensation is ordinarily to be sought at law and cannot be obtained in equity (*Clinan* v. *Cooke* (1802), 1 Sch. & Lef. 22, 25).

(*s*) See *Todd* v. *Gee* (1810), 17 Ves. 273; *Sainsbury* v. *Jones* (1839), 5 My. & Cr. 1; and as to the statutory jurisdiction to give damages in addition to or in lieu of an injunction or specific performance, see pp. 12, 51, *ante*.

(*t*) *Ludlow Corporation* v. *Greenhouse* (1827), 1 Bli. (N. S.) 17, 58, H. L.; *Re Collie, Ex parte Adamson*, *supra*. Since the remedy is by way of account, it is not in the nature of a penal remedy (see *A.-G.* v. *Alford* (1855), 4 De G. M. & G. 843, 851; *Re Barclay, Barclay* v. *Andrew*, [1899] 1 Ch. 674, 683). It follows that the *cestui que trust*, getting the benefit of the breach of trust, may be better off than if the breach of trust had not been committed (see *per* Lord COTTENHAM, L.C., in *Greenlaw* v. *King* (1841), 5 Jur. 18, at p. 19).

SECT. 2. Equity gives Account of Profits, not Damages.

accountable in equity to his principal for secret profits which he has made (*a*).

The same principle attended the granting of injunctions, and an injunction against breach of copyright or infringement of patent was accompanied by an account of the profits made by the defendant, not of the actual loss to the plaintiff (*b*). At the present time all divisions of the High Court have jurisdiction to give damages, and hence a plaintiff has his option either to have an account of profits or to have damages, but he cannot have both. If he takes an account of profits he condones the infringement (*c*).

Death of wrongdoer.

77. Where an action of the nature of tort is brought for unliquidated damages, the death of the wrongdoer is a defence available for his legal personal representatives, in accordance with the maxim *actio personalis moritur cum persona;* and in matters within the concurrent jurisdiction, the same principle applies to the corresponding equitable remedy (*d*). Where, however, as a result of the tort, property, or the proceeds or value of property, belonging to another have been appropriated by the deceased person, and added to his own estate or money, so that his estate has been directly benefited, then a claim for the amount thus appropriated can be maintained against his assets (*e*).

SECT. 3.—*Equity follows the Law.*

Equity follows the law.

78. Jurisdiction in equity is exercised upon the principle that "equity follows the law." But this maxim of course is not universally true, or there would never have been occasion for the development of a separate code of equitable principles (*f*). It means that equity treats the common law as laying the foundation of all jurisprudence, and it does not depart unnecessarily from legal principles (*g*). In matters coming before it which depend solely on legal rights—as in legal claims arising in the course of an administration action—equity applies the rules of law as the appropriate system; in such cases the rules of law are in fact binding in equity. And, when equity has to regulate the equitable interests which it has itself created, it acts, so far as possible, on the analogy of the legal rules applicable to the corresponding legal interests, and only departs from this analogy in exceptional cases (*h*).

(*a*) *Parker* v. *McKenna* (1874), 10 Ch. App. 96, 118; *Hay's Case* (1875), 10 Ch. App. 593; see title AGENCY, Vol. I., pp. 189, 190.

(*b*) *Hogg* v. *Kirby* (1803), 8 Ves. 215, 223.

(*c*) *Neilson* v. *Betts* (1871), L. R. 5 H. L. 1; *De Vitre* v. *Betts* (1873), L. R. 6 H. L. 319.

(*d*) *Peek* v. *Gurney* (1873), L. R. 6 H. L. 377; *Re Duncan, Terry* v. *Sweeting*, [1899] 1 Ch. 387.

(*e*) *Phillips* v. *Homfray* (1883), 24 Ch. D. 439, 454, C. A.; see *Winchester (Bishop) v. Knight* (1717), 1 P. Wms. 406; see also title TORT.

(*f*) "When the court finds the rules of law right, it will follow them; but then it will likewise go beyond them (*Paget* v. *Gee* (1753), Amb. 807, *per* Lord HARDWICKE, at p. 810).

(*g*) *Burgess* v. *Wheate*, *A.-G.* v. *Wheate* (1759), 1 Eden, 177, *per* CLARKE, M.R., at p. 195.

(*h*) "The law is clear, and courts of equity ought to follow it in their judgments concerning titles to equitable estates; otherwise great uncertainty and

SECT. 3. Equity follows the Law.

Thus in regard to the limitations and incidents of equitable estates the rules of law are in general followed, and departures from them are exceptional. Such exceptions occurred when equity declined to allow dower out of equitable estates, or to make an equitable contingent remainder depend for its validity on a sufficient preceding vested interest, or to allow an equitable estate to escheat (*i*). Equity also followed the law as regards limitation of actions, and it applied the Statutes of Limitation as a bar to equitable estates, either by way of analogy, or, as it was sometimes said, because they were binding on a court of equity (*j*).

Where a covenant is void at law, a court of equity will not attempt to enforce it by injunction. In such cases it is the duty of equity to follow the law (*k*). And where there can be no action on the covenant at law, because the same person is a party to it both as covenantor and covenantee, an action does not lie on the covenant in equity. If an equitable claim can be supported, it must be in respect of a liability existing independently of the covenant (*l*).

SECT. 4.—*Equality is Equity.*

Equality is equity.

79. The maxim that "equality is equity" (*m*) expresses in a general way the object both of law (*n*) and equity, namely, to effect a distribution of property and losses proportionate to the several claims or to the several liabilities of the persons concerned. For equality in this connection does not mean literal equality, but proportionate equality (*o*). This doctrine of equality, however, operated more effectually in a court of equity than a court of law (*p*), and was exemplified in many departments of equitable jurisprudence. Thus, equity preferred a tenancy in common to a joint tenancy, whether as between purchasers, mortgagees, or partners, with a view to excluding the right of survivorship (*q*); and a joint account

confusion would ensue" (*Cowper* v. *Cowper* (*Earl*) (1734), 2 P. Wms. 720, *per* JEKYLL, M.R., at p. 753; see *Bath* (*Earl*) v. *Sherwin* (1710), 10 Mod. Rep. 1, 3).

(*i*) See pp. 93, note (*r*), 95, notes (*d*), (*e*), *post*.

(*j*) *Cholmondeley* (*Marquis*) v. *Clinton* (*Lord*) (1821), 4 Bli. 1, H. L., *per* Lord REDESDALE, at p. 119; *Hovenden* v. *Annesley* (*Lord*) (1806), 2 Sch. & Lef. 607, *per* Lord REDESDALE, at p. 630; and see p. 174, *post*.

(*k*) *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A. C. 535, 563.

(*l*) *Ellis* v. *Kerr*, [1910] 1 Ch. 529.

(*m*) Or "equity delights in equality." The maxim in this form was attributed to Lord SOMERS, L.C. (*Petit* v. *Smith* (1695), 1 P. Wms. 7, 9). See also *Re Accrington Corporation Steam Tramways Co.*, [1909] 2 Ch. 40, *per* SWINFEN EADY, J., at p. 44.

(*n*) In the form "equity is equality" the maxim was current at law from the time of Bracton; but in this connection "equity" appears to have referred to the equitable construction of statutes, so as to include cases omitted by the legislature, though within the spirit of the statute; "*in paribus rationibus, paria jura*" (Co. Litt. 24 b; 2 Plowd. 467). The law, however, recognised the equity of proportionate distribution of benefit and loss. "*In æquali jure* the law requires equality; one shall not bear the burden in ease of the rest, and the law is grounded in great equity" (*Dering* v. *Winchelsea* (*Earl*) (1787), 1 Cox, Eq. Cas. 318; 2 White & Tud. L. C., 7th ed., p. 538.

(*o*) See *Steel* v. *Dixon* (1881), 17 Ch. D. 825, 830; *Ker* v. *Ker* (1869), 4 I. R. Eq. 15, 28.

(*p*) *Dering* v. *Winchelsea* (*Earl*), *supra*.

(*q*) *Lake* v. *Craddock* (1732), 3 P. Wms. 158; 2 White & Tud. L. C., 7th ed., 952; *Petty* v. *Styward* (1632), 1 Ch. Rep. 31 [57]; *Jeffereys* v. *Small* (1683), 1

SECT. 4. **Equality is Equity.**

clause in a mortgage is not treated as necessarily excluding several titles to the mortgage money (*r*). So, in the distribution of property, the highest equity is to make an equality between parties standing in the same relation, though this cannot be done contrary to the plain meaning of a deed (*s*).

Upon the same principle equity formerly intervened to set aside an illusory appointment, and to compel an equal appointment under a power (*t*); and the rule gave rise to the rateable distribution of equitable assets between specialty and simple contract creditors (*u*).

In like manner a court of equity, more effectually than a court of law, adjusts losses so that they shall fall in due proportion upon the persons liable; and upon this equity is grounded the doctrine of contribution as between sureties (*a*), and also other doctrines which are intended to apportion losses, such as average (*b*), and abatement of legacies; and perhaps, also, the doctrines of marshalling (*c*) and refunding (*d*) have the same origin.

SECT. 5.—*He who seeks Equity must do Equity. He who comes into Equity must come with Clean Hands.*

Equity and good conduct required in plaintiff.

80. A court of equity in granting relief peculiar to its own jurisdiction acts upon the rule that he who seeks equity must do equity (*e*). By this it is not meant that the court can impose arbitrary conditions upon a plaintiff simply because he stands in that position on the record (*f*). The rule means that a man who comes to seek the aid of a court of equity to enforce a claim must

Vern. 217; *Usher* v. *Ayleward* (1685), 1 Vern. 360; *Lake* v. *Gibson* (1729) 1 Eq. Cas. Abr. 291; *Rigden* v. *Vallier* (1751), 2 Ves. Sen. 252, 258; *Morley* v. *Bird* (1798), 3 Ves. 628, 631; *Steeds* v. *Steeds* (1889), 22 Q. B. D. 537, 541; and a joint tenancy, where it exists both at law and in equity, is severed by a contract for sale (*Brown* v. *Raindle* (1796), 3 Ves. 256); or other contract for value, such as an ante-nuptial marriage settlement (*Coldwell* v. *Fellowes* (1870), L. R. 9 Eq. 410; *Re Hewett, Hewett* v. *Hallett*, [1894] 1 Ch. 362); but not by the marriage by itself unless the effect is to vest the interest of the wife in the husband (*Re Butler's Trusts, Hughes* v. *Anderson* (1888), 38 Ch. D. 286, C. A.).

(*r*) *Re Jackson, Smith* v. *Sibthorpe* (1887), 34 Ch. D. 732.

(*s*) *Hulme* v. *Chitty* (1846), 9 Beav. 437, *per* Lord LANGDALE, M.R., at p. 443.

(*t*) *Gibson* v. *Kinven* (1682), 1 Vern. 66; *Wall* v. *Thurborne* (1686), 1 Vern. 355, 414; see *Craker* v. *Parrott* (1677), 2 Cas. in Ch. 228, 230. And the court, if it has itself to exercise a power, does so on this principle (*Salusbury* v. *Denton* (1857), 3 K. & J. 529, 538; see title POWERS.

(*u*) *Wolestoncroft* v. *Long* (1663), 1 Cas. in Ch. 32; *Hixon* v. *Wytham* (1675), 1 Cas. in Ch. 248; *Anon.* (1681), 2 Cas. in Ch. 54.

(*a*) *Dering* v. *Winchelsea* (*Earl*) (1787), 1 Cox, Eq. Cas. 318; 1 White & Tud. L. C., 7th ed., p. 538. Early cases on the subject are *Peter* v. *Rich* (1630), 1 Rep. Ch. 19 [34]; *Morgan* v. *Seymour* (1638), 1 Rep. Ch. 64 [120]; *Swain* v. *Wall* (1641), 1 Rep. Ch. 80 [149]; see also title GUARANTEE.

(*b*) See *Sheppard* v. *Wright* (1693), Show. Parl. Cas. 18.

(*c*) *Kennoule* (*Lord*) v. *Bedford* (*Earl*) (1676), 1 Cas. in Ch. 295.

(*d*) Francis, Maxims of Equity, pp. 9 *et seq.* As to the early doctrine of refunding, see *Noel* v. *Robinson* (1682), 1 Vern. 90. But the doctrines both of marshalling and refunding only illustrate the maxim in the sense that they secure ultimately the proper distribution of property.

(*e*) "The principle of this court is not to give relief to those who will not do equity" (*Davis* v. *Marlborough* (*Duke*) (1819), 2 Swan. 108, *per* Lord ELDON, L.C., at p. 157; see *Portsea Island Building Society* v. *Barclay*, [1895] 2 Ch. 298, 308, C. A.).

(*f*) *Hanson* v. *Keating* (1844), 4 Hare, 1, 6.

SECT. 5.
He who seeks Equity must do Equity.

be prepared to submit in such proceedings to any directions which the known principles of a court of equity may make it proper to give (*g*); he must do justice as to the matters in respect of which the assistance of equity is asked (*h*). In a court of law it is otherwise: when the plaintiff is found to be entitled to judgment, the law must take its course; no terms can be imposed (*i*).

Thus, where a husband has to come into equity to recover property to which he is entitled in right of his wife, the court only assists him on terms of his making a suitable settlement out of the property in favour of his wife (*k*). And the rule was, probably, the foundation of the doctrines of the consolidation (*l*) and tacking of mortgages (*m*); and after the Statute of Frauds a charge arising by way of deposit of deeds without any memorandum in writing was sometimes founded on the same principle (*n*). Where a person in possession of property has, under a mistaken belief that he is entitled to it, expended money in permanent improvements, the true owner, if he has to assert his title in equity, is required to do equity by repaying this money (*o*); and, generally, one who in good faith incurs expense in dealing with the property of another—as in getting coal—is allowed his expenses (*p*). And a borrower who seeks for equitable relief against a security which is voidable in equity, or which is void by statute, obtains it only on the terms of paying the money which is properly due (*q*). Similarly, when a

(*g*) *Colvin* v. *Hartwell* (1837), 5 Cl. & Fin. 484, 522; see *Shish* v. *Foster* (1748), 1 Ves. Sen. 88.

(*h*) *Gibson* v. *Goldsmid* (1854), 5 De G. M. & G. 757, 765, C. A.

(*i*) *Deeks* v. *Strutt* (1794), 5 Term Rep. 690, 693.

(*k*) *Tidd* v. *Lister* (1852), 10 Hare, 140, 153; *Sturgis* v. *Champneys* (1839), 5 My. & Cr. 97, 105; *Hanson* v. *Keating* (1844), 4 Hare, 1, 4; see title HUSBAND AND WIFE.

(*l*) *Mills* v. *Jennings* (1880), 13 Ch. D. 639, 646, C. A.

(*m*) *St. John* v. *Holford* (1668), 1 Cas. in Ch. 97; *Dacres* (*Lord*) v. *Crompe* (*circ.* 1668), 2 Cas. in Ch. 87; *Bromley* v. *Hamond* (1679), 2 Cas. in Ch. 23. Hence originally the mortgagee might tack a bond debt against the mortgagor (*Anon.* (1698), 3 Salk. 84). Subsequently this was not allowed, since the bond debt was not a charge on the land; and, though tacking was allowed as against an heir or devisee in whose hands the land was subject to payment of bond debts, this was put on the ground of avoiding circuity of action (see *Shuttleworth* v. *Laycock* (1684), 1 Vern. 245; *Troughton* v. *Troughton* (1748), 1 Ves. Sen. 86; *Elvy* v. *Norwood* (1852), 5 De G. & Sm. 240; see *Coleman* v. *Winch* (1721), 1 P. Wms. 775); see also title MORTGAGE.

(*n*) *Keys* v. *Williams* (1838), 3 Y. & C. (EX.) 55, 60. But more usually it is based on part performance (*Whitmore* v. *Farley* (1881), 29 W. R. 825; and see p. 92, *post*).

(*o*) *Neesom* v. *Clarkson* (1845), 4 Hare, 97, 101; see *Davey* v. *Durrant* (1857), 1 De G. & J. 535; *Plimmer* v. *Wellington Corporation* (1884), 9 App. Cas. 699, P. C. But this application of the rule depends on the possessor's ignorance of his want of title (*Ramsden* v. *Dyson* (1866), L. R. 1 H. L. 129, 141; compare *Clavering's Case* (undated), cited in *Jackson* v. *Cator* (1800), 5 Ves. 687, 690); and see p. 168, *post*.

(*p*) *Peruvian Guano Co.* v. *Dreyfus Brothers & Co.*, [1892] A. C. 166, 170 n. (1). See also *Trotter* v. *Maclean* (1881), 13 Ch. D. 574; *Joicey* v. *Dickinson* (1881), 26 Sol. Jo. 109; *Livingstone* v. *Rawyards Coal Co.* (1880), 5 App. Cas. 25; *Brown* v. *Dibbs* (1877), 25 W. R. 776; *Ashton* v. *Stock* (1877), *ibid.* 862; *Jegon* v. *Vivian* (1871), 6 Ch. App. 742.

(*q*) *Waller* v. *Dalt* (1676), 1 Cas. in Ch. 276; *Bill* v. *Price* (1687), 1 Vern. 467; *Mason* v. *Gardiner* (1793), 4 Bro. C. C. 436. Where a security is void under s. 2 of the Money-lenders Act, 1900 (63 & 64 Vict. c. 51), the borrower, if

SECT. 5. **He who seeks Equity must do Equity.**

He who comes into equity must come with clean hands.

purchase is set aside, this is on terms of repaying the purchase-money with interest (*r*); and one who seeks an account must be prepared himself to account (*s*).

81. A court of equity refuses relief to a plaintiff whose conduct in regard to the subject-matter of the litigation has been improper. This was formerly expressed by the maxim "He who has committed iniquity shall not have equity," and relief was refused where a transaction was based on the plaintiff's fraud or misrepresentation (*t*), or where the plaintiff sought to enforce a security improperly obtained (*a*), or where he claimed a remedy for a breach of trust which he had himself procured, and whereby he had obtained money (*b*). Later it was said that the plaintiff in equity must come with perfect propriety of conduct (*c*), or with clean hands (*d*). But this does not mean a general depravity; the conduct complained of must have an immediate and necessary relation to the equity sued for; it must be depravity in a legal as well as in a moral sense (*e*): thus, fraud on the part of a person under disability deprives him of his right to equitable relief, notwithstanding his disability (*f*). Where the transaction is itself unlawful it is not necessary to have recourse to this principle. In equity, just as at law, no suit lies in general in respect of an illegal

he asks only for a declaration that it is void, asserts a legal right, and is not put upon terms (*Chapman* v. *Michaelson*, [1909] 1 Ch. 238, C. A.); but if he goes further and asks for equitable relief—as if he asks for the security to be given up—he must be prepared to repay the loan (*Lodge* v. *National Union Investment Co., Ltd.*, [1907] 1 Ch. 300); and see title MONEY AND MONEY-LENDING.

(*r*) *Peacock* v. *Evans* (1809), 16 Ves. 512; see *Priestly* v. *Wilkinson* (1790), 1 Ves. 214.

(*s*) *Hanson* v. *Keating* (1844), 4 Hare, 1, 5.

(*t*) *Jones* v. *Lenthal* (1669), 1 Cas. in Ch. 154; see *Small* v. *Brackley* (1707), 2 Vern. 602; Francis, Maxims of Equity, p. 5.

(*a*) *Rich* v. *Sydenham* (1671), 1 Cas. in Ch. 202. So relief was not given against a wilful forfeiture (*Thomas* v. *Porter* (1668), 1 Cas. in Ch. 95); and as to suppression of title deeds, see *Gartside* v. *Ratcliff* (1676), 1 Cas. in Ch. 292.

(*b*) *Nail* v. *Punter* (1832), 5 Sim. 545.

(*c*) *Harnett* v. *Yielding* (1805), 2 Sch. & Lef. 549, 554.

(*d*) *Cadman* v. *Horner* (1810), 18 Ves. 10; *Clermont* (*Viscount*) v. *Tasburgh* (1819), 1 Jac. & W. 112, p. 121 (both cases where specific performance was refused on the ground of misrepresentation); *Roberts* v. *Cooper*, [1891] 2 Ch. 335, C. A. (wife debarred by her conduct from equity to settlement). The phrase "with clean hands" has acquired currency in text-books, but is not often used judicially, or expressly made the ground of judicial decision, and it is sometimes used as the equivalent of the principle stated in the previous paragraph; see *Fitzroy* v. *Gwillim* (1786), 1 Term Rep. 153, where it was said by Lord MANSFIELD, C.J., that in an equitable action the plaintiff must "come with clean hands according to the principle that those who seek equity must do equity."

(*e*) *Dering* v. *Winchelsea* (*Earl*) (1787), 1 Cox, Eq. Cas. 318, *per* EYRE, C.B., at p. 319; compare *Jones* v. *Lenthal*, *supra*, where it is said by the reporter that the iniquity must be done to the defendant himself.

(*f*) *Overton* v. *Banister* (1844), 3 Hare, 503; *Nelson* v. *Stocker* (1859), 4 De G. & J. 458, 465, C. A. (as to infants); *Savage* v. *Foster* (1722), 9 Mod. Rep. 35; *Vaughan* v. *Vanderstegen* (1854), 2 Drew. 363, 379; *Re Lush's Trusts* (1869), 4 Ch. App. 591 (as to married women). A married woman restrained from anticipation cannot bind her separate estate by admission, any more than by assignment, and is therefore not debarred from claiming it by reason of her having by deed mistakenly admitted her interest to have ceased (*Bateman* (*Lady*) v. *Faber*, [1897] 2 Ch. 223; see *Cahill* v. *Cahill* (1883), 8 App. Cas. 420; and compare *Macnaghten* v. *Paterson*, [1907] A. C. 483, P. C.).

transaction, but this is on the ground of its illegality, not by reason of the demerits of the plaintiff (*g*).

SECT. 5. He who seeks Equity must do Equity.

SECT. 6.—*Equity looks on that as done which ought to be done.*

Equity looks on that as done which ought to be done.

82. Equity looks upon that as done which ought to be done, or which is agreed to be done. But the maxim does not extend to things which might have been done; nor will equity apply it in favour of everybody, but only of those who had a right to pray that the thing should be done (*h*): thus, where the obligation arises from contract, that which ought to be done is only treated as done in favour of some person entitled to enforce the contract as against the person liable to perform it (*i*). The true meaning of the maxim is that equity will treat the subject-matter, as to collateral consequences and incidents, in the same manner as if the final acts contemplated by the parties had been done exactly as they ought to have been (*k*).

(*g*) Thus a suit in equity is not maintainable in respect of a gambling transaction made unlawful by statute (see *Quarrier* v. *Colston* (1842), 1 Ph. 147); or where the intended use of property is immoral (*Smith* v. *White* (1866), L. R. 1 Eq. 626); or where the claim is against an illegal company (*Re South Wales Atlantic Steamship Co.* (1876), 2 Ch. D. 763, C. A.); or is to protect the copyright in a libellous or immoral publication (*Walcot* v. *Walker* (1802), 7 Ves. 1); or to enforce a contract which is against public policy (*Thomson* v. *Thomson* (1802), 7 Ves. 470, 473), where, for instance, it is an agreement involving the abandonment of a criminal prosecution (*Whitmore* v. *Farley* (1881), 29 W. R. 825, C. A.; *Windhill Local Board of Health* v. *Vint* (1890), 45 Ch. D. 351, C. A.). The objection that a bond given in consideration of future cohabitation is void prevails equally at law and in equity, and if the illegal consideration appears on the face of the instrument, relief is not given against it (*Gray* v. *Mathias* (1800), 5 Ves. 286); if the illegal consideration had to be proved by evidence outside the instrument, discovery was formerly granted in aid of this defence at law (*Benyon* v. *Nettlefold* (1850), 3 Mac. & G. 94; compare *Franco* v. *Bolton* (1797), 3 Ves. 368). In general, in such cases, the defendant is protected by the maxims *ex turpi causâ actio non oritur*, and *in pari delicto melior est conditio possidentis*, which apply both in equity and at law; and the principle that equity requires clean hands does not prevent the defendant from pleading the illegality, if he does not also require to set up any equity on his own account (*Moulis* v. *Owen*, [1907] 1 K. B. 746, C. A.). But in some circumstances, when the consideration is unlawful, and does not appear on the face of the instrument, relief may be given in equity although the plaintiff is *particeps criminis* (*Ayerst* v. *Jenkins* (1873), L. R. 16 Eq. 275, *per* Lord SELBORNE, L.C., p. 282; see *Re Vallance, Vallance* v. *Blagden* (1884), 26 Ch. D. 353; *Phillips* v. *Probyn*, [1899] 1 Ch. 811; and compare *Batty* v. *Chester* (1842), 5 Beav. 103); and as to delivery up of deeds founded on illegal considerations, see *Hayward* v. *Dimsdale* (1810), 17 Ves. 111; *Simpson* v. *Howden* (*Lord*) (1837), 3 My. & Cr. 97; *Lound* v. *Grimwade* (1888), 39 Ch. D. 605; and see p. 53, *ante*. A covenant in a separation deed that the parties shall live separate is enforceable in equity by an injunction against proceedings in the Divorce Court for the restitution of conjugal rights (*Hunt* v. *Hunt* (1862), 4 De G. F. & J. 221). As to the limits of the maxim *ex turpi causâ actio non oritur*, see *Gordon* v. *Metropolitan Police* (*Chief Commissioner*) (1910), 26 T. L. R. 645, C. A.

(*h*) *Burgess* v. *Wheate*, *A.-G.* v. *Wheate* (1759), 1 Eden, 177, *per* CLARKE, M.R., at p. 186. The maxim that equity imputes an intention to fulfil an obligation is of very limited application, and does not require explanation here; see p. 139, *post*.

(*i*) *Re Anstis, Chetwynd* v. *Morgan, Morgan* v. *Chetwynd* (1886), 31 Ch. D. 596, C. A., *per* LINDLEY, L.J., at p. 605; *Re Plumptre's Marriage Settlement, Underhill* v. *Plumptre*, [1910] 1 Ch. 609, 619.

(*k*) Fonblanque, Treatise of Equity, Vol. I., p. 419; Story, s. 649. The rule was said by Lord HARDWICKE, L.C., to hold in every case, except in dower

SECT. 6.
Equity looks on that as done which ought to be done.

The leading examples of the application of the maxim are in cases (1) where land has been directed by settlement or will to be turned into money, and *vice versâ;* and (2) where a contract remains executory on one side, but has been executed on the other. The rule in all cases of the first kind is that what ought to have been done shall be taken as done—a rule so powerful as to alter the very nature of things, to make money land, and, on the contrary, to turn land into money (*l*).

Examples.

So in cases of contract, where the consideration has been paid or performed by one party, that party is treated as being entitled in equity to the same rights as if the contract had been performed by the other party, even though the contract has become in fact incapable of performance (*m*). And money which would have become due if the defendant had performed his contract will be treated as a debt in equity, although not a debt at law (*n*). Upon the same principle is based the efficacy of an assignment of after-acquired property. Neither in equity nor at law can there be an assignment of what has no existence. The assignment operates as a contract, and if it is for value, then when the property comes into existence equity, treating that as done which ought to be done, fastens upon the property, and the contract to assign becomes in equity a complete assignment (*o*). And a security given by a company for money advanced, though in law defective, is good in equity (*p*) if it is *intra vires;* and it may be *intra vires* to the extent to which the company has actually received money, and *ultra vires* as regards money advanced upon it to some other company (*q*).

(*Crabtree* v. *Bramble* (1747), 3 Atk. 680, 687). Dower was not allowed out of equitable estates; see p. 95, *post.*

(*l*) *Lechmere* v. *Carlisle* (*Earl*) (1733), 3 P. Wms. 211, *per* JEKYLL, M.R., at p. 215; *A.-G.* v. *Hubbuck* (1884), 13 Q. B. D. 275, C. A., *per* BOWEN, L.J., at p. 289.

(*m*) Thus, where one in consideration of marriage agreed to take up his freedom of the city of London within a year, but died after the year without having done so, his personal estate was divisible as if he had been a freeman (*Frederick* v. *Frederick* (1721), 1 P. Wms. 710). And the principle has been applied so as to give a wife a jointure under a power to jointure, though the power was not expressly exercised, an agreement to exercise the power having been made by the husband on the marriage (*Coventry* (*Countess*) v. *Coventry* (*Earl*) (1724), 2 P. Wms. 222). "In all cases where an agreement is entered into in contemplation of a valuable consideration, when that is performed, it is but justice and convenience that the purchaser should have an immediate right and ownership in what he hath so purchased" (S. C., *per* GILBERT, B., Francis, Maxims of Equity, Appendix, p. 4). The conversion which is effected by a contract of sale rests upon different grounds; it is contingent upon the parties being ultimately entitled to specific performance; if this is the case, then, for certain purposes there is a retrospective conversion from the date of the contract; see pp. 98, 110, *post.*

(*n*) See *London, Chatham and Dover Rail. Co.* v. *South Eastern Rail. Co.*, [1892] 1 Ch. 120, 143, C. A.

(*o*) *Collyer* v. *Isaacs* (1881), 19 Ch. D. 342, C. A., *per* JESSEL, M.R., at p. 351; see *Langton* v. *Horton* (1842), 1 Hare, 549; *Holroyd* v. *Marshall* (1862), 10 H. L. Cas. 191; see p. 104, *post.*

(*p*) *Re Strand Music Hall Co.* (1865), 3 De G. J. & Sm. 147, 158, C. A.; *Re Queensland Land and Coal Co., Davis* v. *Martin*, [1894] 3 Ch. 181; *Pegge* v. *Neath and District Tramways Co., Ltd.*, [1898] 1 Ch. 183.

(*q*) *Re Johnston Foreign Patents Co., Ltd., Re Johnston Die Press, Ltd., Re*

SECT. 7.—*Equity does not allow a Statute to be made an Instrument of Fraud.*

SECT. 7. Equity does not allow a Statute to be made an Instrument of Fraud.

83. Equity does not allow a statute to be made an instrument of fraud (*r*). Under the Statute of Frauds trusts of land can be created only in writing (*s*), and under the Wills Act, 1837 (*t*), all testamentary dispositions must be in writing. Thus a person who takes real estate by instrument *inter vivos*, or real or personal estate upon an intestacy or under a will, and in either case in pursuance of a parol arrangement, of which he was cognisant, that the property should be held by him upon trust, is not allowed to use the statute as a means of avoiding the performance of the trust. A court of equity does not set aside the statute, but it fastens on the individual who gets a title under it, and imposes on him a personal obligation because he applies the statute as an instrument for accomplishing a fraud (*a*).

Thus, where a voluntary conveyance has been made upon a verbal arrangement that the grantee shall in certain events reconvey, a reconveyance can be required notwithstanding the Statute of Frauds (*b*); and where the arrangement is that the grantee shall hold in trust for the grantor (*c*), or for another person (*d*), the trust will be enforced. Upon the same ground a conveyance absolute in form has been held to be a mortgage (*e*), and an agent for purchase appointed by parol has not been allowed to retain the benefit of the purchase against his principal (*f*). In case of devolution on death the circumstances may be that the heir has procured an intestacy by representing that he would carry out his ancestor's wishes (*g*), or that a devisee or legatee has assented to the gift to himself being upon the terms of a parol trust (*h*); in either case the legal owner of the property is precluded from setting up the statute, and he must carry out the wishes of the deceased, so far as they are legal. Assent on his part during the testator's lifetime is equivalent for this purpose to an actual promise to carry

Johnstonia Engraving Co., Ltd., J. P. Trust Co., Ltd. v. *Above Cos.*, [1904] 2 Ch. 234, C. A.; see title COMPANIES, Vol. V., pp. 340, 739.

(*r*) *Re Marlborough* (*Duke*), *Davis* v. *Whitehead*, [1894] 2 Ch. 133, 141.

(*s*) 29 Car. 2, c. 3, s. 7.

(*t*) 7 Will. 4 & 1 Vict. c. 26, s. 9.

(*a*) *McCormick* v. *Grogan* (1869), L. R. 4 H. L. 82, *per* Lord WESTBURY, at p. 97.

(*b*) *Hutchins* v. *Lee* (1737), 1 Atk. 447; *Davies* v. *Otty* (1865), 35 Beav. 208; *Haigh* v. *Kaye* (1872), 7 Ch. App. 469, *per* JAMES, L.J., at p. 474: "The Statute of Frauds was never intended to prevent the court of equity from giving relief in a case of plain, clear, and deliberate fraud"; *Re Marlborough* (*Duke*), *Davis* v. *Whitehead*, *supra*.

(*c*) *Booth* v. *Turle* (1873), L. R. 16 Eq. 182.

(*d*) *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196, 206, C. A.

(*e*) *Lincoln* v. *Wright* (1859), 4 De G. & J. 16, C. A.

(*f*) *Heard* v. *Pilley* (1869), 4 Ch. App. 548; but see *James* v. *Smith*, [1891] 1 Ch. 384.

(*g*) *McCormick* v. *Grogan*, *supra*, at p. 88; see *Caton* v. *Caton* (1866), 1 Ch. App. 137, 149; *French* v. *French*, [1902] 1 I. R. 172, H. L.; *Sullivan* v. *Sullivan*, [1903] 1 I. R. 193.

(*h*) *Thynn* v. *Thynn* (1684), 1 Vern. 296; *Stickland* v. *Aldridge* (1804), 9 Ves. 516; *Wallgrave* v. *Tebbs* (1855), 2 K. & J. 313, 321; *Jones* v. *Badley* (1868), 3 Ch. App. 362; *Re Maddock*, *Llewellyn* v. *Washington*, [1902] 2 Ch. 220, C. A.; see *Re Pitt Rivers*, *Scott* v. *Pitt Rivers*, [1902] 1 Ch. 403, C. A.

SECT. 7. **Equity does not allow a Statute to be made an Instrument of Fraud.**

out the testator's wishes (*i*). Possibly the doctrine of part performance excluding the Statute of Frauds is based upon the same principle (*k*).

SECT. 8.—*Equity favours a Purchaser for Value without Notice.*

Plea of purchase for value without notice.

84. The plea of "purchase for value without notice" is looked upon with favour in equity. Under the former practice it was frequently effectual in defeating claims against a purchaser who could set it up; and though, since the Judicature Acts, its use has been greatly restricted, it is still available for a purchaser who has got in the legal estate, and will usually give him priority over equitable claims which rank before him in point of time; and it is also available, without the legal estate, against equities as distinguished from equitable interests.

Formerly a court of equity refused to give any assistance against a purchaser for value without notice (*l*). Thus it would not, against him, remove an outstanding term which hindered the plaintiff's action at law (*m*), or order discovery (*n*), or deprive him of the possession of title deeds (*o*). The court did not inquire into the adequacy of the consideration (*p*); though it was necessary that it should have been actually paid before notice, and not merely secured (*q*); and the plea was available for any person entitled to rank as a purchaser—such as a mortgagee (*r*), or a person entitled under a marriage settlement (*s*)—as well as for a purchaser on sale. The plea in substance admitted that the defendant had, as against

(*i*) *Russell* v. *Jackson* (1852), 10 Hare, 204; *Moss* v. *Cooper* (1861), 1 John. & H. 352.

(*k*) *Frame* v. *Dawson* (1807), 14 Ves. 386; *Caton* v. *Caton* (1866), 1 Ch. App. 137, at p. 148; but compare *Maddison* v. *Alderson* (1883), 8 App. Cas. 467, *per* Lord SELBORNE, L.C., at p. 476.

(*l*) *Jerrard* v. *Saunders* (1794), 2 Ves. 454, *per* Lord LOUGHBOROUGH, L.C., at p. 458. The plea was originally regarded as a shield to the possession (*Strode* v. *Blackburne* (1796), 3 Ves. 222, *per* Lord LOUGHBOROUGH, L.C., at p. 225); and hence it only protected a purchaser who had got into possession. But this theory was discarded; and, indeed, the plea was usually required in the interest of an incumbrancer who had not obtained possession (*Wallwyn* v. *Lee* (1803), 9 Ves. 24, 32; *Joyce* v. *De Moleyns* (1845), 2 Jo. & Lat. 374).

(*m*) *Wallwyn* v. *Lee*, *supra*, at p. 31.

(*n*) *Basset* v. *Nosworthy* (1673), Cas. *temp.* Finch, 102; 2 White & Tud. L. C., 7th ed., p. 150.

(*o*) *Head* v. *Egerton* (1734), 3 P. Wms. 280; *Wallwyn* v. *Lee*, *supra*; *Joyce* v. *De Moleyns*, *supra*.

(*p*) *Bassett* v. *Nosworthy*, *supra*.

(*q*) *Hardingham* v. *Nicholls* (1745), 3 Atk. 304; *Tourville* v. *Naish* (1734), 3 P. Wms. 307; see *Molony* v. *Kernan* (1842), 2 Dr. & War. 31, 38. It was said that the denial of notice must be a denial of notice at the execution of the deed and at the payment of the money (*Story* v. *Windsor* (*Lord*) (1743), 2 Atk. 630; *Jones* v. *Thomas* (1733), 3 P. Wms. 243). But the material date is clearly that of the payment of the money, and in practice this is contemporaneous with or subsequent to the execution of the conveyance; see Ashb., p. 74, note (b).

(*r*) *Willoughby* v. *Willoughby* (1756), 2 Ves. Sen. 684; *Brace* v. *Marlborough* (*Duchess*) (1728), 2 P. Wms. 491.

(*s*) *Harding* v. *Hardrett* (1673), Cas. *temp.* Finch, 9; see *Lord Keeper* v. *Wyld* (1682), 1 Vern. 139. As to lessees, see *Re King's Leasehold Estates*, *Ex parte East of London Rail. Co.* (1873), L. R. 16 Eq. 521, 525.

SECT. 8.
Equity favours a Purchaser for Value without Notice.

the plaintiff, no title, and its effect was simply to deny that the plaintiff was entitled to the special remedies provided in equity. If he had a legal title he was at liberty to assert this in the proper forum (*t*).

Changes in the availability of the plea.

85. Originally the plea was available against both equitable and legal claims (*a*). But it came to be restricted to cases where the defendant himself had the legal estate (*b*), or where the legal owner was suing, under the auxiliary jurisdiction in equity, to obtain assistance, such as discovery, in his action at law. Hence in later times the plea was not admitted against an equitable claimant (*c*), nor against a legal owner who sued on his legal title under the concurrent jurisdiction in equity (*d*), or who sued in equity for an equitable remedy—such as foreclosure—incident to his legal title (*e*). In other words, apart from the case where the plea was set up by a defendant who had the legal estate, it was only an absolute bar in equity when it was set up against a plaintiff who came into equity for assistance in an action at law without claiming substantial relief. If the plaintiff came into equity for substantial relief, and if his claim was based on a legal title, the court did not allow the plea to be a bar to the declaration of his right; but it so

(*t*) *Wallwyn* v. *Lee* (1803), 9 Ves. 24, at p. 34.

(*a*) There was a tendency at first to restrict the plea to cases where it was used as a defence to equitable claims; see *Burlace* v. *Cooke* (1677), Freem. (CH.) 24; *Rogers* v. *Seale* (1681), Freem. (CH.) 84. But its validity against legal claims came to be firmly established (*Jerrard* v. *Saunders* (1794), 2 Ves. 454; *Wallwyn* v. *Lee*, *supra*; *Joyce* v. *De Moleyns* (1845), 2 Jo. & Lat. 374; *A.-G.* v. *Wilkins* (1853), 17 Beav. 285).

(*b*) The position of the defendant was, of course, stronger if he himself had the legal estate or the best right to call for it (*Wilkes* v. *Bodington* (1707), 2 Vern. 599); and he could then maintain his priority for all purposes; see p. 81, *post*. But even without the legal estate he could use the plea for the purposes stated in the text; see *Colyer* v. *Finch* (1856), 5 H. L. Cas. 905, 920.

(*c*) *Phillips* v. *Phillips* (1861), 4 De G. F. & J. 208.

(*d*) This was ultimately held to be the effect of *Williams* v. *Lambe* (1791), 3 Bro. C. C. 264, where the plaintiff sued in equity for dower; and of *Collins* v. *Archer* (1830), 1 Russ. & M. 284, where the plaintiff sued in equity for an account of tithes. Apparently these cases were decided on the ground that the plea was no defence to a legal claim; but in fact they were instances of claims made under the concurrent jurisdiction, and they were explained subsequently on this ground (*Phillips* v. *Phillips*, *supra*). So soon, indeed, as substantial relief is asked for in equity, the plea is bound to be rejected, for it means that a *bonâ fide* purchaser for value can get a title from a vendor without title, an extension to equity of the principle of sale in market overt for which there is no warrant; see Ashb., p. 68. It follows that the plea can be no more a defence to an equitable claim than to a legal claim under the concurrent jurisdiction. In each case substantial relief is asked for, and the plea is therefore overruled. This appears to have been first perceived by Lord WESTBURY, L.C., in *Phillips* v. *Phillips*, *supra*, but his decision involved a breach with current notions, and it did not pass without protest; see Sugden, Vendors and Purchasers, 14th ed., p. 796. The course of the practice as to the plea was as follows: It was at first good against equitable claims; then against both legal and equitable claims; then against legal claims under the auxiliary jurisdiction only, and equitable claims; and ultimately only against legal claims under the auxiliary jurisdiction; but for some purposes it continued to be effective against legal claims under the concurrent jurisdiction; and it also remained effective against equities as distinguished from claims to equitable interests; see p. 78, *post*.

(*e*) *Finch* v. *Shaw*, *Colyer* v. *Finch* (1854), 19 Beav. 500, *per* ROMILLY, M.R., at p. 509; affirmed *sub nom. Colyer* v. *Finch*, *supra*.

SECT. 8. **Equity favours a Purchaser for Value without Notice.**

far gave effect to the plea as to refuse to interfere with the defendant by depriving him of any advantage he had obtained, such as the possession of title deeds, and it would not order them to be given up (*f*). If, however, the plaintiff's claim was not based on a legal title, but was merely equitable, this distinction was not observed, and the court both declared who was entitled (*g*) and gave possession of the title deeds as well (*h*).

Abolition of effect of the plea under the auxiliary jurisdiction.

86. The effect of the Judicature Acts has been to give to all divisions of the High Court jurisdiction both at law and in equity, and consequently relief is now granted in each division in respect of legal titles upon the same principles as formerly governed the granting of relief to a legal title under the concurrent jurisdiction in equity. Hence the plea of purchase for value without notice is no bar to discovery in aid of a legal title (*i*), and, as before the Acts, it is no bar to discovery in aid of an equitable title. The court in which the action is brought gives the full appropriate relief to the legal or equitable title, and as incident to this relief it grants discovery (*k*). Moreover, since complete relief is to be given in the same court, it has become impracticable for the court to declare the title of the plaintiff, and at the same time leave him to recover the title deeds elsewhere. The court in declaring the title of the plaintiff to the land must declare also his right to the title deeds, and must order them to be delivered to him accordingly (*l*).

Plea still avails against a mere equity.

87. But the plea of purchase for value without notice still avails against a plaintiff who is not seeking to establish a claim to an equitable estate or interest, but merely to enforce an equity, such as an equity to set aside a conveyance. Ordinarily an assignee takes subject to all equities to which the assignor was subject; and this is the case where the assignee is a volunteer, and also where he is a purchaser for value if he has notice of the circumstances which raise the equity (*m*). But if he is a purchaser for value without notice, the equity cannot be asserted against him (*n*).

(*f*) "It is the practice of the court of equity to take nothing away from a purchaser for valuable consideration of that which he has bought and holds" (*Heath* v. *Crealock* (1874), 10 Ch. App. 22, *per* Lord CAIRNS, L.C., at p. 32); see *Heath* v. *Pugh* (1881), 6 Q. B. D. 345, C. A.; affirmed *sub nom. Pugh* v. *Heath* (1882), 7 App. Cas. 235. And hence the court would not order sale in lieu of foreclosure, since it could not order delivery of the title deeds to the purchaser (*Heath* v. *Crealock*, *supra*).

(*g*) *Stackhouse* v. *Jersey* (*Countess*) (1861), 1 John. & H. 721.

(*h*) *Newton* v. *Newton* (1868), L. R. 6 Eq. 135; reversed on facts (1868), 4 Ch. App. 143.

(*i*) *Ind, Coope & Co.* v. *Emmerson* (1887), 12 App. Cas. 300.

(*k*) *Ibid.*, *per* Lord SELBORNE, at p. 306.

(*l*) *Re Cooper*, *Cooper* v. *Vesey* (1882), 20 Ch. D. 611, C. A.; *Manners* v. *Mew* (1885), 29 Ch. D. 725, 732—735; *Re Ingham*, *Jones* v. *Ingham* (1893), 41 W. R. 235, at p. 237.

(*m*) "A purchaser with notice is liable to the same equity, stands in the same place, and is bound to do that which the vendor would be bound to do by the decree" (*Taylor* v. *Stibbert* (1794), 2 Ves. 437, 439).

(*n*) *Hamilton* v. *Royse* (1804), 2 Sch. & Lef. 315, 327; *Dunbar* v. *Tredennick* (1813), 2 Ball & B. 304, 319; *Garrard* v. *Frankel* (1862), 30 Beav. 445; *Bainbrigge* v. *Brown* (1881), 18 Ch. D. 188. But where the equity to set aside a conveyance is enforced against a purchaser, this will, as a rule, only be upon

SECT. 8. Equity favours a Purchaser for Value without Notice.

Trustees in bankruptcy and judgment or execution creditors take only what was vested in the bankrupt or debtor; hence they do not rank as purchasers, but take subject to prior equities (*o*). A vendor's lien appears to be not a mere equity, but an equitable estate, and it avails against the purchaser and persons claiming under him, whether as volunteers or for value, other than a subsequent purchaser who takes the legal estate without notice (*p*); but the vendor may be postponed by his conduct (*q*).

SECT. 9.—*Equities rank in Order of Time.*

Qui prior est tempore, potior est jure.

88. Where the legal estate is outstanding the priority of equitable interests is *primâ facie* governed by the rule *qui prior est tempore, potior est jure* (*r*). To depart from the rule there must be an act or omission by the prior equitable owner of such a character as to justify his title being postponed (*s*). The rule follows from the principle that equitable interests depend on the creation of a trust. The creation of a trust vests an estate or interest in the subject-matter of the trust in the *cestui que trust*; and this estate or interest cannot be postponed to a subsequent interest except upon grounds which justify the interference with it as a vested interest (*t*). Against the enforcement of the prior equitable estate the plea of purchase for value without notice is, in the absence of the legal estate, no defence (*a*). In the case of a chose in action or trust fund a subsequent equitable incumbrancer without notice can gain priority if he is the first to give notice to the debtor or trustee (*b*);

the terms of repaying to him the purchase-money (*Aldborough* (*Earl*) v. *Trye* (1840), 7 Cl. & Fin. 436, 463).

(*o*) *Whitworth* v. *Gaugain* (1846), 1 Ph. 728; *Kinderley* v. *Jervis* (1856), 22 Beav. 1, 27; *Beavan* v. *Oxford* (*Earl*) (1856), 6 De G. M. & G. 507, 517; *Madell* v. *Thomas & Co.*, [1891] 1 Q. B. 230, 238, C. A.; see titles BANKRUPTCY AND INSOLVENCY, Vol. II., p. 154; EXECUTION.

(*p*) *Mackreth* v. *Symmons* (1808), 15 Ves. 329; *Rice* v. *Rice* (1853), 2 Drew. 73; *Kettlewell* v. *Watson* (1882), 21 Ch. D. 685; affirmed (1884) 26 Ch. D. 501, C. A.; see *Frail* v. *Ellis* (1852), 16 Beav. 350.

(*q*) *Rice* v. *Rice*, *supra*; and see p. 80, *post*.

(*r*) "Wherever the legal estate is standing out, either in a prior incumbrancer, or in such a trustee as against whom the puisne incumbrancer has not the best right to call for the legal estate, the whole title and consideration is in equity, and then the general maxim must take place, *qui prior est tempore, potior est jure*" (*Willoughby* v. *Willoughby* (1756), 1 Term Rep. 763, *per* Lord HARDWICKE, L.C., at p. 773; see *Brace* v. *Marlborough* (*Duchess*) (1728), 2 P. Wms. 491, 496; *Phillips* v. *Phillips* (1861), 4 De G. F. & J. 208, 215). In *Rice* v. *Rice* (1853), 2 Drew. 73, KINDERSLEY, V.-C., spoke of the rule as being the rule of last resort, when there was no other ground for preferring one equity to the other; but in fact it is the *primâ facie* rule, and is only to be departed from on sufficient grounds.

(*s*) *Taylor* v. *London and County Banking Co.*, *London and County Banking Co.* v. *Nixon*, [1901] 2 Ch. 231, C. A., *per* STIRLING, L.J., at p. 260.

(*t*) *Cory* v. *Eyre* (1863), 1 De G. J. & Sm. 149, *per* TURNER, L.J., at p. 167. "Every conveyance of an equitable interest is an innocent conveyance, that is to say, the grant of a person entitled merely in equity passes only that which he is justly entitled to, and no more" (*Phillips* v. *Phillips*, *supra*, *per* Lord WESTBURY, L.C., at p. 215; *Cave* v. *Cave* (1880), 15 Ch. D. 639, 646).

(*a*) *Phillips* v. *Phillips*, *supra*; *Re Vernon, Ewens & Co.* (1886), 33 Ch. D. 402, C. A.; and see p. 77, *ante*.

(*b*) See p. 103, *post*.

SECT. 9. Equities rank in Order of Time.

but this doctrine does not apply to land, and a subsequent incumbrancer does not gain priority by giving notice to the person in whom the legal estate is vested (*c*).

Postponement of equitable claimant.

89. In a contest between an equitable incumbrancer and a legal mortgagee, the latter will not be postponed on the ground of his conduct unless he has been guilty either of direct fraud, or of such gross negligence as would render it unjust to deprive the prior incumbrancer of his priority (*d*). As between equitable claims the question is, whether one party has acted in such a way as to justify him in insisting on his equity as against the other (*e*), and it is possible that a less degree of negligence will suffice to postpone an equitable than a legal incumbrancer (*f*). But whatever may be the abstract test, an equitable mortgagee who is entitled to the title deeds as part of his security, and who omits to get them, is postponed to a subsequent equitable mortgagee who takes the deeds without notice (*g*); and similarly, where the prior mortgagee, having obtained the deeds, parts with them, or allows them unduly to remain out of his possession, and thereby enables the subsequent advance to be obtained (*h*).

On the other hand, an equitable owner or incumbrancer whose interest is such that he does not require the possession of the title deeds to support it—as in the ordinary case of trustee and *cestui que trust*, where the deeds are with the trustee—cannot be charged with any negligence if the trustee makes use of his possession of the deeds to commit a fraud, and is not postponed to a subsequent equitable owner who has parted with his money on the faith of the title deeds (*i*); unless the trustee purports to act under a

(*c*) *Jones* v. *Gibbons* (1804), 9 Ves. 407; *Jones* v. *Jones* (1838), 8 Sim. 633; *Wilmot* v. *Pike* (1845), 5 Hare, 14; *Re Richards, Humber* v. *Richards* (1890), 45 Ch. D. 589; *Hopkins* v. *Hemsworth*, [1898] 2 Ch. 347. This applies to equitable interests in leaseholds (*Wiltshire* v. *Rabbits* (1844), 14 Sim. 76; *Union Bank of London* v. *Kent* (1888), 39 Ch. D. 238, C. A.; and see *Taylor* v. *London and County Banking Co., London and County Banking Co.* v. *Nixon*, [1901] 2 Ch. 231, C. A.)

(*d*) *Oliver* v. *Hinton*, [1899] 2 Ch. 264, 274, C. A.; *Northern Counties of England Fire Insurance Co.* v. *Whipp* (1884), 26 Ch. D. 482, C. A.; *Manners* v. *Mew* (1885), 29 Ch. D. 725. The omission to inquire for title deeds will postpone a legal mortgagee to a prior equitable estate and will also postpone him to a subsequent equitable interest (*Walker* v. *Linom*, [1907] 2 Ch. 104, 114). In *Mocatta* v. *Murgatroyd* (1717), 1 P. Wms. 393, a first mortgagee who attested the second mortgage was postponed for not giving to the second mortgagee notice of his mortgage. But it has been recognised that this went too far (see the reporter's note).

(*e*) *National Provincial Bank of England* v. *Jackson* (1886), 33 Ch. D. 1, C. A., *per* COTTON, L.J., at p. 13.

(*f*) In *Taylor* v. *Russell*, [1891] 1 Ch. 8, C. A., KAY, J., at p. 17, considered that the test was the same in each case; but this was doubted by Lord MACNAGHTEN in the House of Lords, [1892] A. C. 244, at p. 262; see *Taylor* v. *London and County Banking Co., London and County Banking Co.* v. *Nixon*, *supra*, at p. 260.

(*g*) *Farrand* v. *Yorkshire Banking Co.* (1888), 40 Ch. D. 182; *Re Castell and Brown, Ltd., Roper* v. *Castell and Brown, Ltd.*, [1898] 1 Ch. 315; *Re Valletort Sanitary Steam Laundry Co., Ltd., Ward* v. *Valletort Sanitary Steam Laundry Co., Ltd.*, [1903] 2 Ch. 654.

(*h*) *Waldron* v. *Sloper* (1852), 1 Drew. 193.

(*i*) *Cory* v. *Eyre* (1863), 1 De G. J. & Sm. 149, *per* TURNER, L.J., at p. 169;

power vested in him—such as a trust or power of sale—and conveys the land by a deed containing a proper receipt clause (*k*). If, however, the owner of property hands over title deeds to an agent in order to enable him to dispose of the property, but subject to restrictions, and the agent creates an interest in disregard of the restrictions, then the owner, whether his estate is legal (*l*) or equitable, is bound by the act of his agent, and is postponed to the interest thus created (*m*).

SECT. 10.—*The Legal Estate gives Priority.*

The legal estate gives priority

90. When there is an existing equitable interest in property, and an interest is subsequently created in favour of a purchaser for value without notice of the earlier interest (*n*), and such purchaser either gets in the legal estate at the time of his purchase, or, in certain circumstances, after his purchase, his possession of the legal estate gives him priority over the earlier equitable owner (*o*). The equities being equal except as regards time, the legal estate, properly got in by the owner of the later equitable interest, entitles him to hold the property either as absolute owner, or until his mortgage is discharged, as the case may be (*p*). There is, in the absence of notice or of any other circumstance to postpone him, other than that of being later in point of time, no equity attaching upon his conscience by virtue of which the court will deprive him of his legal advantage ; and the subsequent purchaser is entitled to the like priority if he has the better right to call for a conveyance of the legal estate (*q*). The importance which courts of equity, in

Shropshire Union Railways and Canal Co. v. *R.* (1875), L. R. 7 H. L. 496, *per* Lord CAIRNS, L.C., at p. 507 ; *Carritt* v. *Real and Personal Advance Co.* (1889), 42 Ch. D. 263 ; see *Newton* v. *Newton* (1868), 4 Ch. App. 143.

(*k*) *Lloyds Bank, Ltd.* v. *Bullock*, [1896] 2 Ch. 192 ; but not where, the power being to sell only, the transaction is in effect one of mortgage (*Capell* v. *Winter*, [1907] 2 Ch. 376).

(*l*) *Perry Herrick* v. *Atwood* (1857), 2 De G. & J. 21 ; *Brocklesby* v. *Temperance Building Society*, [1895] A. C. 173.

(*m*) *Rimmer* v. *Webster*, [1902] 2 Ch. 163 ; see *Truman* v. *Attenborough* (1910), 54 Sol. Jo. 682 ; and title AGENCY, Vol. I., pp. 204, 205.

(*n*) A purchaser who has notice of an equitable interest must not rely on the assurance of the vendor that it has been got in, but must ascertain this for himself (*Jared* v. *Clements*, [1903] 1 Ch. 428, C. A.). A contract which is merely personal and collateral does not create an equitable interest in the land so as to bind a purchaser taking with notice of it (*Phillips* v. *Miller* (1875), L. R. 10 C. P. 420, Ex. Ch.) ; but a hire-purchase agreement as to machinery to be affixed to the land is not such a contract, and a purchaser with notice, or who has only an equitable estate, takes subject to it (*Re Samuel Allen & Sons, Ltd.*, [1907] 1 Ch. 575). The term "purchaser for value" includes a mortgagee (*Berwick & Co.* v. *Price*, [1905] 1 Ch. 632).

(*o*) *Marsh* v. *Lee* (1670), 2 Vent. 337. This is "by reason of that force this court necessarily and rightly allows to the common law and to legal titles" (*Wortley* v. *Birkhead* (1754), 2 Ves. Sen. 571, *per* Lord HARDWICKE, L.C., at p. 574).

(*p*) *Bates* v. *Johnson* (1859), John. 304, 314 ; *Bailey* v. *Barnes*, [1894] 1 Ch. 25, 36, C. A.

(*q*) *Wilkes* v. *Bodington* (1707), 2 Vern. 599. This is so, for instance, where the legal estate is held upon trust for the subsequent purchaser (*Stanhope* v. *Verney* (*Earl*) (1761), 2 Eden, 81 ; *Maundrell* v. *Maundrell* (1805), 10 Ves. 246, 270 ; *Buckle* v. *Mitchell* (1812), 18 Ves. 100 ; *Wilmot* v. *Pike* (1845), 5 Hare, 14 ; *Taylor* v. *London and County Banking Co.*, *London and County Banking Co.*

SECT. 10. **The Legal Estate gives Priority.**

deciding priorities, attach to the legal estate, is an instance of the general principle that equity follows the law (*r*).

Entire want of title in vendor.

Moreover, the legal estate affords protection to a purchaser, not only where his title is impeached by reason of some secret act done by the vendor whereby he deprived himself of the right to dispose of the estate, but also where the vendor never had such right, but induced the purchaser by falsehood as to a fact of title to believe that he had the right; provided that the pretended title was clothed with possession, and that the falsehood could not have been discovered by reasonable diligence (*s*). The legal estate protects both against secret incumbrances on the vendor's title and against entire want of title in the vendor (*t*).

Purchaser with notice from purchaser without notice.

A purchaser with notice can protect himself by getting in the legal estate from a purchaser who took without notice (*u*), unless the later purchaser is a trustee buying back trust property which he has sold, or there are other circumstances of fraud (*x*).

Legal estate got in at time of purchase

91. If the later purchaser obtains a conveyance of the legal estate at the time of his purchase, and can support the plea of purchase for valuable consideration without notice, then the legal estate affords him an absolute protection (*b*). He does not lose the protection because the person conveying to him is a trustee holding upon an express trust; and if the deeds offered to, and properly accepted by, him do not give notice of the trust, he is not deemed to take with notice because he subsequently uses as a link in his title a deed which discloses the trust but which was unknown to him when he purchased (*c*). The doctrine is also available for a trustee with the legal estate who makes an advance to the *cestui que trust* without notice of a prior charge on the equitable interest; the legal estate gives him priority (*d*).

Legal estate got in after purchase.

92. When a purchaser does not get in the legal estate at the time of his purchase, he may get it in subsequently from any person who is able to convey it to him without committing a breach of trust, and he thereby gains priority over any earlier equitable

v. *Nixon*, [1901] 2 Ch. 231, 263, C. A.). The legal estate is not available where it passes by estoppel only, and where the estoppel is not binding on the prior claimant (*Eyre* v. *Burmester* (1862), 10 H. L. Cas. 90).

(*r*) See p. 68, *ante*.

(*s*) *Jones* v. *Powles* (1834), 3 My. & K. 581; *Young* v. *Young* (1867), L. R. 3 Eq. 801.

(*t*) The plea of purchase for value without notice required an allegation of possession by the person who conveyed to the defendant, but not of his actual title; it was enough that he pretended to be entitled (Mitford on Pleadings, p. 275, where the essentials of the plea are given; Ashb., p. 74; *Pilcher* v. *Rawlins* (1872), 7 Ch. App. 259, 266).

(*u*) *Lowther* v. *Carlton* (1741), 2 Atk. 242; *A.-G.* v. *Biphosphated Guano Co.* (1878), 11 Ch. D. 327, 334, C. A.; *Kettlewell* v. *Watson* (1882), 21 Ch. D. 685, 707; *Re Handman and Wilcox's Contract*, [1902] 1 Ch. 599, 609, C. A.

(*a*) *Barrow's Case* (1880), 14 Ch. D. 432, 445, C. A.

(*b*) *Pilcher* v. *Rawlins*, *supra*, at p. 269.

(*c*) *Pilcher* v. *Rawlins*, *supra*, overruling *Carter* v. *Carter* (1857), 3 K. & J. 617.

(*d*) *Newman* v. *Newman* (1885), 28 Ch. D. 674.

SECT. 10. The Legal Estate gives Priority.

interest of which he had no notice at the time of his purchase (*e*). It is immaterial that he has notice when he gets in the legal estate (*f*). Indeed, his having then received notice is usually the reason for his desiring to get in that estate (*g*). He may get it in, although proceedings have been commenced to establish the priorities, at any time before an order for that purpose is made (*h*). The most usual case of the legal estate being got in is when a third mortgagee, who has advanced his money without notice of a second mortgage, takes a transfer of the first mortgage with a conveyance of the legal estate. He can then squeeze out the second mortgagee, and hold the property until the first and third mortgages are both satisfied (*i*); at any rate if the first mortgagee has, at the date of the transfer, no notice of the second mortgage, and apparently, too, though he has notice (*k*). This doctrine is known as the *tabula in naufragio* (*l*).

Legal owner a trustee.

93. If the holder of the legal estate is a trustee for a person having a prior equitable interest, a subsequent purchaser cannot avail himself of the legal estate if he gets it in after notice of the trust, although he paid his money before notice. By taking a conveyance with notice of the trust he himself becomes the trustee, and must not, to get a plank to save himself, be guilty of a breach of trust (*m*). A satisfied mortgagee is a trustee for this purpose;

(*e*) *Marsh* v. *Lee* (1670), 2 Vent. 337; *Brace* v. *Marlborough* (*Duchess*) (1728), 2 P. Wms. 491; *Bailey* v. *Barnes*, [1894] 1 Ch. 25, C. A.

(*f*) *Blackwood* v. *London Chartered Bank of Australia* (1874), L. R. 5 P. C. 92, 111.

(*g*) *Wortley* v. *Birkhead* (1754), 2 Ves. Sen. 571, 574; *Willoughby* v. *Willoughby* (1756), 2 Ves. Sen. 684.

(*h*) *Brace* v. *Marlborough* (*Duchess*), *supra*; *Wortley* v. *Birkhead*, *supra*; *Bailey* v. *Barnes*, *supra*, at p. 37.

(*i*) *Brace* v. *Marlborough* (*Duchess*), *supra*.

(*k*) *Peacock* v. *Burt* (1834), 4 L. J. (CH.) 33. If notice to the first mortgagee is immaterial, then the first mortgagee is able to prefer which of the second and third mortgagees he pleases. In *Bates* v. *Johnson* (1859), John. 304, 314, this was stated by WOOD, V.-C., to be the rule, but he observed that the result was contrary to the ordinary doctrine of the court. It was treated as law, though again disapproved of, in *West London Commercial Bank* v. *Reliance Permanent Building Society* (1885), 29 Ch. D. 954, C. A. In *Peacock* v. *Burt*, *supra*, the third mortgagee had no notice of the second mortgage when he advanced his money and took a transfer of the first mortgage, but the first mortgagee had notice. The third mortgagee was allowed priority over the second; see the remarks on this in *West London Commercial Bank* v. *Reliance Permanent Building Society*, *supra*, *per* LINDLEY, L.J., at p. 963.

(*l*) *Brace* v. *Marlborough* (*Duchess*), *supra*; *Wortley* v. *Birkhead*, *supra*; *Phillips* v. *Phillips* (1861), 4 De G. F. & J. 208; see the statement of the doctrine by Lord SELBORNE, L.C., in *Blackwood* v. *London Chartered Bank of Australia*, *supra*. The court was formerly not very particular as to the means by which the legal estate was got in (see *Fagg's* (*Sir John*) *Case* (1570), cited in *Huntingdon* (*Earl*) v. *Greenville* (1682), 1 Vern. 49, at p. 52; *Harcourt and Knowels' Case* (undated), cited in *Hitchcock* v. *Sedgwick* (1690), 2 Vern. 156, at p. 159; *Carter* v. *Carter* (1857), 3 K. & J. 617, 636); and see title MORTGAGE.

(*m*) *Saunders* v. *Dehew* (1692), 2 Vern. 271; *Allen* v. *Knight* (1846), 5 Hare, 272; *Mumford* v. *Stohwasser* (1874), L. R. 18 Eq. 556, 563; *Harpham* v. *Shacklock* (1881), 19 Ch. D. 207, 214, C. A.; *Taylor* v. *Russell*, [1891] 1 Ch. 8, 29, C. A.; *Perham* v. *Kempster*, [1907] 1 Ch. 373. According to the judgment of WOOD, V.-C., in *Carter* v. *Carter*, *supra*, at p. 639, and to a *dictum* of JESSEL, M.R., in *Mumford* v. *Stohwasser*, *supra*, the purchaser loses the protection if the trustee has notice, but he himself has not. But there is nothing in such a case

SECT. 10. The Legal Estate gives Priority.

he holds the legal estate in trust for the first equitable owner, and cannot confer priority on a subsequent purchaser by conveying to him (*n*). But a trust or equity, to affect the conscience of him who has got in the legal estate, must be a trust or equity not in favour of some third person, but in favour of the person against whom the legal estate is set up (*o*).

Where there is a mortgage to secure present and future advances, the mortgagee cannot, by virtue of his legal estate, claim priority for advances made after he has had notice of a second mortgage (*p*).

SECT. 11.—*Notice.*

Actual notice to principal or agent.

94. Notice of a prior dealing with, or other circumstance affecting, property which will defeat a plea of purchase for value without notice may be either actual or constructive. Actual notice to the party himself exists where knowledge of the dealing or circumstance is brought directly home to him (*q*). And under this head is included actual notice to an agent—usually a solicitor—employed in the transaction. Such notice is imputed to the principal, and it affects him whether communicated to him or not (*r*). But an exception is admitted where there has been fraud on the part of the agent in the matter. Although actual communication to the principal is not required, yet fraud excludes in practice

Exception in case of fraud.

to affect the conscience of the purchaser, and he should not lose his legal advantage. This extension of the doctrine is referred to doubtfully in *Bailey* v. *Barnes*, [1894] 1 Ch. 25, C. A.

(*n*) Originally a subsequent incumbrancer was allowed to protect himself by getting in a satisfied term (*Willoughby* v. *Willoughby* (1756), 2 Ves. Sen. 684); but later this could only be done where the term was unsatisfied (*Maundrell* v. *Maundrell* (1805), 10 Ves. 246, 270; *Ex parte Knott* (1806), 11 Ves. 609, 613; *Carter* v. *Carter* (1857), 3 K. & J. 617, 639, 640; *Prosser* v. *Rice* (1859), 28 Beav. 68, 74; *Pilcher* v. *Rawlins* (1872), 7 Ch. App. 268; *Mumford* v. *Stohwasser* (1874), L. R. 18 Eq. 556, 562; *Taylor* v. *Russell*, [1891] 1 Ch. 8, 29, C. A. Satisfied terms can no longer exist, but the same principle applies to satisfied legal mortgages (*Carter* v. *Carter*, *supra*; *Taylor* v. *Russell*, *supra*).

(*o*) *Taylor* v. *Russell*, [1891] 1 Ch. 8, C. A.; [1892] A. C. 244, 253, H. L.; and see further title MORTGAGE.

(*p*) *Hopkinson* v. *Rolt* (1861), 9 H. L. Cas. 514; as to the effect of appropriation of payments under the rule in *Devaynes* v. *Noble*, *Clayton's Case* (1816), 1 Mer. 529, 572, on the first mortgagee's security, see *Deeley* v. *Lloyds Bank*, [1910] 1 Ch. 648, C. A.

(*q*) For actual notice to be binding it must be given by a person interested in the property and in the course of the negotiation (*Barnhart* v. *Greenshields* (1853), 9 Moo. P. C. C. 18, 36); and where it is to a corporation, it must be given to an official as such, see *Simpson* v. *Molsons' Bank*, [1895] A. C. 270, P. C.

(*r*) *Espin* v. *Pemberton* (1859), 3 De G. & J. 547, *per* Lord CHELMSFORD, L.C., at p. 554, who pointed out that notice imputed in this way, though sometimes called constructive notice, is more conveniently classed as actual notice; compare *Cave* v. *Cave* (1880), 15 Ch. D. 639, 643; *Berwick & Co.* v. *Price*, [1905] 1 Ch. 632, 639. Notice to an agent is notice to the principal, since otherwise notice might be avoided in every case by employing agents (*Sheldon* v. *Cox* (1764), 2 Eden, 224; *Boursot* v. *Savage* (1866), L. R. 2 Eq. 134, 142; *Rolland* v. *Hart* (1871), 6 Ch. App. 678, 681). The doctrine is not confined to notice to solicitors (*Merry* v. *Abney* (1663), 1 Cas. in Ch. 38). If the agent is acting within the scope of his authority, the most positive proof that he did not communicate notice to his principal does not exempt the latter (*Bawden* v. *London Edinburgh and Glasgow Assurance Co.*, [1892] 2 Q. B. 534, C. A.). See also title AGENCY, Vol. I., p. 215; and *Re Payne & Co., Ltd.*, *Young* v. *Payne & Co.*, [1904] 1 Ch. 608.

all probability of communication, and hence the knowledge of the fraudulent agent is not imputed to the principal (*s*).

Notice to agent must be in same transaction.

Notice to the agent will not be imputed to the principal unless it is of a matter which was material to the particular transaction, and which it was the agent's duty to communicate to his principal (*t*); nor will it be imputed unless it comes to the knowledge of the agent as such in the same transaction with respect to which the question of notice to his principal arises (*u*).

Knowledge of common officer of two companies.

Where a transaction takes place between two companies which have a common officer, and the common officer is concerned in the transaction, knowledge acquired by him as officer of one company will not be imputed to the other company unless it was his duty, as officer of the first company, to communicate that knowledge to the other company, and his duty, as officer of the second company, to receive notice (*a*); and as regards matters of internal regulation,

(*s*) *Kennedy* v. *Green* (1834), 3 My. & K. 699, 720; *Espin* v. *Pemberton* (1859), 3 De G. & J. 547, 555; *Thompson* v. *Cartwright* (1863), 33 Beav. 178, 185; *Waldy* v. *Gray* (1875), L. R. 20 Eq. 238, 251; see *Re Southampton's (Lord) Estate, Allen* v. *Southampton (Lord), Banfather's Claim* (1880), 16 Ch. D. 178; *Re Cousins* (1886), 31 Ch. D. 671; and compare *Marjoribanks* v. *Hovenden* (1843), 6 I. Eq. R. 238. But there must be fraud independently of the mere non-disclosure of the prior title (*Atterbury* v. *Wallis* (1856), 8 De G. M. & G. 454, 466, C. A.). "It must be made out that distinct fraud was intended in the very transaction, so as to make it necessary for the solicitor to conceal the facts from his client in order to defraud him" (*Rolland* v. *Hart* (1871), 6 Ch. App. 678, *per* Lord HATHERLEY, L.C., at p. 683); see *Cave* v. *Cave* (1880), 15 Ch. D. 639, 644; *Berwick & Co.* v. *Price*, [1905] 1 Ch. 632, 640.

(*t*) Thus it is not material to a transaction of transfer of mortgage that the transferee's solicitor knows of a matter which would, if known to the transferee, prevent a further advance (*Wyllie* v. *Pollen* (1863), 3 De G. J. & Sm. 596, 601); see *Espin* v. *Pemberton*, *supra*, at p. 554; *Rolland* v. *Hart*, *supra*, at p. 682.

(*u*) Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 3 (1) (ii.); see *Thorne* v. *Heard and Marsh*, [1895] A. C. 495, 501. The statute restored the rule laid down by Lord HARDWICKE, L.C., in *Warrick* v. *Warrick* (1745), 3 Atk. 291, for the reason that "otherwise it would make purchasers' and mortgagees' titles depend altogether on the memory of their counsellors and agents, and oblige them to apply to persons of less eminence as counsel, as not being so likely to have notice of former transactions"; see *Worsley* v. *Scarborough (Earl)* (1746), 3 Atk. 392. The restriction to the same transaction had, previously to the statute, been disregarded, and the client was affected by notice to his solicitor where the one transaction was closely followed by and connected with the other, or where it was clear that the previous transaction was present to the mind of the solicitor when engaged in the later transaction (*Hargreaves* v. *Rothwell* (1836), 1 Keen, 154, 159; see *Fuller* v. *Benett* (1843), 2 Hare, 394, 403; *Spencer* v. *Topham* (1856), 2 Jur. (N. S.) 865).

The statute put an end to this application of the doctrine (*Re Cousins* (1886), 31 Ch. D. 671, 677); it also put an end to the doctrine that where the same solicitor was acting for both parties to a sale or mortgage, the knowledge of the vendor or mortgagor was imputed to him and through him to his other client (*Re Cousins*, *supra*). *Boursot* v. *Savage* (1866), L. R. 2 Eq. 134, so far as it rested on this doctrine, is not now an authority (*Taylor* v. *London and County Banking Co.*, *London and County Banking Co.* v. *Nixon*, [1901] 2 Ch. 231, 258, C. A.). The mere fact that only one solicitor is employed in a matter does not make him the agent of both parties (*Perry* v. *Holl* (1860), 2 De G. F. & J. 38). But where a client has placed himself entirely in the hands of his solicitor, and constituted him his general agent in a series of transactions, the knowledge of the solicitor is imputed to him (*Dixon* v. *Winch*, [1900] 1 Ch. 736, C. A).

(*a*) *Re Hampshire Land Co.*, [1896] 2 Ch. 743; *Re Fenwick, Stobart & Co., Ltd., Deep Sea Fishery Co.'s Claim*, [1902] 1 Ch. 507.

SECT. 11. Notice.

the second company is entitled to assume that the first company has acted regularly (*b*).

Constructive notice.

95. Although a purchaser has no actual knowledge, by himself or by his agent, of a matter prejudicially affecting his vendor's title, yet in certain circumstances he is treated as though he had notice, and he is then said to have constructive notice of the matter (*c*). Before the Conveyancing Act, 1882 (*d*), the cases in which such notice might be established fell under three heads: first, where the purchaser omitted to make usual and proper inquiries into the vendor's title; secondly, where he omitted to follow up an inquiry suggested by some matter of which he had actual notice; and thirdly, where he designedly abstained from inquiry for the purpose of avoiding notice (*e*). In any of these cases the purchaser was held to be affected with notice of what he would have discovered if he had made the inquiries which a prudent purchaser would have made in the circumstances. Constructive notice has been defined as the knowledge which the courts impute to a person upon a presumption of the existence of the knowledge so strong that it cannot be allowed to be rebutted, either from his knowing something which ought to have put him upon further inquiry, or from his wilfully abstaining from inquiry to avoid notice (*f*).

(*b*) *Royal British Bank* v. *Turquand* (1856), 6 E. & B. 327, Ex. Ch.; *Re Hampshire Land Co.*, [1896] 2 Ch. 743.

(*c*) See *The Birnam Wood*, [1907] P. 1, C. A., *per* FARWELL, L. J., at p. 14: "The courts have of late years been unwilling to apply the principle of constructive notice so as to fix companies or persons with knowledge of facts of which they had no knowledge whatever."

(*d*) 45 & 46 Vict. c. 39.

(*e*) See the classification by WIGRAM, V.-C., in *Jones* v. *Smith* (1841), 1 Hare, 43, 55, which, however, does not expressly state the first case. This requires to be included; see Dart, Vendors and Purchasers, 7th ed., Vol. II., pp. 896—908; *Wilson* v. *Hart* (1866), 1 Ch. App. 463, 467; and it covers to a large extent, if not entirely, the third class. Constructive notice has been based on the purchaser's gross negligence (*Ware* v. *Egmont* (*Lord*) (1854), 4 De G. M. & G. 460, *per* Lord CRANWORTH, L.C.); and this may be evidence of fraud (*West* v. *Reid* (1843), 2 Hare, 249, *per* WIGRAM, V.-C., at p. 257, explaining his judgment in *Jones* v. *Smith*, *supra*). But the doctrine does not depend on fraudulent intention (*Jones* v. *Williams* (1857), 24 Beav. 47, 59). Notice that a draft deed (which is subsequently executed) has been prepared is not, in general, constructive notice of its execution (*Cothay* v. *Sydenham* (1788), 2 Bro. C. C. 391). As to notice of a settlement, see *Williams* v. *Williams* (1881), 17 Ch. D. 437.

(*f*) *Espin* v. *Pemberton* (1859), 3 De G. & J. 547, *per* Lord CHELMSFORD, L.C., at p. 554. It was frequently said that the doctrine of constructive notice was not to be extended; see *Ware* v. *Egmont* (*Lord*), *supra*. Where notice is relied on to prevent priority by registration under the Deeds Registration Acts, this must be not merely constructive, but such direct notice as to make it fraudulent in the purchaser to disregard it (*Le Neve* v. *Le Neve* (1747), Amb. 436; 2 White & Tud. L. C., 7th ed., 175; *Jolland* v. *Stainbridge* (1797), 3 Ves. 478; *Wyatt* v. *Barwell* (1815), 19 Ves. 435; *Robinson* v. *Woodward* (1851), 4 De G. & Sm. 562; *Bradley* v. *Riches* (1878), 9 Ch. D. 189; see *Crowly* v. *Bergtheil*, [1899] A. C. 374, 382, P. C.).

Under the Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54), s. 14, a subsequent purchaser or incumbrancer who registers first does not lose the priority thus gained by actual or constructive notice, but only by fraud; see *Battison* v. *Hobson*, [1896] 2 Ch. 403; compare *Robinson* v. *Woodward*, *supra*. An interest not created by a document registrable under a Registry Act does

SECT. 11. Notice

Constructive notice under the Conveyancing Act, 1882.

Under the Conveyancing Act, 1882 (*g*), a purchaser is not, apart from actual knowledge in himself or his agent, to be prejudicially affected by notice of any instrument, fact, or thing unless it would have come to his knowledge, or to the knowledge of his solicitor or other agent, if such inquiries and inspections had been made as ought reasonably to have been made by him or by the solicitor or other agent (*h*). The word "ought" in this connection does not import a duty or obligation, for a purchaser is under no duty to the possible holder of a latent title or security to make any inquiry. The expression "ought reasonably" means as a matter of prudence, having regard to what is usually done by men of business in similar cases (*i*). The statute, in effect, only states the previous law, though its negative form shows that a restriction, rather than an extension, of the doctrine of notice was intended (*k*).

not lose priority by the mere registration of a subsequent registrable incumbrance (*Re Calcott and Elvin's Contract*, [1898] 2 Ch. 460 (on the Middlesex Registry Act, 1708 (7 Ann. c. 20)); see *White* v. *Neaylon* (1886), 11 App. Cas. 171, P. C.); but the Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54), applies to a charge by deposit of deeds unaccompanied by any memorandum (*Battison* v. *Hobson*, [1896] 2 Ch. 403). Registration under the Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 71, is subject to equities of which the assignee had notice (*New Ixion Tyre and Cycle Co.* v. *Spilsbury*, [1898] 2 Ch. 484, C. A.); but a mortgagee of a ship or share in a ship, who registers his mortgage, is not affected by notice of prior unregistered equities (*Black* v. *Williams*, [1895] 1 Ch. 408); and see title SHIPPING AND NAVIGATION.

(*g*) 45 & 46 Vict. c. 39. "Purchaser" includes a mortgagee and lessee (*ibid.*, s. 1 (4) (ii.)); see *Hunt* v. *Luck*, [1902] 1 Ch. 428, 433, C. A.; and compare *Wilson* v. *Hart* (1866), 1 Ch. App. 463, 467.

(*h*) Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 3 (1) (i.), (ii.); and see title SALE OF LAND.

(*i*) *Bailey* v. *Barnes*, [1894] 1 Ch. 25, C. A.; compare *Agra Bank, Ltd.* v. *Barry* (1874), L. R. 7 H. L. 135, 157; *Gainsborough (Earl)* v. *Watcombe Terra Cotta Clay Co.* (1885), 54 L. J. (CH.) 991.

(*k*) *Bailey* v. *Barnes*, *supra*. A purchaser is bound, at the risk of being affected with constructive notice, to make the usual full investigation of title, notwithstanding that he is debarred by agreement from doing so (*Peto* v. *Hammond* (1861), 30 Beav. 495, 507; *Re Cox and Neve's Contract*, [1891] 2 Ch. 109, 117); or is prevented by statute (which he is at liberty to exclude by agreement) (*Patman* v. *Harland* (1881), 17 Ch. D. 353; *Mogridge* v. *Clapp*, [1892] 3 Ch. 382, C. A.); that is, if in the circumstances he acts unreasonably in not excluding the statute (*Imray* v. *Oakshette*, [1897] 2 Q. B. 218, C. A.). And he is bound to follow up any inquiries suggested by matters of which he has actual notice. "In all cases where the purchaser cannot make out a title but by a deed which leads him to another fact, the purchaser shall not be a purchaser without notice of that fact, but shall be presumed cognisant thereof; for it is *crassa negligentia* that he sought not after it" (*Moore* v. *Bennett* (1678), 2 Cas. in Ch. 246; see *Bisco* v. *Banbury (Earl)* (1676), 1 Cas. in Ch. 287, 291; *Coppin* v. *Fernyhough* (1788), 2 Bro. C. C. 291; *Malpas* v. *Ackland* (1827), 3 Russ. 273).

This rule still holds good, and notice of a deed within the period for which the title should be investigated, which affects the land, is notice both of its contents, and of the facts which would be disclosed if its production was insisted on (see *Peto* v. *Hammond*, *supra*); but where a deed may or may not affect the land, and the purchaser inquires whether it does, and receives an answer in the negative, he is not bound to inquire further (*Jones* v. *Smith* (1841), 1 Hare, 43; (1843), 1 Ph. 244; see *English and Scottish Mercantile Investment Co.* v. *Brunton*, [1892] 2 Q. B. 700, C. A.). Notice that the land is in the possession of a tenant puts the purchaser on inquiry as to the terms of the holding, and he has constructive notice of the tenant's rights (*Taylor* v. *Stibbert* (1794),

SECT. 11. Notice.

Where the effect of constructive notice would be to invalidate a transaction, such as a sale under the Settled Land Acts, the court will not readily apply the doctrine (*l*).

Part III.— Equitable Interests in Property.

SECT. 1.—*Nature of Equitable Estates.*

SUB-SECT. 1.—*Trust Estates.*

Equitable estates under trusts.

96. Equitable estates in real property arise either under trusts or mortgages. An equitable estate arises under a trust when by virtue of a deed, will, or other instrument the legal owner—the trustee—is bound to hold the property for the benefit of another, the *cestui*

2 Ves. 437; *Allen* v. *Anthony* (1816), 1 Mer. 282; *Meux* v. *Maltby* (1818), 2 Swan. 277, 281), including an agreement for sale to him (*Daniels* v. *Davison* (1809), 16 Ves. 249, 254; (1811), 17 Ves. 433; *Hunt* v. *Luck*, [1902] 1 Ch. 428, C. A.). But this only refers to equities between the purchaser and tenant when the legal estate has passed; not to questions between vendor and purchaser before completion (*Caballero* v. *Henty* (1874), 9 Ch. App. 447; see *Phillips* v. *Miller* (1875), L. R. 10 C. P. 420, Ex. Ch.). And the purchaser is not affected with notice of the title of a person, other than the vendor, under whom the tenant claims. A person neglecting to inquire to whom the tenant pays rent is not affected with notice of the interest of the tenant's lessor; though if he has actual notice that an adverse claimant is in receipt of rent, he is affected with notice of any interest such claimant may have (*Barnhart* v. *Greenshields* (1853), 9 Moo. P. C. C. 18, 34; *Knight* v. *Bowyer* (1858), 2 De G. & J. 421, C. A.; *Hunt* v. *Luck*, *supra*); *Mumford* v. *Stohwasser* (1874), L. R. 18 Eq. 556, on this point is overruled.

A purchaser is bound to inquire for the title deeds and to call for their production (*Birch* v. *Ellames* (1794), 2 Anst. 427; *Worthington* v. *Morgan* (1849), 16 Sim. 547; *Berwick & Co.* v. *Price*, [1905] 1 Ch. 632, 638; *Re Greer*, *Greer* v. *Greer*, [1907] 1 I. R. 57); but he may accept a satisfactory reason for their non-production, and is not then affected with notice of the title of a third person who in fact holds them (*Plumb* v. *Fluitt* (1791), 2 Anst. 432; *Hewitt* v. *Loosemore* (1851), 9 Hare, 449, 457; *Espin* v. *Pemberton* (1859), 3 De G. & J. 547, 556; see *Spencer* v. *Clarke* (1878), 9 Ch. D. 137). The statement that they are at a bankers for safe custody is not sufficient (*Maxfield* v. *Burton* (1873), L. R. 17 Eq. 15). Actual notice, however, that the deeds are in the custody of a third person is notice of such person's interest (*Hiern* v. *Mill* (1801), 13 Ves. 114; *Dryden* v. *Frost* (1838), 3 My. & Cr. 670, 673; and see *Oliver* v. *Hinton*, [1899] 2 Ch. 264, C. A.; *Walker* v. *Linom*, [1907] 2 Ch. 104, 114).

Constructive notice is not implied where negotiable securities are taken in the ordinary course of business and without ground of suspicion, merely because inquiry would have led to knowledge of a defect of title (*London Joint Stock Bank* v. *Simmons*, [1892] A. C. 201; *Thomson* v. *Clydesdale Bank, Ltd.*, [1893] A. C. 282). Notice that debentures have been issued is not necessarily notice of their contents (*English and Scottish Mercantile Investment Co.* v. *Brunton*, [1892] 2 Q. B. 700, C. A.; *Re Valletort Sanitary Steam Laundry Co., Ltd.*, *Ward* v. *Valletort Sanitary Steam Laundry Co., Ltd.*, [1903] 2 Ch. 654; see *Wilson* v. *Kelland*, [1910] 2 Ch. 306). And, generally, the rules as to constructive notice do not apply to commercial transactions (*Manchester Trust* v. *Furness*, [1895] 2 Q. B. 539, 545, C. A.). But they apply to a mortgage of a policy of insurance (*Spencer* v. *Clarke*, *supra*; *Re Weniger's Policy*, [1910] 2 Ch. 291), and to a trustee paying a share of the trust fund to an assignee of the *cestui que trust* (*Davis* v. *Hutchings*, [1907] 1 Ch. 356). As to notice to a lessee of the lessor's title, see title LANDLORD AND TENANT.

(*l*) *Mogridge* v. *Clapp*, [1892] 3 Ch. 382, 396, C. A.; see *Hurrell* v. *Littlejohn*; [1904] 1 Ch. 689.

que trust (*m*); or when, without a written instrument, the circumstances are such that a court of equity will impose this obligation upon the legal owner (*n*). The essence of the relation of trustee and *cestui que trust* is that the trustee is at law the owner of the land, though the *cestui que trust* takes the profits, and can require the trustee to convey at his direction (*o*).

Nature of *cestui que trust's* estate.

97. Originally the *cestui que trust* was not considered to have any right in the land itself (*p*). His right was merely a personal right to enforce the trust against the trustee and such subsequent legal owners as, in the view of a court of equity, ought to be required to give effect to the trust (*q*). Such subsequent owners included persons deriving title under the trustee without consideration, whether with or without notice of the trust, and persons taking from the trustee for valuable consideration with notice of the trust (*r*). But later the right of the *cestui que trust*, since it extended to the beneficial enjoyment of the land itself, came to be regarded as giving him an estate in the land; and this equitable estate now ranks as a right attaching to the land (*s*), though such right may be

(*m*) See *Hardoon* v. *Belilios*, [1901] A. C. 118, 123, P. C.; and as to the term "*cestui que trust*," see Law Quarterly Review, Vol. XXVI., p. 196.

(*n*) For the various classes of trusts—express, constructive, and resulting—see p. 154, *post*; and title TRUSTS AND TRUSTEES.

(*o*) See Butler's note to Co. Litt. 290 b, adapting to trusts the definition of a use in *Chudleigh's Case* (1595), 1 Co. Rep. 120 a, 121 b; and see *ibid.*, n. (n).

(*p*) At common law the trust was a thing in action, to be enforced only by subpœna in Chancery, and hence it was not assignable at common law (*Finch's* (*Sir Moyle*) *Case* (1600), 4 Co. Inst. 85).

(*q*) Before the Statute of Uses (27 Hen. 8, c. 10), where land was conveyed to one and his heirs to the use of another, the use was treated at law as repugnant to the previous limitation and void, but it was recognised and enforced in Chancery. Hence it was said that he who had a use had *jus neque in re neque ad rem*, but only a confidence and trust, for which he had no remedy at the common law, but only by subpœna in Chancery (*Chudleigh's Case*, *supra*, n. (p); *Brent's Case* (1577), 2 Leon. 14, 16; Gilbert, Law of Uses and Trusts, p. 2). The use, however, had a flexibility in Chancery which was denied to common law limitations. The Statute of Uses turned the use into the legal estate, and in conveyances operating under the statute the common law courts allowed it to retain this flexibility; so that, for instance, an estate of freehold to arise *in futuro* could be created by way of springing use (*Chudleigh's Case*, *supra*, at 124 a, n. (m 1)); but declined to allow that there could be a use upon a use (*Tyrrel's Case* (1557), Dyer, 155 a; Tudor, L. C. Real Prop., 4th ed., p. 289). Hence a new opening was made for equitable jurisdiction, and the whole system of trusts was in effect built up in defiance of the statute (*Hopkins* v. *Hopkins* (1738), 1 Atk. 581). To this system of trusts the principle that the obligation rested only on the conscience of the trustee was as much applicable as to the earlier uses (see Co. Litt. 290 b, n. (1)).

(*r*) This seems to have been settled at an early date, although at first the trust bound only the original feoffee to uses (see *Chudleigh's Case*, *supra*, at p. 121 b, n. (s), referring to Keil. 42, pl. 7 (1502)). Whether a lord taking the legal estate by escheat was bound by the trust was a matter of doubt (*Fawcet* v. *Lowther* (1751), 2 Ves. Sen. 300, 304; and see p. 95, *post*); but a disseisor was not bound (*Finch's* (*Sir Moyle*) *Case* (1600), 4 Co. Inst. 85; *Chudleigh's Case*, *supra*, at 139 b; Gilbert, Law of Uses and Trusts, by Sugden, p. 429, n. (6); Lewin, Law of Trusts, 11th ed., pp. 270, 274; T. Cyprian Williams in 51 Sol. Jo., p. 143).

(*s*) *Re Nisbet and Potts' Contract*, [1905] 1 Ch. 391; affirmed [1906] 1 Ch. 386, C. A. This was a decision that a disseisee is bound by the equity arising out of

SECT. 1. Nature of Equitable Estates.

defeated if the legal estate passes to an owner who takes for value without notice (*t*).

Equitable waste.

98. For some purposes a tenant for life is treated as a trustee for those entitled in remainder. Thus, although he may be expressly made unimpeachable for waste, so as not in general to be liable for acts of destruction done to the inheritance, yet, on the ground of his fiduciary position, equity interposes to prevent wanton destruction of a dwelling-house, or of trees planted for ornament or shelter, and such waste is known as equitable waste (*a*). Equitable waste, therefore, is treated as a breach of trust, and after the death of the tenant for life his assets are liable to make it good (*b*).

Equity to set aside a deed.

99. The legal owner of an estate in land who has conveyed it in such circumstances that, while the conveyance on the face of it is good, he is entitled in equity to have it set aside, has an equitable interest in the land which is analogous to the beneficial ownership. Consequently it can be devised (*c*), and can be assigned, whether for value or by voluntary deed (*d*). If money has been paid for the legal conveyance, the equitable right is similar to an equity of redemption (*e*), and the money must be repaid on the conveyance being set aside (*f*) Similarly, a purchaser who has completed his contract may be entitled to impeach a title founded on fraud committed on his vendor; though, since the right to complain of a fraud is not a marketable commodity, a purchase of the estate for the purpose of acquiring a right to set aside a deed for fraud will not be assisted by a judgment for specific performance (*g*).

SUB-SECT. 2.—*Equity of Redemption.*

Equity of redemption.

100. An equitable estate arises under a legal mortgage when the day fixed for redemption has passed without payment of the mortgage money. Until that day the mortgagor retains his legal

a restrictive covenant; but the principle applies equally to a trust, and the case was in substance an overruling of the old law.

(*t*) See p. 81, *ante*.

(*a*) *Anon.* (1704), Freem. (CH.) 278; *Vane* v. *Barnard* (*Lord*) (1716), 2 Vern. 738; *Lawley* v. *Lawley* (1717), Jac. 71, n.; *Rolt* v. *Somerville* (*Lord*) (1737), 2 Eq. Cas. Abr. 759; *Coffin* v. *Coffin* (1821), Jac 70. As to the origin of the jurisdiction, see *Aston* v. *Aston* (1749), 1 Ves. Sen. 264, *per* Lord HARDWICKE, L.C., at p. 265; and see titles REAL PROPERTY AND CHATTELS REAL; SETTLEMENTS.

(*b*) *Ormonde* (*Marquis*) v. *Kynnersley* (1820), 5 Madd. 369.

(*c*) *Stump* v. *Gaby* (1852), 2 De G. M. & G. 623; *Gresley* v. *Mousley* (1859), 4 De G. & J. 78, 93.

(*d*) *Dickinson* v. *Burrell*, *Dickinson* (*Ann*) v. *Burrell*, *Stourton* v. *Burrell* (1866), L. R. 1 Eq. 337; but to enable the assignee to sue, the assignment must be of the assignor's entire interest in the property, and not of the mere right to sue (*ibid.*, *per* Lord ROMILLY, M.R., at p. 342); compare *Prosser* v. *Edmonds* (1835), 1 Y. & C. (EX.) 481, 491.

(*e*) *Blake* v. *Johnson* (1700), Prec. Ch. 142.

(*f*) *Stump* v. *Gaby*, *supra*, *per* Lord ST. LEONARDS, L.C., at p. 630: "In the view of this court he remains the owner, subject to the repayment of the money which has been advanced"; compare *Aldborough* (*Lord*) v. *Trye* (1840), 7 Cl. & Fin. 436, 463, H. L.

(*g*) *De Hoghton* v. *Money* (1866), 2 Ch. App. 164; see also title SPECIFIC PERFORMANCE.

right under the terms of the mortgage to a reconveyance on payment. After that day this right is forfeited at law, but the mortgagor is entitled to be relieved against the forfeiture in equity (*h*), and the interest which he thus retains in the land is called an equity of redemption (*i*). It is not a mere right, but is an estate in the land; the person entitled to the equity of redemption is considered as the owner of the land, while the interest of the mortgagee is treated as part of his personal assets (*k*). Hence, when this position is changed by foreclosure, the mortgagee, in acquiring for the first time the ownership of, and the beneficial title to, the land, takes it under an entirely new title (*l*). A mortgage by way of trust for sale is a mortgage only (*m*).

Clog on equity of redemption not allowed.

101. The Court of Chancery was so jealous of preserving the equity of redemption that it did not allow it to be clogged or fettered by any agreement entered into by the mortgagor and mortgagee at the time of the mortgage (*n*), and this is an inflexible rule at the present time (*o*). It does not prevent the mortgagee from stipulating for a collateral advantage if this is limited to the duration of the security, and is not unfair to the mortgagor (*p*). Nor does it prevent the mortgage being for a fixed term, provided that the term is reasonable, *e.g.*, five or seven years (*q*). But on redemption the mortgagor is entitled to have his property back as free and unfettered as if it had never been made the subject of the security (*r*). The rule applies not only to land, but to other

(*h*) The court, it was said with some exaggeration, would relieve a mortgagee to the tenth generation (*Bacon* v. *Bacon* (1640), Toth. 133); see, generally, title MORTGAGE.

(*i*) See p. 10, *ante*.

(*k*) *Casborne* v. *Scarfe* (1737), 1 Atk. 603; 2 White & Tud. L. C., 7th ed., p. 6; *Thornborough* v. *Baker* (1675), 3 Swan. 628, 630.

(*l*) *Heath* v. *Pugh* (1881), 6 Q. B. D. 345, C. A., *per* Lord SELBORNE, L.C., at p. 360. The right of foreclosure results from the original interference of equity in favour of the mortgagor; see *Sampson* v. *Pattison* (1842), 1 Hare, 533, 536.

(*m*) *Re Alison, Johnson* v. *Mounsey* (1879), 11 Ch. D. 284, 294, C. A.; *Locking* v. *Parker* (1872), 8 Ch. App. 30.

(*n*) *Howard* v. *Harris* (1683), 1 Vern. 190; *Jennings* v. *Ward* (1705), 2 Vern. 520; *Toomes* v. *Conset* (1745), 3 Atk. 261; *Re Edwards' Estate* (1861), 11 I. Ch. R. 367. In *Orby* v. *Trigg* (1722), 9 Mod. Rep. 2, it was considered that a covenant in a mortgage giving the mortgagee a right of pre-emption was enforceable, if not oppressively used; but this is doubtful.

(*o*) *Salt* v. *Northampton* (*Marquis*), [1892] A. C. 1.

(*p*) Such as a covenant in a mortgage of a public-house to obtain liquor from the mortgagee during the continuance of the mortgage (*Biggs* v. *Hoddinott*, [1898] 2 Ch. 307, C. A.; overruling to this extent the *dictum* in *Jennings* v. *Ward*, *supra*, that a man shall not have interest for his money and a collateral advantage besides for the loan of it). A covenant not so restricted in duration will be void (*Noakes & Co., Ltd.* v. *Rice*, [1902] A. C. 24; *Brown* v. *Ryan*, [1901] 2 I. R. 653, C. A.); *Santley* v. *Wilde*, [1899] 2 Ch. 474, *contra*, is overruled.

(*q*) *Teevan* v. *Smith* (1882), 20 Ch. D. 724, 729, C. A.; *Morgan* v. *Jeffreys*, [1910] 1 Ch. 620. And apparently the provision for the mortgage remaining must be binding on both parties (*Morgan* v. *Jeffreys*, *supra*).

(*r*) *Noakes & Co., Ltd.* v. *Rice*, *supra*, *per* Lord MACNAGHTEN, at p. 30. It has been held that a mortgagee may charge a bonus or commission and deduct it from the money advanced (*Potter* v. *Edwards* (1857), 26 L. J. (CH.) 468; *Mainland* v. *Upjohn* (1889), 41 Ch. D. 126); but that he cannot claim to add commission or

SECT. 1. Nature of Equitable Estates.

forms of property, such as shares or stock (*s*), or a policy of insurance (*t*); it forbids an indirect as much as a direct fetter on the property (*a*); and it applies to mortgages made by commercial and other companies (*b*). But an agreement fettering the equity made subsequently to the mortgage is valid (*c*).

SUB-SECT. 3.—*Equitable Securities.*

Equitable securities.

102. In addition to legal mortgages, which give the legal estate to the mortgagee and leave an equity of redemption in the mortgagor, there are various forms of security under which the creditor or other person entitled has only an equitable interest (*d*). This is so where the legal estate is outstanding in a prior mortgagee, and a subsequent incumbrancer takes a conveyance of the equity of redemption in the form of a legal mortgage; and where, while the legal estate remains in the mortgagor, an equitable charge is created by deposit of title deeds or otherwise (*e*), with or without a memorandum in writing (*f*). In addition, charges on land are created by will or settlement, and liens—such as a vendor's lien (*g*)—arise by operation of law. As regards such equitable mortgages or charges, and equitable liens, the chief distinction relates to the remedy of the incumbrancer. An ordinary second mortgage in the form of a legal mortgage carries with it all the ordinary remedies of a mortgagee. The mortgagee is entitled to foreclose the mortgagor; and, on the other hand, he is entitled to redeem the

remuneration to principal and interest when the mortgage is paid off (*James* v. *Kerr* (1889), 40 Ch. D. 449; *Field* v. *Hopkins* (1890), 44 Ch. D. 524, C. A.). It is doubtful, however, whether these latter cases would be followed since *Biggs* v. *Hoddinott*, [1898] 2 Ch. 307, C. A.

(*s*) *Bradley* v. *Carritt*, [1903] A. C. 253; *Samuel* v. *Jarrah Timber and Wood Paving Corporation*, [1904] A. C. 323.

(*t*) *Salt* v. *Northampton* (*Marquis*), [1892] A. C. 1.

(*a*) *Bradley* v. *Carritt*, *supra*.

(*b*) *Samuel* v. *Jarrah Timber and Wood Paving Corporation*, *supra*; *British South Africa Co.* v. *De Beers Consolidated Mines, Ltd.*, [1910] 1 Ch. 354; C. A. (1910), 54 Sol. Jo. 679. Irredeemable debenture stock is authorised by the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 103; see title COMPANIES, Vol. V., p. 362.

(*c*) *Reeve* v. *Lisle*, [1902] A. C. 461.

(*d*) See generally, title MORTGAGE.

(*e*) See *Re Pidcock*, *Penny* v. *Pidcock* (1907), 51 Sol. Jo. 514.

(*f*) The creation of a charge on land without writing is opposed to the Statute of Frauds, but such securities have been supported on the ground that the delivery of the title deeds is an act of part performance (*Russel* v. *Russel* (1783), 1 Bro. C. C. 269); this has been disapproved of, but followed (*Ex parte Haigh* (1805), 11 Ves. 403; *Ex parte Finden* (1805), 11 Ves. 404, n.; see *Norris* v. *Wilkinson* (1806), 12 Ves. 192, 197; *Ex parte Mountfort* (1808), 14 Ves. 606; *Ex parte Coombe* (1810), 17 Ves. 369; see *Re McMahon*, *McMahon* v. *McMahon* (1886), 55 L. T. 763; compare p. 71, *ante*). And evidence of the agreement being thus let in, the deposit may cover subsequent advances, if the agreement is clearly shown to be to that effect (*Ex parte Langston* (1810), 17 Ves. 227; see n. (1) (5th ed. by Belt) to *Russel* v. *Russel*, *supra*); though a legal mortgage cannot be extended by parol agreement to cover a further advance (*Re Hewett*, *Ex parte Hooper* (1815), 1 Mer. 7). The actual delivery of the title deeds by way of security is necessary. It is not sufficient that, after a parol agreement to give security, they come into the hands of the creditor for another purpose (*Re Beetham*, *Ex parte Broderick* (1886), 18 Q. B. D. 380, 385).

(*g*) See *Mackreth* v. *Symmons* (1808), 15 Ves. 329; 2 White & Tud. L. C., 7th ed. p. 926; *Kettlewell* v. *Watson* (1884), 26 Ch. D. 501, C. A.; see title LIEN.

prior mortgage. A charge accompanied by an agreement to execute a legal mortgage, and also a charge created by deposit of title deeds, carries with it the same remedy of foreclosure. The court treats the deposit as an agreement to execute a legal mortgage, and, therefore, as giving all the remedies incident to such a mortgage (*h*). But a charge created by settlement or by will does not carry with it a right of foreclosure, but only a right of sale, to be exercised with the help of the court (*i*); and in the case of an equitable lien the creditor must have recourse to the court to declare the lien, and enforce it by sale (*j*).

A charge may be created by covenant, as where a settlor covenants to charge an annuity on his real estate or on a specified part of it (*k*); and a covenant to charge under a power, where the covenantor becomes insane before he can exercise it, may be assisted in equity as a defective execution of the power (*l*). But there is no charge if the lands to be subject to it are not ascertained (*m*), or if the settlor has an option of settling money instead of the annuity (*n*). An agreement to execute a mortgage on request does not give an immediate charge (*o*).

SUB-SECT. 4.—*Incidents of Equitable Estates.*

Equitable estates follow analogy of legal estates.

103. Equitable estates, whether arising under trusts or under mortgages, are dealt with upon the principle that equity follows the law (*p*), and are in general subject to the same rules as legal estates (*q*). Thus they can be divided into various concurrent or successive interests (*r*), and the words of limitation by which this

(*h*) *Carter* v. *Wake* (1877), 4 Ch. D. 605, *per* JESSEL, M.R., at p. 606; *Harrold* v. *Plenty*, [1901] 2 Ch. 314.

(*i*) In the case of a judgment becoming a charge on land, the creditor has been allowed a right of foreclosure (see *Rolleston* v. *Morton* (1842), 1 Dr. & War. 171, 195; *Jones* v. *Bailey* (1853), 17 Beav. 582; Fisher on Mortgages, 5th ed., p. 481); and this analogy has been followed with regard to a charge created by debentures (*Sadler* v. *Worley*, [1894] 2 Ch. 170; *Re Continental Oxygen Co.*, *Elias* v. *Continental Oxygen Co.*, [1897] 1 Ch. 511). But the ordinary mode of enforcing a charge is by sale (see *Footner* v. *Sturgis* (1852), 5 De G. & Sm. 736); and this is the only way when the charge is created by will or settlement (*Re Owen*, [1894] 3 Ch. 220; *Re Lloyd*, *Lloyd* v. *Lloyd*, [1903] 1 Ch. 385, 404, C. A.).

(*j*) See titles LIEN; MORTGAGE; PAWNBROKERS AND PLEDGES.

(*k*) *Legard* v. *Hodges* (1792), 1 Ves. 477; *Ravenshaw* v. *Hollier* (1834), 7 Sim. 3; *Montagu* v. *Sandwich* (*Earl*) (1886), 32 Ch. D. 525, C. A.

(*l*) *Affleck* v. *Affleck* (1857), 3 Sm. & G. 394; see title POWERS.

(*m*) *Fremoult* v. *Dedire* (1718), 1 P. Wms. 429; *Williams* v. *Lucas* (1789), 2 Cox, 160; *Mornington* v. *Keane* (1858), 2 De G. & J. 292; see *Averall* v. *Wade* (1835), L. & G. *temp.* Sugd. 252, 261; and compare *Kennedy* v. *Daly* (1804), 1 Sch. & Lef. 355, 371, where an agreement on marriage made in 1764 by a Papist in Ireland to convey all his real estate in strict settlement in case he should at any time be qualified by law to do so, was held not to constitute a charge on his estate until 1778, when the Papist disabilities were removed by 17 & 18 Geo. 3, c. 49 (Irish).

(*n*) *Ravenshaw* v. *Hollier*, *supra*.

(*o*) *Shaw* v. *Foster* (1872), L. R. 5 H. L. 321, 334.

(*p*) *Coope* v. *Arnold* (1855), 4 De G. M. & G. 574, 585; and see p. 68, *ante*.

(*q*) As to a trust estate, see *Hopkins* v. *Hopkins* (1738), 1 Atk., 581, 591; *Burgess* v. *Wheate*, *A.-G.* v. *Wheate* (1759), 1 Eden, 177, 223, 226; as to an equity of redemption, see *Casborne* v. *Scarfe* (1737), 1 Atk. 603; 2 White & Tud. L. C., 7th ed., p. 6.

(*r*) In the case of limitations of a trust estate, the fact that the legal estate was

SECT. 1. Nature of Equitable Estates.

division is effected usually receive the same construction as in the case of legal limitations (*s*): they are subject to the same rules of descent (*t*); they can be devised (*u*) and alienated (*a*); and they can be made available for payment of debts (*b*). If, however, there is

vested in the trustees was a sufficient protection to contingent remainders (*Hopkins* v. *Hopkins* (1734), Cas. *temp.* Talb. 44; Fearne's Contingent Remainders, p. 304; *Re Finch, Abbiss* v. *Burney* (1881), 17 Ch. D. 211, 229, C. A.; *Marshall* v. *Gingell* (1882), 21 Ch. D. 790); and so a legal estate outstanding in a mortgagee preserved contingent remainders (*Astley* v. *Micklethwait* (1880), 15 Ch. D. 59, 65).

(*s*) See *Norfolk's (Duke) Case* (1685), 3 Cas. in Ch. 28; Co. Litt. 290 b, Butler's note; 1 Sanderson, Uses and Trusts, 4th ed., p. 269; Shep. Touch. by Preston, p. 507, note (8); 2 Preston's Estates, p. 64. Hence in a deed an equitable limitation by way of executed trust in favour of a person without words of inheritance gives only a life estate (*Holliday* v. *Overton* (1852), 15 Beav. 480, affirmed on appeal, 16 Jur. 751; *Lucas* v. *Brandreth* (No. 2) (1860), 28 Beav. 274; *Tatham* v. *Vernon* (1861), 29 Beav. 604; *Middleton* v. *Barker* (1873), 29 L. T. 643; *Meyler* v. *Meyler* (1883), 11 L. R. Ir. 522; *Re Whiston's Settlement, Lovatt* v. *Williamson*, [1894] 1 Ch. 661). Executory trusts are construed with more freedom (*Egerton* v. *Brownlow (Earl)* (1853), 4 H. L. Cas. 1, 210; *Sackville West* v. *Holmesdale (Viscount)* (1870), L. R. 4 H. L. 543). The rule in *Shelley's Case* applies to equitable limitations (*Austen* v. *Taylor* (1759), 1 Eden, 361; *Re Buckton, Buckton* v. *Buckton*, [1907] 2 Ch. 406); provided all the limitations are of this nature (Fearne's Contingent Remainders, p. 52, v. 9; p. 58). So, too, does the rule against double possibilities, which forbids a limitation in favour of a child of an unborn person (*Re Nash, Cook* v. *Frederick*, [1910] 1 Ch. 1, C. A.).

(*t*) See Co. Litt. 290 b, Butler's note. This applies also to copyholds, so that in trusts executed the beneficial estate descends in accordance with the special custom of the manor, *e.g.*, to the youngest son (*Trash* v. *Wood* (1839), 4 My. & Cr. 324; *Re Hudson, Cassels* v. *Hudson*, [1908] 1 Ch. 655); and so as to an equity of redemption (*Fawcet* v. *Lowther* (1751), 2 Ves. Sen. 300, 303).

(*u*) Devises of equitable estates were recognised at common law (*Pawlett* v. *A.-G.* (1667), Hard. 465, 469; and see *Anon.* (1679), 2 Cas. in Ch. 8; *Blake* v. *Foster* (1813), 2 Ball & B. 387).

(*a*) The resemblance between legal and equitable estates was carried so far that trust estates tail were barred by fine and recovery, although they were in their nature incapable of these processes (*Goodrick* v. *Brown* (1664), Freem. (CH.) 180; *North* v. *Way* (1681), 1 Vern. 13; Co. Litt. 290 b, Butler's note (xiv.); *Hopkins* v. *Hopkins* (1738), 1 Atk. 581, 591); and similarly as to equities of redemption (*Casborne* v. *Scarfe* (1737), 1 Atk. 603; 2 White & Tud. L. C., 7th ed., p. 6). But there was a necessary exception as to forms of conveyance, since an equitable estate was incapable of livery of seisin, or of being conveyed under the Statute of Uses, and hence a trust estate could be transferred by assignment or declaration of trust in writing, or, before the Statute of Frauds by parol. Under the modern system of conveyancing voluntary assignments of equitable estates are in practice always made by deed, but a transfer for value is equally effectual if made under hand only; see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 375, note (*d*). Before the institution of the separate use a wife's trust term was subject to alienation by her husband unless it had been assigned in trust for her with his consent (*Turner's Case* (1681), 1 Vern. 7; *Pitt* v. *Hunt* (1681), 1 Vern. 18; *Jewson* v. *Moulson* (1742), 2 Atk. 417, 421); and after her death the husband surviving takes her chattels real vested in possession during the coverture without taking out administration to her, and therefore, also, her equitable term (*Re Bellamy, Elder* v. *Pearson* (1883), 25 Ch. D. 620, 623).

(*b*) That is, by equitable execution (see title EXECUTION), or by sale; in this respect equity followed the law, and allowed the equitable remedy against only one half of the debtor's real estate, as under a writ of *elegit* before the Judgments Act, 1838 (1 & 2 Vict. c. 110) (*Stileman* v. *Ashdown* (1743), 2 Atk. 608; see *Rowe* v. *Bant* (1751), 1 Dick. 150). And as to the remedy against devisees of the debtor under stat. (1691) 3 Will. & Mar. c. 14, see *Gawler* v. *Wade* (1707), 1 P. Wms. 99.

on the deed a clear intention apparent that the grantee of an equitable estate shall take the entire equitable fee simple, this may pass without express limitation of such an estate (*c*).

104. But the analogy between legal and equitable estates does not in strictness apply as regards rights in favour of third parties —such as escheat (*d*) and dower (*e*)—which are incident to the

Rights against legal estate not usually incident to equitable estate.

(*c*) "In limitation of a trust either of real or personal estate to be determined [in a court of equity], the construction ought to be made according to the construction of limitations of a legal estate; with this distinction, unless the intent of the testator or author of the trust plainly appears to the contrary" (*Garth* v. *Baldwin* (1755), 2 Ves. Sen. 646, *per* Lord HARDWICKE, L.C., at p. 655; see Hayes, Introduction to Conveyancing, 5th ed., Vol. I., p. 92; Williams on Settlements, p. 60); and effect has been given to this reservation in *Pugh* v. *Drew* (1869), 17 W. R. 988; *Re Tringham's Trusts, Tringham* v. *Greenhill*, [1904] 2 Ch. 487; *Re Oliver's Settlement, Evered* v. *Leigh*, [1905] 1 Ch. 191; *Re Houston, Rodgers* v. *Houston*, [1909] 1 I. R. 319; *Re Thursby's Settlement, Grant* v. *Littledale*, [1910] 2 Ch. 181, 189; see *Re Ford and Ferguson's Contract*, [1906] 1 I. R. 607; but see *Re Irwin, Irwin* v. *Parkes*, [1904] 2 Ch. 752, as to the cases to which the reservation is to be confined. In *Bayshaw* v. *Spencer* (1748), 2 Atk. 577; 1 Ves. Sen. 142, Lord HARDWICKE treated all trusts as executory for the purpose of the construction of equitable limitations, but in *Garth* v. *Baldwin*, *supra*, he did not carry this freedom of construction so far; see *Jones* v. *Morgan* (1783), 1 Bro. C. C. 206, 222.

(*d*) Thus, escheat for lack of a tenant is an incident of the legal estate, but it was not in equity made an incident of the equitable estate. In the case of a trust, it is probable that, on escheat of the legal estate, the lord took it free from the trust, and, if this was so, there was no reason for allowing him an escheat of the equitable estate as well. But the point was not settled, and, in fact, escheat of the legal estate was an unlikely event. On the other hand, upon the death of the *cestui que trust* intestate and without heirs, the lord could not call for a conveyance from the trustee, who therefore kept the land for his own benefit (*A.-G.* v. *Sands* (1669), Hard. 488; *Burgess* v. *Wheate* (1759), 1 Eden, 177, *per* HENLEY, Lord Keeper, and CLARKE, M.R.). Lord MANSFIELD, C.J., who delivered a dissentient judgment in *Burgess* v. *Wheate*, *supra*, considered that the lord's legal estate by escheat would be subject to the trust, and that on the other hand the lord would take beneficially by escheat of the equitable estate.

In the case of an equity of redemption also, the legal estate and not the equity escheated (*Burgess* v. *Wheate*, *supra*, at p. 256; *Fawcet* v. *Lowther* (1751), 2 Ves. Sen. 300); but the lord, on the escheat of the legal estate, took it subject to the equity of redemption; the mortgagee, on the other hand, in the event of the death of the mortgagor intestate and without heirs, was entitled to hold the estate free from the equity of redemption unless it was required for creditors of the mortgagor, or unless the mortgagee, by suing the personal representatives for the mortgage debt, made himself liable to reconvey to them (*Burgess* v. *Wheate*, *supra*, at pp. 210, 256; *Gordon* v. *Gordon* (1821), 3 Swan. 400). Similarly, under the modern system of conveying freehold hereditaments in possession by grant, the mortgagee under a legal mortgage becomes seised at law of the hereditaments, so as, in the case of customary freeholds, to be subject to the legal incidents of tenure; while the mortgagor, on the other hand, although remaining in possession, is not so subject. Consequently a heriot is not due on the death of the mortgagor (*Copestake* v. *Hoper*, [1908] 2 Ch. 10, C. A.; see articles by T. Cyprian Williams in 51 Sol. Jo. 478, 496; 52 *ibid.*, 510); and title COPYHOLDS, Vol. VIII., p. 39.

(*e*) The refusal of equity to allow a wife dower out of an equitable estate appears to have been originally based on the same principle as the refusal to allow escheat. Dower was an incident of the legal estate, and was not made incident also to the equitable estate. But where the legal estate was in a trustee the dowress could only take subject to the trust, and hence she was, in effect, excluded both from the legal and the equitable estate. However correct theoretically, this was felt to be wrong practically, since dower was a right of property which might fairly be claimed against an equitable as much as against

SECT. 1. Nature of Equitable Estates.

legal estate. These remain incident to the legal estate; they are not transferred to the equitable estate, nor are they doubled by corresponding rights being given also against the equitable estate. Exceptions to this rule, however, have been introduced by statute (*f*).

SUB-SECT. 5.—*Equitable Interests in Personal Property and under Contracts.*

Equitable interests in personal property.

105. Equitable interests may subsist also in personal property, by reason of the creation of trusts (*g*); and, upon a mortgage of such property, an equity of redemption will arise in favour of the mortgagor, which will last until the property has been lawfully sold by the mortgagee, or until he has obtained a judgment for foreclosure (*h*). And to the legal and equitable interests thus co-existing the same principles apply as in the case of real property. The burdens incident to the legal estate must be borne by the legal owner, and cannot be enforced against the *cestui que trust* (*i*),

a legal estate, and it was allowed out of an equity of redemption by JEKYLL, M.R., in *Banks* v. *Sutton* (1732), 2 P. Wms. 700. But too many titles had been accepted on the faith of the existence of a trust being a protection against dower to allow of the rule being set aside, and dower was not admitted in the case either of a trust estate or of an equity of redemption existing at the date of the marriage (*Chaplin* v. *Chaplin* (1733), 3 P. Wms. 229; *A.-G.* v. *Scott* (1735), Cas. *temp.* Talb. 138; *Godwin* v. *Winsmore* (1742), 2 Atk. 525; *D'Arcy* v. *Blake* (1805), 2 Sch. & Lef. 387). And similarly as to freebench (*Forder* v. *Wade* (1794), 4 Bro. C. C. 521; *Smith* v. *Adams* (1854), 5 De G. M. & G. 712, C. A.; compare *Godwin* v. *Winsmore, supra*). But the theory that rights peculiar to the legal estate are not to be extended to the equitable estate was never applied to a tenancy by the curtesy. This was treated as subject to the general principle that the rules of property ought to be the same in all courts, and it was allowed both in the case of trust estates (*Watts* v. *Ball* (1708), 1 P. Wms. 108) and of equities of redemption (*Casborne* v. *Scarfe* (1737), 1 Atk. 603; 2 White & Tud. L. C., 7th ed., p. 6)—in the latter case on the ground that the mortgagor was to be regarded as in equitable seisin of the estate, which of course should have been equally effectual to give a right of dower. But the inconsistency was allowed to stand; see *D'Arcy* v. *Blake, supra, per* Lord REDESDALE, L.C., at p. 389.

(*f*) Thus, under the Intestates Estates Act, 1884 (47 & 48 Vict. c. 71), s. 4, equitable estates may escheat to the Crown; and under the Dower Act, 1833 (3 & 4 Will. 4, c. 105), dower is allowed out of equitable estates.

(*g*) A trust is the usual mode of creating successive interests in personal property (see Fearne, Contingent Remainders, p. 407, v.), and is essential for this purpose in assignments *inter vivos;* though under wills a future interest could be created at law in chattels real by way of executory gift, and a future interest in chattels could be similarly created in equity (see *Vachel* v. *Vachel* (1669), 1 Cas. in Ch. 129). Originally, in order to secure this effect, the preceding bequest for life must have been of the use of the chattels, not of the chattels themselves; but this distinction was abandoned (Fearne, Contingent Remainders, p. 406); and the former practice of requiring the legatee for life to give security was also abandoned, and he was required instead to sign and deposit with the master an inventory of the goods (*Foley* v. *Burnell* (1783), 1 Bro. C. C. 274, 279; *Conduitt* v. *Soane* (1844), 1 Coll. 285). But the legatee for life is still entitled absolutely to things *quæ usu consumuntur* (*Randall* v. *Russell* (1817), 3 Mer. 190; *Andrew* v. *Andrew* (1845), 1 Coll. 686, 691). As to equitable security on a policy of life insurance, see *Crossley* v. *City of Glasgow Life Assurance Co.* (1876), 4 Ch. D. 421.

(*h*) Foreclosure or sale is the appropriate remedy in the case of personal property not passing by delivery (*London and Midland Bank* v. *Mitchell*, [1899] 2 Ch. 161; *Harrold* v. *Plenty*, [1901] 2 Ch. 314); but where the property passes by delivery, the mortgage operates by way of pledge, and foreclosure does not lie (*Carter* v. *Wake* (1877), 4 Ch. D. 605).

(*i*) Thus a trustee of shares is liable for calls (*Re Electric Telegraph Co.*

who, on the other hand, is bound to indemnify the trustee against such burdens, and is entitled to the beneficial enjoyment of the property (*k*).

Equitable interest in contract.

106. The doctrine of trusts applies also to contracts, and where two persons enter into a contract which is intended to be for the benefit of a third person, such person is a *cestui que trust* under the contract, and may enforce it in a court of equity (*l*); thus, under articles of partnership a trust may be created in favour of the widow of one of the partners (*m*). And in a settlement by way of covenant, if the covenant is already perfect, equity will interfere in favour of a volunteer, even though the deed has been kept by the settlor till his death, and not communicated to the trustees or the *cestui que trust* (*n*); and volunteers who are defeated by the covenantor conveying away trust property may, after his death, claim against his assets (*o*).

SUB-SECT. 6.—*Imperfect Gifts not Assisted.*

Imperfect gifts not assisted.

107. Equitable interests in property may be created in favour of volunteers, but a court of equity does not interfere to perfect

Ireland, Bunn's Case (1860), 2 De G. F. & J. 275, C. A.; *Re Moseley Green Coal and Coke Co., Ltd., Barrett's Case* (1864), 4 De G. J. & Sm. 416; *Re East of England Banking Co., Ex parte Bugg* (1865), 2 Drew. & Sm. 452); and this liability is not limited to the amount of the trust estate (*Leifchild's Case* (1865), L. R. 1 Eq. 231; *Muir* v. *City of Glasgow Bank* (1879), 4 App. Cas. 337); and he holds "in his own right" so as to be qualified (where this is a requirement) for directorship (*Pulbrook* v. *Richmond Consolidated Mining Co.* (1878), 9 Ch D. 610; *Bainbridge* v. *Smith* (1889), 41 Ch. D. 462, C. A.; *Cooper* v. *Griffin*, [1892] 1 Q. B. 740, C. A.; *Sutton* v. *English and Colonial Produce Co.* (1902), 50 W. R. 571). A mortgagee who takes a transfer of the mortgaged shares is in the same position (*Royal Bank of India's Case* (1869), 4 Ch. App. 252; *Weikersheim's Case* (1873), 8 Ch. App. 831). So a trustee (*Gretton* v. *Diggles* (1813), 4 Taunt. 766) and a mortgagee by assignment (*Haig* v. *Homan* (1830), 4 Bli. (N. S.) 380, H. L.; *Stone* v. *Evans* (1796), Peake, Add. Cas. 94) of leasehold property are liable at law upon the covenants in the lease; but cannot be compelled in equity to perform them (*Sparkes* v. *Smith* (1692), 2 Vern. 275); and an equitable interest in leaseholds, though accompanied by possession, imposes no direct liability. As to a mortgagee by deposit, see *Moores* v. *Choat* (1839), 8 Sim. 508; *Robinson* v. *Rosher* (1841), 1 Y. & C. Ch. Cas. 7; *Moore* v. *Greg* (1848), 2 Ph. 717; as to a *cestui que trust*, see *Nokes* v. *Fish* (1857), 3 Drew. 735; and as to an equitable assignee under an agreement to take an assignment, see *Cox* v. *Bishop* (1857), 8 De G. M. & G. 815, C. A.; *Friary, Holroyd, and Healey's Breweries, Ltd.* v. *Singleton*, [1899] 1 Ch. 86.

(*k*) As to shares, see *Hughes-Hallett* v. *Indian Mammoth Gold Mines Co.* (1882), 22 Ch. D. 561; *Hardoon* v. *Belilios*, [1901] A. C. 118, 123, P. C.; as to leases, see *Close* v. *Wilberforce* (1838), 1 Beav. 112; *Willson* v. *Leonard* (1840), 3 Beav. 373; *Nokes* v. *Fish, supra;* but the company or lessor may be able to make use of the trustee's right of indemnity so as, in effect, to secure payment by the *cestui que trust* (*Cruse* v. *Paine* (1868), L. R. 6 Eq. 641; see *Re European Society Arbitration Acts, Ex parte British Nation Life Assurance Association* (*Liquidators*) (1878), 8 Ch. D. 679, 708, C. A.).

(*l*) *Gandy* v. *Gandy* (1885), 30 Ch. D. 57, C. A.

(*m*) *Re Flavell, Murray* v. *Flavell* (1883), 25 Ch. D. 89, C. A.; and see title PARTNERSHIP.

(*n*) *Fletcher* v. *Fletcher* (1844), 4 Hare, 67; see *Bridge* v. *Bridge* (1852), 16 Beav. 315, 321. But where the settlement by way of covenant is not complete (*e.g.*, in the case of a covenant to surrender copyholds) equity will not interfere (*Jefferys* v. *Jefferys* (1841), Cr. & Ph. 138; *Dening* v. *Ware* (1856), 22 Beav. 184).

(*o*) *Williamson* v. *Codrington* (1750), 1 Ves. Sen. 511.

SECT. 1. Nature of Equitable Estates.

an imperfect gift (*p*). In order to render a voluntary settlement valid and effectual, the settlor must either (1) have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done to transfer the property, and to render the settlement binding on him—this is effected when he actually transfers his own interest in the property to the donee or to trustees for the donee; or (2) while retaining the property in himself, the donor must have declared himself to be a trustee of it for the donee. But the court does not treat an imperfect gift by way of transfer as a declaration of trust (*q*). If the donor has only an equitable interest vested in him, the gift is effectually made by an assignment of this interest (*r*), and notice to the trustees is not essential (*s*); similarly a chose in action may be given by an equitable assignment, without notice to the debtor (*t*). And if there is an intention to give property or release a debt, and the legal estate in the property becomes vested in the donee, or the debt becomes extinguished at law, though not in equity, this completes the gift or release (*u*).

SECT. 2.—*Equitable Interests under Contracts of Sale* (*a*).

Equitable interest of purchaser.

108. Upon the signing of a contract for sale of land a change takes place in the equitable, but not in the legal, interest in the land. At law the purchaser has no right to the land, nor the vendor to the money, until the conveyance is executed (*b*). But in equity, if

(*p*) See the early cases collected in note to *Ward* v. *Audland* (1845), 8 Beav. 201, 213.

(*q*) *Milroy* v. *Lord* (1862), 4 De G. F. & J. 264, C. A., *per* TURNER, L.J., at p. 274. "There is no case in which a party has been compelled to perfect a gift which in the mode of making it he has left imperfect," *per* GRANT, M.R., in *Antrobus* v. *Smith* (1805), 12 Ves. 39, 46; see *Jones* v. *Lock* (1865), 1 Ch. App. 25 (delivery of a cheque to a child with words of gift, the cheque being at once taken back and retained by the donor); *Antrobus* v. *Smith, supra; Dillon* v. *Coppin* (1839), 4 My. & Cr. 647; *Warriner* v. *Rogers* (1873), L. R. 16 Eq. 340; *Heartley* v. *Nicholson* (1875), L. R. 19 Eq. 233 (all cases of attempted gift of shares in partnership or company, but no actual transfer, or declaration of trust); *Richards* v. *Delbridge* (1874), L. R. 18 Eq. 11 (property not effectually given by indorsement of a memorandum of gift on a title deed); *Re Breton's Estate, Breton* v. *Woollven* (1881), 17 Ch. D. 416 (imperfect gift of furniture); *Re Richardson, Shillito* v. *Hobson* (1885), 30 Ch. D. 396, C. A. (an equitable mortgage by deposit of deed not effectually transferred by parol gift with delivery of the deed); see title GIFTS.

(*r*) *Kekewich* v. *Manning* (1851), 1 De G. M. & G. 176, C. A.

(*s*) *Donaldson* v. *Donaldson* (1854), Kay, 711.

(*t*) *Harding* v. *Harding* (1886), 17 Q. B. D. 442; *Re Patrick, Bills* v. *Tatham*, [1891] 1 Ch. 82, C. A.; compare *Fortescue* v. *Barnett* (1834), 3 My. & K. 36 (assignment of life policy by deed). A bond must be transferred to a volunteer by instrument under seal (*Edwards* v. *Jones* (1836), 1 My. & Cr. 226); but an ordinary chose in action can be transferred by any means which operate as an equitable assignment, such as the indorsement and delivery of a banker's deposit receipt (*Re Griffin, Griffin* v. *Griffin*, [1899] 1 Ch. 408).

(*u*) This happens when the donor or creditor appoints the donee or debtor to be his executor; see, as to debts, *Strong* v. *Bird* (1874), L. R. 18 Eq. 315; *Re Applebee, Leveson* v. *Beales*, [1891] 3 Ch. 422; as to gifts, *Re Griffin, Griffin* v. *Griffin, supra*; *Re Stewart, Stewart* v. *McLaughlin*, [1908] 2 Ch. 251; and see *Re Innes, Innes* v. *Innes*, [1910] 1 Ch. 188.

(*a*) See title SALE OF LAND.

(*b*) *Fludyer* v. *Cocker* (1805), 12 Ves. 25, 27; *Laird* v. *Pim* (1841), 7 M. & W. 474; *East London Union* (*Guardians*) v. *Metropolitan Rail. Co.* (1869), L. R. 4 Exch. 309.

the contract is one of which specific performance would be ordered (*c*), the beneficial interest passes to the purchaser immediately on the signing of the contract, and thereupon the vendor, in regard to his legal ownership and possession of the land, becomes constructively a trustee for the purchaser (*d*). As such trustee he is bound to take reasonable care of the property, since the purchaser is entitled to have it handed over to him on completion in the same condition as when he entered into the contract (*e*). On the other hand, the property is, from the date of the contract, at the risk of the purchaser, and he has no claim against the vendor for depreciation which is not due to the vendor's neglect (*f*); but he is entitled to accessions to the value (*g*). Before the purchaser can be required to complete the vendor must make out his title; but pending completion he retains an interest in the property, since it forms the security for the purchase-money. Thus the vendor is not a mere dormant trustee; he is a trustee having a personal and substantial interest in the property, a right to protect that interest, and an active right to assert that interest if anything should be done in derogation of it (*h*).

(*c*) *Cornwall* v. *Henson*, [1899] 2 Ch. 710; see title SPECIFIC PERFORMANCE.

(*d*) *Hadley* v. *London Bank of Scotland* (1865), 3 De G. J. & Sm. 63, 70, C. A.; *Shaw* v. *Foster* (1872), L. R. 5 H. L. 321, *per* Lord CAIRNS, at p. 338, *per* Lord HATHERLEY, L.C., at p. 356; *Lysaght* v. *Edwards* (1876), 2 Ch. D. 499; see *Rose* v. *Watson* (1864), 10 H. L. Cas. 672; *Re Thomas, Thomas* v. *Howell* (1886), 34 Ch. D. 166. But the vendor is not at once a mere trustee. "He is in progress towards it, and finally becomes such when the money is paid, and when he is bound to convey" (*Wall* v. *Bright* (1820), 1 Jac. & W. 494, *per* PLUMER, M.R., at p. 503). "He is certainly a trustee for the purchaser; a trustee, no doubt, with peculiar duties and liabilities, for it is a fallacy to suppose that every trustee has the same duties and liabilities; but he is a trustee" (*Egmont (Earl)* v. *Smith, Smith* v. *Egmont (Earl)* (1877), 6 Ch. D. 469, *per* JESSEL, M.R., at p. 475).

(*e*) *Foster* v. *Deacon* (1818), 3 Madd. 394; and see note (*h*), *infra*.

(*f*) *Robertson* v. *Skelton* (1849), 12 Beav. 260; and loss by fire falls on the purchaser (*Counter* v. *Macpherson* (1845), 5 Moo. P. C. C. 83, 105); see *Rayner* v. *Preston* (1881), 18 Ch. D. 1, C. A.); the older cases were in favour of the property being at the vendor's risk till the time for completion; see Ashb., p. 504, n. (o).

(*g*) *Vesey* v. *Elwood* (1842), 3 Dr. & War. 74, 79.

(*h*) *Shaw* v. *Foster, supra*, at p. 338; *Raffety* v. *Schofield*, [1897] 1 Ch. 937, 943. It has been much discussed whether the vendor's lien upon the property places him, while he remains in possession, on the footing of a mortgagee, so as to render him accountable, without special circumstances, for wilful default. According to *Sherwin* v. *Shakspear* (1854), 5 De G. M. & G. 517, C. A., he is a trustee rather than a mortgagee, and chargeable for wilful default only on special circumstances being shown. But in *Phillips* v. *Sylvester* (1872), 8 Ch. App. 173, 176, Lord SELBORNE, L.C., put him on the footing of a mortgagee in possession; and this case, though it has been adversely criticised (Dart, Vendors and Purchasers, 7th ed., p. 674), has been treated as stating the existing law (*Royal Bristol Permanent Building Society* v. *Bomash* (1887), 35 Ch. D. 390, 398). At any rate, the vendor is liable to the purchaser if he allows yearly property, which can be readily let, to remain unlet, or if he neglects to keep agricultural land in a proper state of cultivation (*Egmont (Earl)* v. *Smith, Smith* v. *Egmont (Earl)*, *supra*, at p. 474). Practically the test appears to be whether the vendor has taken reasonable care of the property (*Royal Bristol Permanent Building Society* v. *Bomash, supra*; *Clarke* v. *Ramuz*, [1891] 2 Q. B. 456, C. A.). But the purchaser is not entitled to an allowance for deterioration happening after he took possession, or after a title has been shown under which he could safely take possession (*Binks* v. *Rokeby (Lord)* (1818), 2 Swan. 222, 226; *Minchin* v. *Nance* (1841), 4 Beav. 332).

SECT. 2. Equitable Interests under Contracts of Sale.

109. The date for completion specified in the contract does not affect the equitable relation of vendor and purchaser. Before this date the purchaser is already equitable owner subject to completion. It marks, however, the time when the purchaser becomes entitled to the rents and profits, and the vendor to interest on the unpaid purchase-money (*i*). If no date is fixed by the contract, then the date for completion is the time when the vendor has made out his title, and when, therefore, the purchaser could safely take possession (*k*).

Where the vendor has entered into a subsequent contract for sale, the first purchaser, provided his contract is specifically enforceable (*l*), has the better title, and can assert it in an action for specific performance against the vendor and the second purchaser, unless the latter has obtained the legal estate without notice (*m*).

SECT. 3.—*Restrictive Covenants* (*n*).

Covenants running with the land in equity.

110. As between lessor and lessee both the burden and the benefit of a covenant which touches or concerns the land, and is not merely collateral, run with the reversion and the term at law (*o*); though when the covenant relates to a thing not *in esse* at the time of the demise, the assigns of the lessee must be named to make it binding on them (*p*). As between persons interested in land otherwise than as lessor and lessee, the benefit of a covenant may run with the land at law, but not the burden (*q*). The burden, however, may run with the land in equity if the covenant is negative (*r*).

Interest created by restrictive covenants.

111. A restrictive covenant creates an equitable interest in the land of the nature of a negative easement, and, in accordance with the maxim *qui prior est tempore, potior est jure* (*s*), it binds subsequent equitable owners, whether they take with notice of it or not; and it binds also a subsequent legal owner unless he obtained the legal estate for value and without notice (*a*).

(*i*) But where the contract only fixes the date of completion, and does not stipulate as to interest, this rule is subject to exceptions (*Esdaile* v. *Stephenson* (1822), 1 Sim. & St. 122).

(*k*) *Carrodus* v. *Sharp* (1855), 20 Beav. 56; *Barsht* v. *Tagg*, [1900] 1 Ch. 231, 235.

(*l*) *Goodwin* v. *Fielding* (1853), 4 De G. M. & G. 90; *De Hoghton* v. *Money* (1866), 2 Ch. App. 164.

(*m*) *Potter* v. *Sanders* (1846), 6 Hare, 1; *Trinidad Asphalte Co.* v. *Coryat*, [1896] A. C. 587, P. C.

(*n*) See titles LANDLORD AND TENANT; REAL PROPERTY AND CHATTELS REAL; SALE OF LAND.

(*o*) The proposition stated in the text is based upon the doctrines laid down in *Spencer's Case* (1583), 5 Co. Rep. 16 a; 1 Smith, L. C., 11th ed. 55, and upon statutory extensions of those doctrines introduced by stat. (1540) 32 Hen. 8, c. 34, and the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), ss. 10, 11; see also title CONTRACT, Vol. VII., p. 504.

(*p*) See *Dewar* v. *Goodman*, [1907] 1 K. B. 612; [1908] 1 K. B. 94; [1909] A. C. 72.

(*q*) *Austerberry* v. *Oldham Corporation* (1885), 29 Ch. D. 750, C. A.

(*r*) The equitable doctrine does not apply to covenants which require an act to be done by the covenantor, such as the expenditure of money in repairs (*Haywood* v. *Brunswick Building Society* (1881), 8 Q. B. D. 403, C. A.; see *Andrew* v. *Aitken* (1882), 22 Ch. D. 218). As to the meaning of a covenant not to erect more than one house on a particular site, see *Ilford Park Estates, Ltd.* v. *Jacobs*, [1903], 2 Ch. 522.

(*s*) See p. 79, *ante*.

(*a*) This doctrine was first established by *Tulk* v. *Moxhay* (1848), 2 Ph. 774,

Building scheme.

Frequently such covenants are created on the sale of plots of land under a common building scheme; and then, although there is no express contract that the various purchasers shall have the benefit of the covenants entered into by the other purchasers with the common vendor, yet such a contract will be implied; and, accordingly, each purchaser and his assigns can obtain an injunction against other purchasers (*b*) or (as to unsold plots) against the vendor (*c*) to restrain a breach of the covenants. But the vendor may expressly reserve to himself the right of dispensing with the observance of the covenants (*d*).

and, as there laid down, it depended on the subsequent owner taking with notice of the covenant. "It is said that the covenant being one which does not run with the land, this court cannot enforce it; but the question is, not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased": *per* Lord COTTENHAM, L.C., at p. 777; see *Wilson* v. *Hart* (1866), 1 Ch. App. 463. The principle applies to other forms of property, such as ships (*De Mattos* v. *Gibson* (1859), 4 De G. & J. 276, 282, C. A.); and it applies even though there is no antecedent relation, such as that of vendor and purchaser, or lessor and lessee (*Luker* v. *Dennis* (1877), 7 Ch. D. 227, *per* FRY, J., at p. 236). But the view that the covenant runs in equity by reason of notice has been set aside in favour of the principle that it creates an equitable interest in the land of the nature of a negative easement (but see *Noakes & Co., Ltd.* v. *Rice*, [1902] A. C. 24, 32, 35); and, like a legal easement, it gives a present interest in the land and is not obnoxious to the rule against perpetuities (*London and South Western Rail. Co.* v. *Gomm* (1882), 20 Ch. D. 562, C. A., *per* JESSEL, M.R., at p. 583; *Formby* v. *Barker*, [1903] 2 Ch. 539, 552, C. A.). It follows that it binds a subsequent equitable owner, though without notice, and a subsequent legal owner unless he is protected as a purchaser for value without notice (*ibid.*; *Rogers* v. *Hosegood*, [1900] 2 Ch. 388, 405, C. A.; *Osborne* v. *Bradley*, [1903] 2 Ch. 446, 451; *Re Nisbet and Potts' Contract*, [1906] 1 Ch. 386, C. A., affirming FARWELL, J., [1905] 1 Ch. 391; compare *Averall* v. *Wade* (1835), L. & G. *temp.* Sugd. 252, 260; and as to notice, see *Rowell* v. *Satchell*, [1903] 2 Ch. 212). As to negative covenants, see title EASEMENTS, Vol. XI., pp. 240, 247.

A purchaser will be bound by the covenants if he receives notice before the completion of his contract, and hence he can refuse to complete on the ground of there being covenants affecting the property which were not disclosed before the contract (*Reeve* v. *Berridge* (1888), 20 Q. B. D. 523, C. A.; *Re White and Smith's Contract*, [1896] 1 Ch. 637; *Molyneux* v. *Hawtrey*, [1903] 2 K. B. 487, C. A.).

(*b*) *Renals* v. *Cowlishaw* (1878), 9 Ch. D. 125, *per* HALL, V.-C., at p. 129; affirmed (1879), 11 Ch. D. 866, C. A.; *Nottingham Patent Brick and Tile Co.* v. *Butler* (1885), 15 Q. B. D. 261; affirmed (1886), 16 Q. B. D. 778, C. A.; *Collins* v. *Castle* (1887), 36 Ch. D. 243; *Spicer* v. *Martin* (1888), 14 App. Cas. 12; *Elliston* v. *Reacher*, [1908] 2 Ch. 374; and whether the plots are sold at the same or at successive sales, provided the stipulations were a condition at each sale (*Rowell* v. *Satchell*, *supra*). Restrictive covenants may be registered against land registered under the Land Transfer Acts, 1875 and 1897 (38 & 39 Vict. c. 87; 60 & 61 Vict. c. 65); but the registration does not make the covenants enforceable between purchasers of the land *inter se*, where they are not otherwise enforceable by virtue of a building scheme (*Willé* v. *St. John*, [1910] 1 Ch. 325, C. A.). A purchaser who is shown the building plan is not necessarily entitled to the benefit of the covenants (*Tucker* v. *Vowles*, [1893] 1 Ch. 195). Where a vendor sells adjoining lots at different times to different purchasers under similar restrictions, this in itself does not entitle the purchaser of one plot to enforce the covenants as against the other (*Master* v. *Hansard* (1876), 4 Ch. D. 718, C. A.). And as to what constitutes a building scheme, see *Osborne* v. *Bradley*, [1903] 2 Ch. 446; *A.-G.* v. *Richmond Corporation* (1903), 89 L. T. 700; *Reid* v. *Bickerstaff*, [1909] 2 Ch. 305, C. A.; *Tubbs* v. *Esser* (1910), 26 T. L. R. 145; and as to non-liability of an owner for breaches of covenant by a predecessor, see *Powell* v. *Helmsley*, [1909] 2 Ch. 252.

(*c*) *Re Birmingham and District Land Co. and Allday*, [1893] 1 Ch. 342.

(*d*) *Everett* v. *Remington*, [1892] 3 Ch. 148.

SECT. 3. Restrictive Covenants.

Where no building scheme.

In the absence of a building scheme, a purchaser of a neighbouring plot of land will not take the benefit of the covenant unless upon his purchase he contracts to have it (*e*); nor unless the covenant, on being entered into by the first purchaser, is so attached to the land retained by the vendor as to pass with different parts of that land to subsequent purchasers by mere conveyance of the land, *e.g.*, where it is entered into for the benefit of the vendors, their heirs and assigns, "and others claiming under them any of their adjoining lands" (*f*). A covenant in form positive may be in substance negative, and therefore enforceable as a restrictive covenant (*g*).

Release of restrictive covenant.

A restrictive covenant will cease to be enforceable if the character of the neighbourhood has been so altered as to render the enforcement useless (*h*), or if the persons entitled to the benefit of it have acquiesced in the changed user of the property (*i*). It will be presumed to have been released if there has been for many years an open enjoyment of the land inconsistent with it (*j*). It will be extinguished upon purchase of the land under the Lands Clauses Consolidation Act, 1845 (*k*), and compensation can be claimed for its value (*l*).

Part IV.—Equitable Doctrines Affecting Property.

SECT. 1.—*Equitable Assignments.*

Assignments permitted in equity.

112. It was the policy of the common law that no mere possibility, or contingent right or title, or thing in action should be assigned, since this might lead to litigation (*m*); but the validity of the reason was not recognised in equity, and assignments were permitted both of contingent interests in real and leasehold estate and of choses in action (*n*). This was based partly upon the doctrine that an assignment operates by way of contract, and on

(*e*) *Renals* v. *Cowlishaw* (1878), 9 Ch. D. 125.

(*f*) *Rogers* v. *Hosegood*, [1900] 2 Ch. 388, 405, C. A.; see *Reid* v. *Bickerstaff*, [1909] 2 Ch. 305, C. A.

(*g*) *Catt* v. *Tourle* (1869), 4 Ch. App. 654; *Clegg* v. *Hands* (1890), 44 Ch. D. 503, 519, C. A.

(*h*) *Bedford (Duke)* v. *British Museum (Trustees)* (1822), 2 My. & K. 552; see *Knight* v. *Simmonds*, [1896] 2 Ch. 294, C. A.; *Osborne* v. *Bradley*, [1903] 2 Ch. 446, 452; see *Elliston* v. *Reacher*, [1908] 2 Ch. 374, 393.

(*i*) *Roper* v. *Williams* (1822), Turn. & R. 18; *Sayers* v. *Collyer* (1884), 28 Ch. D. 103, C. A.

(*j*) *Gibson* v. *Doeg* (1857), 2 H. & N. 615; *Hepworth* v. *Pickles*, [1900] 1 Ch. 108.

(*k*) *Baily* v. *De Crespigny* (1869), L. R. 4 Q. B. 180; see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 367 *et seq.*

(*l*) *Kirby* v. *Harrogate School Board*, [1896] 1 Ch. 437, C. A.; compare *Tendring Union Guardians* v. *Dowton*, [1891] 3 Ch. 26, C. A.

(*m*) *Lampet's Case* (1612), 10 Co. Rep. 46 b, 48 a.

(*n*) *Wright* v. *Wright* (1750), 1 Ves. Sen. 409; see, generally, title CHOSES IN ACTION, Vol. IV., pp. 374 *et seq.*

this footing it was necessary that there should be a valuable consideration to make the contract enforceable (*o*). But in another view the effect of the assignment was to make the assignor a trustee for the assignee (*p*), and this did not require any consideration. At the present time the distinction is not primarily between the presence or absence of consideration, but whether the disposition amounts to an absolute assignment, so as to put the assignee in the place of the assignor, in which case it is good, though voluntary (*q*); or whether it merely gives a charge on property, in which case it operates by way of contract, and requires a valuable consideration to support it (*r*).

Title under equitable assignment.

113. To constitute an equitable assignment of a chose in action no particular form of words is required; an engagement or direction by a debtor to pay out of a specified debt or fund constitutes an equitable assignment, though it does not operate as an assignment of the whole fund or debt. A mere charge on a fund or debt operates as a partial equitable assignment (*s*). Notice to the person owing the debt, or to the holder of the fund, is not necessary to complete the title of the assignee (*t*); but if he omits to give such notice, a subsequent assignee, who took without notice of the first charge, may, by giving notice, obtain priority over him (*a*). In the case of a legal chose in action the assignee can now obtain a legal title by the assignment—*i.e.*, the right to sue in his own name—if the assignment is absolute (*b*) and is of the entire debt (*c*),

Chose in action assignable subject to equities.

114. Sometimes the instrument creating a chose in action makes it assignable by the creditor free from equities between himself and the debtor, and then the debtor is bound to pay the assignee, although he has a claim against the assignor which might be used by way of defence or set-off in an action brought by the

(*o*) "An assignment always operates by way of agreement or contract; amounting in the consideration of this court to this, that one agrees with another to transfer" (*Wright* v. *Wright* (1750), 1 Ves. Sen. 409, *per* Lord HARDWICKE, L.C., at p. 412).

(*p*) See p. 10, *ante;* compare *Fulham* v. *McCarthy* (1848), 1 H. L. Cas. 703.

(*q*) See p. 98, *ante*, and *Squib* v. *Wyn* (1717), 1 P. Wms. 378; *Nanney* v. *Morgan* (1887), 37 Ch. D. 346, 352, C. A.

(*r*) *Re Lucan (Earl), Hardinge* v. *Cobden* (1890), 45 Ch. D. 470.

(*s*) *Durham Brothers* v. *Robertson,* [1898] 1 Q. B. 765, C. A., *per* CHITTY, L.J., at p. 769; *Rodick* v. *Gandell* (1852), 1 De G. M. & G. 763, *per* Lord TRURO, L.C., at p. 777; *Brown, Shipley & Co.* v. *Kough* (1885), 29 Ch. D. 848, 851, C. A.; *Gorringe* v. *Irwell India Rubber and Gutta Percha Works* (1886), 34 Ch. D. 128, C. A., *per* COTTON, L.J., at p. 134; *Brandt's (William) Sons & Co.* v. *Dunlop Rubber Co.*, [1905] A. C. 454.

(*t*) *Ward* v. *Duncombe,* [1893] A. C. 369, *per* Lord MACNAGHTEN, at p. 392.

(*a*) *Dearle* v. *Hall* (1828), 3 Russ. 1; *Re Dallas,* [1904] 2 Ch. 385, C. A. Similarly a stop order on a fund in court will give priority to a second incumbrancer, provided he did not take with notice (*Re Holmes (A. D.)* (1885), 29 Ch. D. 786, C. A.; see *Re Eyton, Bartlett* v. *Charles* (1890), 45 Ch. D. 458).

(*b*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (6) (including assignments by way of mortgage; *Durham Brothers* v. *Robertson, supra;* see *Hughes* v. *Pump House Hotel Co.*, [1902] 2 K. B. 190, C. A.).

(*c*) *Forster* v. *Baker* (1910), 102 L. T. 522, C. A., affirming decision of BRAY, J., *ibid.*, p. 29, and not following *Skipper and Tucker* v. *Holloway* (1909), 79 L. J. (K. B.) 91, reversed on another ground, *ibid.*, p. 496; compare *Jones* v. *Humphreys,* [1902] 1 K. B. 10.

SECT. 1. Equitable Assignments.

assignor (*d*). But otherwise an equitable assignment is subject to the rule that the assignee takes subject to all rights of set-off and defences existing between the debtor and the assignor; except that, after notice of an assignment of a chose in action, the debtor cannot by payment or otherwise do anything to take away or diminish the rights of the assignee as they stood at the time of the notice (*e*).

Assignment of after-acquired property.

115. An assignment for valuable consideration of property to be afterwards acquired by the assignor operates as a covenant to assign it when acquired, and the beneficial interest passes so soon as the property is acquired by the assignor (*f*).

SECT. 2.—*Conversion.*

Theoretical conversion of land into money and money into land.

116. The rule that equity considers that as done which ought to be done has given rise to the doctrine of conversion (*g*) by means of which land may be impressed with the legal qualities of personal estate, and money may be impressed with the legal qualities of real estate, although no actual sale or purchase, as the case may be, has taken place. This change of one kind of property into the other may follow from a direction contained in a will or settlement, from a contract, or from an order of the court (*h*). The general principle is that land directed or agreed to be sold and turned into money, or money directed or agreed to be laid out in the purchase of land is to be considered as that species of property into which it is directed or agreed to be converted: thus the owner of the property or the contracting parties may make land money, or money land (*i*). It follows that no change is effected where land is directed to be sold and the proceeds reinvested in the purchase of land (*j*).

(*d*) *Re Goy & Co., Ltd., Farmer* v. *Goy & Co., Ltd.*, [1900] 2 Ch. 149.

(*e*) *Roxburghe* v. *Cox* (1881), 17 Ch. D. 520, C. A., *per* JAMES, L.J., at p. 526; *Re Brown and Gregory, Ltd., Shephard* v. *Brown and Gregory, Ltd., Andrews* v. *Brown and Gregory, Ltd.*, [1904] 1 Ch. 627; see *Newfoundland Government* v. *Newfoundland Rail. Co.* (1888), 13 App. Cas. 199, P. C.; *Re Taunton, Delmard, Lane & Co., Christie* v. *Taunton, Delmard, Lane & Co.*, [1893] 2 Ch. 175. Where a fund in court in an action is carried to a separate account, the person entitled to it under the account can confer a title on an assignee for value free from equities of other parties to the action (*Edgar* v. *Plomley*, [1900] A. C. 431, P. C.).

(*f*) *Collyer* v. *Isaacs* (1881), 19 Ch. D. 342, C. A.; *Re Clarke, Coombe* v. *Carter* (1887), 36 Ch. D. 348, C. A.; *Tailby* v. *Official Receiver* (1888), 13 App. Cas. 523; see p. 74, *ante;* and title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 497. And where a person has conveyed for value a defective title, and he afterwards acquires a good title, the good title is available in equity to make the conveyance effectual (*Noel* v. *Bewley* (1829), 3 Sim. 103; *Re Bridgwater's Settlement, Partridge* v. *Ward*, [1910] W. N. 188), provided the conveyance purports to be of an absolute title in the first instance (*Smith* v. *Osborne* (1857), 6 H. L. Cas. 375, 398).

(*g*) See *Lechmere* v. *Carlisle (Earl)* (1733), 3 P. Wms. 211, 215; *Guidot* v. *Guidot* (1745), 3 Atk. 254, 256; *Re Walker, Macintosh-Walker* v. *Walker*, [1908] 2 Ch. 705, 712.

(*h*) See p. 111, *post.*

(*i*) *Fletcher* v. *Ashburner* (1779), 1 Bro. C. C. 497, see *per* Sir T. SEWELL, M.R., at p. 499; 1 White & Tud. L. C., 7th ed. p. 327; *Wheldale* v. *Partridge* (1800), 5 Ves. 388, 397; see the early cases collected in note to *Cruse* v. *Barley* (1727), 3 P. Wms. 19, at p. 22. Where the trust for sale is void under the rule against perpetuities, but the beneficial interests are not void, the trust for sale is disregarded and the land is taken as realty (*Re Appleby, Walker* v. *Lever, Walker* v. *Nisbet*, [1903] 1 Ch. 565, C. A.).

(*j*) *Sperling* v. *Toll* (1747), 1 Ves. Sen. 70; *Pearson* v. *Lane* (1809), 17 Ves. 101.

SECT. 2. Conversion.

Direction in will or settlement must be imperative.

117. Equitable conversion takes place, in the case of a will, when land is devised upon trust for sale, or money is bequeathed to be laid out in land; in the case of a settlement, when land is conveyed or agreed to be conveyed upon trust for sale, or when money is paid or agreed to be paid, and is to be held upon trust for the purchase of land. But in each case the direction to change the nature of the property must be imperative. There is no conversion where there is a mere power to sell land, or to invest money in real estate, or where it is left optional whether an investment of money shall take the form of real or personal estate (*k*). And conversion is not effected by a mere declaration that personalty shall devolve as realty, or *vice versâ*. There must be an imperative trust or direction which in equity can be treated as effecting the desired change in the nature of the property (*l*); and to deprive the heir of his rights under an intestacy the property must be disposed of in favour of the next of kin, and *vice versâ* (*m*). Moreover, the direction to convert must be effectual; if for any reason it is void, there is no conversion (*n*).

Direction to convert need not be express.

118. But it is not essential that there should be an express direction to convert the property. It is sufficient if an imperative trust for conversion can be collected from the instrument (*o*): thus though there may be an apparent option to invest money in land or in personalty, yet if the limitations applicable to the investment are only suitable for real estate, the money will be treated as converted into realty (*p*). And though there is a discretionary

(*k*) *Curling* v. *May* (1734), cited 3 Atk. 255; *Walker* v. *Denne* (1793), 2 Ves. 170, 184; *Wheldale* v. *Partridge* (1800), 5 Ves. 388; *Walter* v. *Maunde* (1815), 19 Ves. 424; *De Beauvoir* v. *De Beauvoir* (1852), 3 H. L. Cas. 524; *Smithwick* v. *Smithwick* (1861), 12 I. Ch. R. 181, 201; *Re Whitty's Trust* (1875), 9 I. R. Eq. 41; *Re Ibbitson's Estate* (1869), L. R. 7 Eq. 226; *Atwell* v. *Atwell* (1871), L. R. 13 Eq. 23; *Hyett* v. *Mekin* (1884), 25 Ch. D. 735; *Re Hotchkys, Freke* v. *Calmady* (1886), 32 Ch. D. 408, C. A.; *Re Bird, Pitman* v. *Pitman*, [1892] 1 Ch. 279; *Re Walker, Macintosh-Walker* v. *Walker*, [1908] 2 Ch. 705. If the conversion is directed in a certain event which is ascertained to be existing at the date of the testator's death, the conversion takes effect from the death (*Ward* v. *Arch* (1846), 15 Sim. 389; and see *Wall* v. *Colshead* (1858), 2 De G. & J. 683, C. A.). But a power to sell for the purpose of distribution does not effect a conversion till there is an actual sale (*Lucas* v. *Brandreth* (No. 1) (1860), 28 Beav. 273); see *Brown* v. *Bigg* (1802), 7 Ves. 279; *Polley* v. *Seymour* (1837), 2 Y. & C. (EX.) 708, 722; and generally a mere power does not effect a conversion (*De Beauvoir* v. *De Beauvoir*, *supra*).

(*l*) *Re Walker, Macintosh-Walker* v. *Walker*, *supra*; compare *Edwards* v. *Tuck* (1856), 23 Beav. 268; *Hyett* v. *Mekin*, *supra*.

(*m*) It is not sufficient that the testator directs that the proceeds shall be considered to all intents and purposes as personal estate; this is on the assumption that he dies testate, and implies no gift in favour of the next of kin (*Robinson* v. *London Hospital* (*Governors*) (1853), 10 Hare, 19; *Taylor* v. *Taylor* (1853), 3 De G. M. & G. 190).

(*n*) *Re Appleby, Walker* v. *Lever, Walker* v. *Nisbet*, [1903] 1 Ch. 565, C. A.

(*o*) See *Burrell* v. *Baskerfield* (1849), 11 Beav. 525.

(*p*) *Cowley* v. *Hartstonge* (1813), 1 Dow, 361; *Johnson* v. *Arnold* (1748), 1 Ves. Sen. 169; *Earlom* v. *Saunders* (1754), Amb. 241; *Cookson* v. *Reay* (1842), 5 Beav. 22, affirmed *sub nom. Cookson* v. *Cookson* (1845), 12 Cl. & Fin. 121, H. L.; *Simpson* v. *Ashworth* (1843), 6 Beav. 412; *De Beauvoir* v. *De Beauvoir, supra*; see *Evans* v. *Ball* (1882), 47 L. T. 165, H. L. But a limitation to "heirs" is not sufficient to convert money into realty (*Atwell* v. *Atwell*, *supra*).

SECT. 2. Conversion.

power to sell the whole or part of land, yet, if there are trusts which require the exercise of the power, there is a conversion (*q*). And a trust for conversion will be implied where real and personal property are given for division in such a manner as can only be effectuated by sale (*r*).

Conversion at request.

119. Where there is a trust for conversion at the request of a specified person, the request is generally treated, not as a condition of conversion, but as intended to secure the performance of the trust, and the trust is imperative and operates at once to effect a conversion (*s*); and similarly where a specified consent or approbation is required (*t*). But it is otherwise if the direction is to convert on the joint request of two persons, as of husband and wife (*a*); or if the language otherwise shows that the consent is essential (*b*); or if the effect is to give a discretion as to the form which the property is to take (*c*).

Effect of conversion.

120. When conversion has once been effected in equity, whether of land into money or of money into land, the property is treated in equity as having all the legal incidents of its new form (*d*); and this whether the conversion is under a will or a settlement or otherwise. Consequently, land which has been theoretically converted into money will pass as personalty under the will (*e*) or upon the intestacy (*f*) of the *cestui que trust;* and money which has been theoretically converted into land will pass as real estate under the *cestui que trust's* will (*g*), or upon his

(*q*) *Ralph* v. *Carrick* (1877), 5 Ch. D. 984, 996, 997; this point was not discussed on appeal ((1879), 11 Ch. D. 873, C. A.); see *Grieveson* v. *Kirsopp* (1838), 2 Keen, 653.

(*r*) *Mower* v. *Orr* (1849), 7 Hare, 473; see *Cornick* v. *Pearce* (1848), 7 Hare, 477; *Greenway* v. *Greenway* (1860), 2 De G. F. & J. 128.

(*s*) *Thornton* v. *Hawley* (1804), 10 Ves. 129; *Burrell* v. *Baskerfield* (1849), 11 Beav. 525.

(*t*) *Lechmere* v. *Carlisle* (*Earl*) (1733), 3 P. Wms. 211, 220; *Wrightson* v. *Macaulay* (1845), 4 Hare, 487, 497; compare the opposite opinion in *Stead* v. *Newdigate* (1817), 2 Mer. 521, 530.

(*a*) *Re Taylor's Settlement* (1852), 9 Hare, 596.

(*b*) *Davies* v. *Goodhew* (1834), 6 Sim. 585, where the sale was to take place with a specified consent, "and not without"; compare *Huskisson* v. *Lefevre* (1858), 26 Beav. 157; *Sykes* v. *Sheard* (1863), 33 Beav. 114, on appeal, 2 De G. & Sm. 6, C. A.

(*c*) *Re Taylor's Settlement*, *supra*, at p. 602.

(*d*) As to the effect of conversion in relation to death duties, see title ESTATE AND OTHER DEATH DUTIES, *post*.

(*e*) Thus it will pass under a residuary bequest of personalty (*Stead* v. *Newdigate*, *supra*; *Gover* v. *Davis* (1860), 29 Beav. 222); and not under a devise of land (*Elliott* v. *Fisher* (1842), 12 Sim. 505); and, where the will disposes of this property only, probate of the will as a will of personalty can be granted (*In the Goods of Gunn* (1884), 9 P. D. 242, 244); though not where the conversion of land into money is only effected by the will to be proved (*In the Goods of Barden* (1867), L. R. 1 P. & D. 325). Under the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1 (3), probate can be granted in respect of real estate only, so that the last two cases are apparently obsolete.

(*f*) *Ashby* v. *Palmer* (1816), 1 Mer. 296; *Biggs* v. *Andrews* (1832), 5 Sim. 424, where part of the land had not been sold; *Griffith* v. *Ricketts*, *Griffith* v. *Lunell* (1849), 7 Hare, 299.

(*g*) Thus it will pass under a general devise of land or of real estate (*Lingen* v. *Sowray* (1711), 1 P. Wms. 172; *Greenhill* v. *Greenhill* (1711), 2 Vern. 679;

intestacy (*h*). But the *cestui que trust*, by a suitable description in his will, may show an intention to include proceeds of sale of land in a devise, or money to be invested in land in a bequest, and effect will be given to such intention accordingly (*i*). Money theoretically converted into land will be subject to tenancy by the curtesy (*k*), and probably to dower (*l*).

Date of conversion.

121. In the case of conversion directed by will, the conversion takes place from the death of the testator (*m*); where it is directed by deed, from the delivery of the deed (*n*); and this is so, although

Guidot v. *Guidot* (1745), 3 Atk. 254; *Rashleigh* v. *Master* (1790), 1 Ves. 201; *Biddulph* v. *Biddulph* (1806), 12 Ves. 161; *Green* v. *Stephens* (1810), 17 Ves. 64, 77; *Chandler* v. *Pocock* (1880), 15 Ch. D. 491, 499, affirmed (1881), 16 Ch. D. 648, C. A.; *Re Greaves' Settlement Trusts* (1883), 23 Ch. D. 313); and will not pass under a bequest of personal estate (*Gillies* v. *Longlands* (1851), 4 De G. & Sm. 372); and see *Wrightson* v. *Macaulay* (1845), 4 Hare, 487. Where the trust is for investment in land generally, the money will not pass under a devise of land in a particular county (*Re Cleveland's (Duke) Settled Estates*, [1893] 3 Ch. 244, C. A.). A direction to resettle "hereditaments" which are already subject to a settlement extends to money held upon trust under the settlement for investment in land (*Basset* v. *St. Levan* (1894), 43 W. R. 165; *Re Gosselin, Gosselin* v. *Gosselin*, [1906] 1 Ch. 120).

(*h*) *Lingen* v. *Sowray* (1711), 1 P. Wms. 172; *Disher* v. *Disher* (1712), 1 P. Wms. 204; *Chaplin* v. *Horner* (1718), 1 P. Wms. 483; *Scudamore* v. *Scudamore* (1720), Prec. Ch. 543; *Edwards* v. *Warwick* (*Countess*) (1723), 2 P. Wms. 171; see *Knights* v. *Atkyns* (1687), 2 Vern. 20. Where the money is to be paid by the ancestor, and before his death the trusts which require investment in land are exhausted, a different principle comes in; the money is "at home" in the lifetime of the ancestor, and the equity of the heir to take it as land does not arise; see p. 116, *post*.

(*i*) Thus, if in his will a testator describes a fund as so much money agreed to be laid out in land, it will pass as personal estate (*Cross* v. *Addenbroke* (1719), cited in note to *Lechmere* v. *Carlisle* (*Earl*) (1733), 3 P. Wms. 211, 222). But it has been held that a devise by B. of a share in a specific estate taken by him under the will of A. will not pass the share if, under the will of A., it was converted (*Elliott* v. *Fisher* (1842), 12 Sim. 505), *sed quære;* and see *Re Pedder's Settlement* (1854), 5 De G. M. & G. 890, C. A.

(*k*) *Sweetapple* v. *Bindon* (1705), 2 Vern. 536; *Cunningham* v. *Moody* (1748), 1 Ves. Sen. 174, 176; *Dodson* v. *Hay* (1791), 3 Bro. C. C. 405; *Follett* v. *Tyrer* (1844), 14 Sim. 125.

(*l*) Formerly this was not so, probably because a widow was not dowable out of an equitable estate (*Cunningham* v. *Moody, supra; Crabtree* v. *Bramble* (1747), 3 Atk. 680, 687); and see p. 95, *ante*. But now that women are dowable out of equitable estates (Dower Act, 1833 (3 & 4 Will. 4, c. 105)), the rule may be taken to have been changed. The effect of the conversion of money into land, and *vice versâ*, was formerly important in regard to the liability of the property to debts of the deceased *cestui que trust* (*Whitwick* v. *Jermin* (undated), cited in *Baden* v. *Pembroke* (*Earl*) (1688), 2 Vern. 52, 58; and see cases cited in 1 White & Tud. L. C., 7th ed., at p. 334); but now that land is liable for both specialty and simple contract debts the result of conversion is not important. The Intestates Estates Act, 1884 (47 & 48 Vict. c. 71), s. 4, appears to have similarly abolished the old rule that the court would not treat money as land where the Crown would take by escheat (*Walker* v. *Denne* (1793), 2 Ves. 170, 185; *Henchman* v. *A.-G.* (1834), 3 My. & K. 485, 494; see *Taylor* v. *Haygarth* (1844), 14 Sim. 8). On the other hand, money which would, as such, have been forfeitable, prior to the Forfeiture Act, 1870 (33 & 34 Vict. c. 23), to the Crown on conviction of felony was saved by a theoretical conversion into land (*Re Harrop's Estate* (1857), 3 Drew. 726).

(*m*) *Beauclerk* v. *Mead* (1741), 2 Atk. 167; *Hutcheon* v. *Mannington* (1791), 1 Ves. 366. Hence actual conversion gives no fresh title to the proceeds of land as personalty (*Re Bacon, Toovey* v. *Turner*, [1907] 1 Ch. 475, 481).

(*n*) *Griffith* v. *Ricketts, Griffith* v. *Lunell* (1849), 7 Hare, 299, 311; *Clarke* v.

SECT. 2. Conversion.

a period is expressly fixed within which the sale is to be made (*o*); or although the trustees are directed to sell when it shall appear advantageous (*p*), or when the sale shall be for the benefit of the *cestui que trust* (*q*); or although the sale is not to take place till the happening of a future event (*r*), such as the death of a tenant for life (*s*). If, however, the future event is contingent, the conversion does not take place until the contingency is ascertained (*t*). In the event of a postponement of the actual sale of land after the time when it is to be deemed to take place, the intermediate rents and profits go to the person entitled to the income of the proceeds of sale (*u*).

Total or partial failure of purpose of conversion.

122. The purposes for which a conversion is directed by will may fail either wholly or partially, and then, upon the assumption that the conversion was directed for these purposes only (*a*), equity will treat the property, so far as the purposes fail, as reconverted; and if it was originally land, will give it to the heir-at-law (*b*); and if it was originally money, will give it to the next of kin (*c*). And this is so whether conversion has actually taken place or not (*d*), and although the real and personal estate have been blended so as to

Franklin (1858), 4 K. & J. 257, 263; unless the deed shows an intention that the property shall remain in its existing state until a future event (*Wheldale* v. *Partridge* (1803), 8 Ves. 227, 236).

(*o*) *Pearce* v. *Gardner* (1852), 10 Hare, 287.

(*p*) *Robinson* v. *Robinson* (1854), 19 Beav. 494.

(*q*) *Doughty* v. *Bull* (1725), 2 P. Wms. 320; *Re Raw, Morris* v. *Griffiths* (1884), 26 Ch. D. 601.

(*r*) *Tily* v. *Smith* (1844), 1 Coll. 434.

(*s*) *Clarke* v. *Franklin* (1858), 4 K. & J. 257; *Stead* v. *Newdigate* (1817), 2 Mer. 521.

(*t*) *Ward* v. *Arch* (1846), 15 Sim. 389.

(*u*) *Casamajor* v. *Strode* (1809), 19 Ves. 390, n.; *Fitzgerald* v. *Jervoise* (1820), 5 Madd. 25; *Re Searle, Searle* v. *Baker*, [1900] 2 Ch. 829. As to intermediate income generally where conversion is postponed, see *Howe* v. *Dartmouth* (*Earl*), *Howe* v. *Aylesbury* (*Countess*) (1802), 7 Ves. 137; 1 White & Tud. L. C., 7th ed., p. 68; and titles EXECUTORS AND ADMINISTRATORS; TRUSTS AND TRUSTEES.

(*a*) *Hill* v. *Cock* (1813), 1 Ves. & B. 173, *per* Lord ELDON, L.C., at p. 175.

(*b*) *Ackroyd* v. *Smithson* (1780), 1 Bro. C. C. 503; 1 White & Tud. L.C., 7th ed., p. 372; *Robinson* v. *Taylor* (1789), 2 Bro. C. C. 589; *Chitty* v. *Parker* (1793), 2 Ves. 271; *Berry* v. *Usher* (1805), 11 Ves. 87; *Roberts* v. *Walker* (1830), 1 Russ. & M. 752; and the principle applies also to money which is in equity theoretically land, and which is subject to a devise on trust for sale (*Re Taylor's Settlement* (1852), 9 Hare, 596, 604). The failure of the trusts may be by reason of the death of a legatee or devisee in the lifetime of the testator (*Ackroyd* v. *Smithson, supra*); or of a legatee or devisee failing to obtain a vested interest (*Jessopp* v. *Watson* (1833), 1 My. & K. 665); or of a disposition being illegal, as where it infringes the Mortmain Act (*Jones* v. *Mitchell* (1823), 1 Sim. & St. 290; *Hopkinson* v. *Ellis* (1846), 10 Beav. 169, 174, 175); or the Accumulations Act, 1800 (39 & 40 Geo. 3, c. 98) (*Eyre* v. *Marsden* (1838), 2 Keen, 564; *Simmons* v. *Pitt* (1873), 8 Ch. App. 978; *Re Perkins, Brown* v. *Perkins* (1909), 101 L. T. 345); or where the surplus of the proceeds of sale is undisposed of (*Naismith* v. *Boyes*, [1899] A. C. 495).

(*c*) *Cogan* v. *Stephens* (1835), 5 L. J. (CH.) 17. Before this case, while it was admitted that personalty directed to be laid out in land resulted to the next of kin on a total failure of the purposes of conversion, it was doubted whether the next of kin would take on a partial failure (see judgment of Lord COTTENHAM, M.R.).

(*d*) In *Ackroyd* v. *Smithson, supra*, the land had been sold; compare *Bective* v. *Hodgson* (1864), 10 H. L. Cas. 656, *per* Lord WESTBURY, L.C., at p. 667.

form a mixed fund (*e*). The testator, foreseeing this result, may avoid it, if he so chooses, by directing that the conversion shall be not only for the primary purposes of his will, but shall be absolute, and shall prevail as between the heir and the next of kin (*f*): but to effect this, it is not sufficient, in the case of land directed to be converted, merely to exclude the heir—there must be an actual gift of the proceeds in favour of the next of kin; and, similarly, in the case of money directed to be laid out in land, there must, to exclude the next of kin, be a gift of the land in favour of the heir (*g*). Where the income only of the proceeds of sale is disposed of, there is a resulting trust of the capital in favour of the heir (*h*); and similarly the heir takes income which is undisposed of (*i*).

Character in which property results on failure of purposes of conversion under will.

123. When, upon the failure of the purposes for which a conversion is directed by will, the heir or the next of kin, as the case may be, takes the property, it may become necessary to ascertain whether it is taken by the one or the other as real or personal estate. Here, again, the result does not depend upon whether there has been an actual conversion or not, but on whether there has been a total or only a partial failure of the purposes for which conversion was directed. If, before the death of the testator, these purposes have wholly failed, the need for conversion has gone, and if there is an actual conversion it is improper and should not affect the rights of the heir or the next of kin (*j*). Hence, in the case of land directed to be turned into money, the heir-at-law takes the property, whatever its form, as real estate, and, unless otherwise disposed of, it will descend to his heir-at-law; and, similarly, in the case of money directed to be laid out in land, the next of kin will take it, whatever its form, as personal estate (*k*).

Total failure.

Partial failure.

If, however, there has been at the death of the testator only a partial failure of the purposes for which conversion was directed, the result is different. The trust for conversion becomes operative, and though, so far as the purposes fail, land directed to be sold goes to the heir-at-law, yet he takes it as personal estate (*l*), whether it has been actually sold or not (*m*); and, similarly, money directed

(*e*) *Ackroyd* v. *Smithson* (1780), 1 Bro. C. C. 503; 1 White & Tud. L. C., 7th ed., p. 372; *Jessopp* v. *Watson* (1833), 1 My. & K. 665. Where debts and legacies are payable out of the mixed fund, the converted land must bear its rateable proportion before the reconversion takes effect (*Tench* v. *Cheese* (1855), 6 De G. M. & G. 453, 467, C. A.; *Allan* v. *Gott* (1872), 7 Ch. App. 439, 445).

(*f*) 1 Jarman on Wills, 5th ed., 530; see cases collected in note to *Cruse* v. *Barley* (1727), 3 P. Wms. 19, 22.

(*g*) *Fitch* v. *Weber* (1848), 6 Hare, 145; see *Berry* v. *Usher* (1805), 11 Ves. 87.

(*h*) *Wilson* v. *Major* (1805), 11 Ves. 205; *Watson* v. *Hayes* (1839), 5 My. & Cr. 125.

(*i*) *Eyre* v. *Marsden* (1838), 2 Keen, 564; *Re Perkins, Brown* v. *Perkins* (1909), 101 L. T. 345.

(*j*) *Davenport* v. *Coltman* (1842), 12 Sim. 588, 610.

(*k*) *Smith* v. *Claxton* (1820), 4 Madd. 484, *per* LEACH, V.-C., at p. 493; *Bagster* v. *Fackerell* (1859), 26 Beav. 469; *Buchanan* v. *Harrison* (1861), 1 John. & H. 662.

(*l*) *Smith* v. *Claxton, supra*; *Jessopp* v. *Watson, supra*; *A.-G.* v. *Lomas* (1873), L. R. 9 Exch. 29.

(*m*) *Re Richerson, Scales* v. *Heyhoe*, [1892] 1 Ch. 379.

SECT. 2. **Conversion.**

to be laid out in land goes to the next of kin as real estate, whether land has been actually purchased or not (*n*).

Where conversion directed by deed.

Where there is a total or partial failure of the purposes of a conversion directed by deed the principle is the same, but it has to be applied with reference to the time from which the deed operates. A will speaks from the death of the testator; a deed from the time of delivery. Hence the property not required for the stated objects results to the settlor himself, and not to his heir-at-law or next of kin (*o*); and if there is a total failure of the purposes, it results to him, in the case of land to be turned into money, as realty, which, if he has died without disposing of it, passes to his heir-at-law (*p*); if there is a partial failure, it results to him as personalty (*q*). Similarly, money directed to be laid out in land results to the settlor, on a total failure of the purposes of conversion, as personalty, and on a partial failure, as realty (*r*).

Conversion by contract of sale.

124. The doctrine of conversion applies where land is agreed to be sold, and from the date when the contract becomes binding the land is treated for purposes of testamentary disposition and of devolution as personalty. In ordinary cases the signing of the contract marks the date of this conversion (*s*). Special considerations arise where land is taken under the Lands Clauses Consolidation Act, 1845 (*t*), or where it is purchased under an option of purchase conferred by agreement. Where land is taken under that Act the notice to treat does not create a contract (*a*); but as soon as the purchase price has been ascertained, whether by agreement, by arbitration, or by a jury, a contract arises by virtue of the statute (*b*); and if this is done in the landowner's lifetime, the proceeds of sale pass as personalty, but the rents accruing between his death and completion belong to the devisee or heir (*c*).

Under Lands Clauses Consolidation Act.

(*n*) *Curteis* v. *Wormald* (1878), 10 Ch. D. 172, C. A., overruling *Head* v. *Godlee*, *Reynolds* v. *Godlee* (1859), John. 536, 583; see also *Cogan* v. *Stephens* (1835), 5 L. J. (CH.) 17.

(*o*) *Griffith* v. *Ricketts*, *Griffith* v. *Lunell* (1849), 7 Hare, 299, 311.

(*p*) *Ripley* v. *Waterworth* (1802), 7 Ves. 425, 435.

(*q*) *Hewitt* v. *Wright* (1780), 1 Bro. C. C. 86; *Clarke* v. *Franklin* (1858), 4 K. & J. 257; see *Van* v. *Barnett* (1812), 19 Ves. 102; *Biggs* v. *Andrews* (1832), 5 Sim. 424.

(*r*) See *Wheldale* v. *Partridge* (1803), 8 Ves. 227, 236; *Clarke* v. *Franklin*, *supra*, at pp. 264, 265.

(*s*) See p. 98, *ante*. If the heir adopts and carries out a parol contract of his ancestor, this avoids any objection based on the Statute of Frauds; the conversion is complete, and the purchase-money belongs to the next of kin (*Frayne* v. *Taylor* (1863), 10 Jur. (N. S.) 119); but otherwise an unenforceable contract does not effect a conversion (*Re Thomas*, *Thomas* v. *Howell* (1886), 34 Ch. D. 166). On the other hand, if it is enforceable, but goes off after the death of the vendor through the default of the purchaser, there is conversion (*Curre* v. *Bowyer* (1818), 5 Beav. 6, n.; see *Broom* v. *Monck* (1805) 10 Ves. 597).

(*t*) 8 & 9 Vict. c. 18; see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 66.

(*a*) *Haynes* v. *Haynes* (1861), 1 Drew. & Sm. 426, 450.

(*b*) *Harding* v. *Metropolitan Rail. Co.* (1872), 7 Ch. App. 154, 158; see *Regent's Canal Co.* v. *Ware* (1857), 23 Beav. 575; and compare *Morgan* v, *Milman* (1853), 3 De G. M. & G. 24, C. A.

(*c*) *Ex parte Hawkins* (1843), 13 Sim. 569; *Re Manchester and Southport Rail. Co.* (1854), 19 Beav. 365; *Watts* v. *Watts* (1873), L. R. 17 Eq. 217. But a compulsory sale of settled land does not effect a conversion (*Re Taylor's Settlement*

Under option of purchase.

Where an agreement confers an option of purchase, the exercise of the option converts the agreement into an agreement for sale, and the land itself is treated as converted from the date of the agreement, though the title to the intermediate rents and profits is not changed. Thus, if the vendor has died in the interval, the proceeds of sale do not belong to his devisee or heir, but pass as personal estate—in other words, the exercise of the option deprives the devisee or heir of the land without compensation (*d*); but he is not required to account for rents and profits received before the time for completion (*e*). The vendor may, however, either in the agreement (*f*) or in his will, indicate his intention that the owner at the date of the exercise of the option shall take the proceeds of sale; and where, after the land has been made subject to the option, he specifically devises it, the devise is construed as passing the proceeds of sale if the option is exercised (*g*).

Conversion under a power or by the court.

125. Although there is no imperative trust for conversion, yet there may be a disposition of the property under a power conferred by a settlor or testator, or otherwise existing. In such cases, if the disposition involves a change in the nature of the property, a conversion is effected upon the power being exercised (*h*); and the conversion is final, and the property belongs to the beneficial owner at the time of conversion in its altered form. Hence, though some of the purposes of the conversion fail, so that there is a surplus, this devolves upon the representatives of the owner in the altered form; and if it is the proceeds of sale of land, there is no equity in the heir to take the property as though it were land. This is equally the case whether the conversion is by a trustee under a power, or is in pursuance of an order of the court (*i*), including a sale in a

(1852), 9 Hare, 596); nor, apparently, of land of a lunatic (*Re Tugwell* (1884), 27 Ch. D. 309; *contra*, *Re East Lincolnshire Railway Act*, *Ex parte Flamank* (1851), 1 Sim. (N. S.) 260); or of an infant (*Kelland* v. *Fulford* (1877), 6 Ch. D. 491); unless the purchase-money is paid to trustees who are not bound to reinvest it in land (*Re Morgan*, *Smith* v. *May*, [1900] 2 Ch. 474).

(*d*) *Lawes* v. *Bennett* (1785), 1 Cox, Eq. Cas. 167, 171. The rule applies whether the vendor dies testate or intestate, and although the option is exercisable only after his death (*Re Isaacs*, *Isaacs* v. *Reginall*, [1894] 3 Ch. 506); see *Re Crofton* (1839), 1 I. Eq. R. 204; *Re Cousins*, *Alexander* v. *Cross* (1885), 30 Ch. D. 203, C. A.

(*e*) *Townley* v. *Bedwell* (1808), 14 Ves. 591; *Collingwood* v. *Row* (1857), 3 Jur. (N. S.) 785.

(*f*) *Re Graves Minors*, *Graves* v. *Graves* (1864), 15 I. Ch. R. 357.

(*g*) *Drant* v. *Vause* (1842), 1 Y. & C. Ch. Cas. 580; *Emuss* v. *Smith* (1848), 2 De G. & Sm. 722. Where the agreement follows the will containing the specific devise, the devise is not saved (*Farrar* v. *Winterton* (*Earl*) (1842), 5 Beav. 1; *Weeding* v. *Weeding* (1861), 1 John. & H. 424); but where the will was confirmed by a codicil made on the same day as the agreement, the devise was held to carry the proceeds of sale (*Re Pyle*, *Pyle* v. *Pyle*, [1895] 1 Ch. 724).

(*h*) *Re Dyson*, *Challinor* v. *Sykes*, [1910] 1 Ch. 750. The power must, of course, be still in existence (*Re Jump*, *Galloway* v. *Hope*, [1903] 1 Ch. 129).

(*i*) *Steed* v. *Preece* (1874), L. R. 18 Eq. 192, *per* JESSEL, M.R., at p. 197: "If a conversion is rightfully made, whether by the court or a trustee, all the consequences of a conversion must follow; and there is no equity in favour of the heir or anyone else to take the property in any other form than that in which it is found"; *Hyett* v. *Mekin* (1884), 25 Ch. D. 735. This *dictum* is opposed to *Jermy* v. *Preston* (1842), 13 Sim. 356; and *Cooke* v. *Dealey* (1855), 22 Beav. 196; but was approved in *Burgess* v. *Booth*, [1908] 2 Ch. 648, C. A.

SECT. 2. Conversion.

partition action (*k*). Consequently, where the court sells the estate of an adult (*l*), or of an infant (*m*), or of a lunatic (*n*), the property is converted out and out—the conversion taking effect from the date of the order (*o*)—and there is no reconversion of any proceeds of sale not required for the purpose of the order; except in the case of a person under disability, where the sale is made under the Partition Acts, 1868 and 1876 (*p*), and the money is not paid out of court to trustees (*q*). And it is the same where a mortgagee sells under his power of sale, during the lifetime of the mortgagor. Upon the death of the mortgagor without having received the surplus, there is no equity in the heir to have the surplus reconverted, notwithstanding that the mortgage contains a trust for payment of the surplus to the mortgagor, his heirs and assigns (*r*). But if the land is sold after the mortgagor's death, the surplus belongs to the heir or devisee (*s*), notwithstanding that the trust is for payment to the mortgagor, his executors and administrators (*t*).

Election to reconvert.

126. When property which is subject to a trust for conversion is vested, as regards the beneficial interest, in an absolute owner, he is entitled to take the property in its actual state, free from the trust for conversion; but he must indicate his election (*u*) to take the property in this manner. Such election operates to put an end to the theoretical conversion of the property; or, in other words, it effects a reconversion (*a*). But it is enough if the party shows an

(*k*) *Re Dodson, Yates* v. *Morton*, [1908] 2 Ch. 638.

(*l*) *Arnold* v. *Dixon* (1874), L. R. 19 Eq. 113.

(*m*) *Burgess* v. *Booth*, [1908] 2 Ch. 648, C. A., disapproving of *Scott* v. *Scott* (1882), 9 L. R. Ir. 367; see *Dyer* v. *Dyer* (1865), 34 Beav. 504. But the proceeds of timber on settled land may retain the character of real estate (*Field* v. *Brown, Smith* v. *Brown* (1859), 27 Beav. 90).

(*n*) *Ex parte Bromfield* (1792), 1 Ves. 453; *Oxenden* v. *Compton* (*Lord*) (1793), 2 Ves. 69; *Ex parte Phillips* (1812), 19 Ves. 118; *Hartley* v. *Pendarves*, [1901] 2 Ch. 498.

(*o*) *Burgess* v. *Booth, supra*; *Arnold* v. *Dixon, supra*.

(*p*) 31 & 32 Vict. c. 40; 39 & 40 Vict. c. 17. This is under s. 8 of the Act of 1868; *Foster* v. *Foster* (1875), 1 Ch. D. 588; and *Mildmay* v. *Quicke* (1877), 6 Ch. D. 553; see *Mordaunt* v. *Benwell* (1881), 19 Ch. D. 302.

(*q*) *Re Morgan, Smith* v. *May*, [1900] 2 Ch. 474; on the ground that the trustees are "absolutely entitled"; see *Re Hobson's Trusts* (1878), 7 Ch. D. 708, C. A. But if the beneficiary dies before payment, the money goes to his heir-at-law as money (*Mordaunt* v. *Benwell, supra*).

(*r*) *Re Grange, Chadwick* v. *Grange*, [1907] 2 Ch. 20, C. A.; and *à fortiori* if the direction is for payment to the executors (*Re Underwood* (1857), 3 K. & J. 745).

(*s*) *Bourne* v. *Bourne* (1842), 2 Hare, 35; see *Re Cooper's Trusts, Ex parte Sparks* (1853), 4 De G. M. & G. 757, C. A.

(*t*) *Wright* v. *Rose* (1825), 2 Sim. & St. 323.

(*u*) The election here referred to is an incident of the doctrine of conversion. It must be distinguished from the election between two properties or benefits, which is treated subsequently; see p. 116, *post*.

(*a*) *Cookson* v. *Cookson* (1845), 12 Cl. & Fin. 121, H. L., *per* Lord COTTENHAM, at p. 146; see *Pearson* v. *Lane* (1809), 17 Ves. 101, *per* GRANT, M.R., at p. 104; *Ashby* v. *Palmer* (1816), 1 Mer. 296. When a mortgagee in possession dies while the statute is running in his favour, the mortgage debt and land devolves as personalty. But so soon as the statute has run, the land vests as realty in the persons beneficially entitled to the mortgage debt, and no case for election arises (*Re Loveridge, Pearce* v. *Marsh*, [1904] 1 Ch. 518).

intention to take the property in its actual state, and it is immaterial whether he knows or does not know that, but for some election by him, the trust property, if money, would be turned into land, or if land would become money (*b*).

Several owners.

Where the beneficial title to land subject to a trust for conversion is vested in several persons, there can be no reconversion unless all concur (*c*). Each is entitled to share in the enhanced price which the sale of the entirety of the estate might produce. But the same reason does not apply where several persons are entitled to money to be laid out in land, and anyone can elect to take his share of the money unconverted (*d*).

Remainderman.

A remainderman can elect to take property unconverted, and his election will be operative if the property is still in fact unconverted when his interest falls into possession; this is so, whether he is entitled to a vested (*e*), or to a contingent remainder (*f*). But there can be no final reconversion except by direction of the persons absolutely entitled (*g*).

Tenant in tail.

Under the old law a tenant in tail could bar his own issue by a fine levied either in vacation time or in term, and, if there were no remainders in the way, money in court liable to be invested in land was paid out to him without actual fine levied (*h*); but if there were remainders, it was necessary that they should be barred by recovery before he could elect as against them to take the money in specie (*i*). Under the Fines and Recoveries Act (*j*), 1833, the purpose of a recovery is effected by a disentailing deed, by which the tenant in tail can elect both as to land to be converted into money and money to be

(*b*) *Harcourt* v. *Seymour* (1851), 2 Sim. (N. S.) 12, 46.

(*c*) *Holloway* v. *Radcliffe* (1857), 23 Beav. 163; *Biggs* v. *Peacock* (1882), 22 Ch. D. 284, C. A.; *Re Tweedie and Miles* (1884), 27 Ch. D. 315; *Re Douglas and Powell's Contract*, [1902] 2 Ch. 296, 312; and consequently a trust for sale continues until there has been an election to reconvert by all the absolute owners; compare *Re Jenkins and H. E. Randall & Co.'s Contract*, [1903] 2 Ch. 362. As to the duration of a power of sale, compare *Trower* v. *Knightley* (1821), Madd. & G. 134; *Peters* v. *Lewes and East Grinstead Rail. Co.* (1881), 18 Ch. D. 429, C. A.; *Re Cotton's Trustees and London School Board* (1882), 19 Ch. D. 624; *Re Sudeley (Lord) and Baines & Co.*, [1894] 1 Ch. 334; *Re Jump, Galloway* v. *Hope*, [1903] 1 Ch. 129; *Talbot* v. *Scarisbrick*, [1908] 1 Ch. 812. A power to postpone the sale is not put an end to by the vesting of a share in possession, so as to entitle the owner of the share to call either for an immediate sale or for a conveyance of an undivided share in the land (*Re Horsnaill, Womersley* v. *Horsnaill*, [1909] 1 Ch. 631).

(*d*) Since, if invested in land, he might the next moment turn it into money, "and equity, like nature, will do nothing in vain" (*Seeley* v. *Jago* (1717), 1 P. Wms. 389; *Walker* v. *Denne* (1793), 2 Ves. 170, 182). And this appears to be so where the only persons interested, other than the absolute owner, are portioners; but if the only person so interested is a jointress, she is entitled to have the money laid out in land as security for the jointure rentcharge, and while this right lasts there is no reconversion (*Walrond* v. *Rosslyn*, *Walrond* v. *Fulford* (1879), 11 Ch. D. 640).

(*e*) See *Crabtree* v. *Bramble* (1747), 3 Atk. 680.

(*f*) *Meek* v. *Devenish* (1877), 6 Ch. D. 566.

(*g*) *Sisson* v. *Giles* (1863), 3 De G. J. & Sm. 614.

(*h*) *Benson* v. *Benson* (1710), 1 P. Wms. 130; *Short* v. *Wood* (1718), 1 P. Wms. 470.

(*i*) *Cunningham* v. *Moody* (1748), 1 Ves. Sen. 174; or it was sufficient to obtain the consent of the remaindermen (*Trafford* v. *Boehm* (1746), 3 Atk. 440).

(*j*) 3 & 4 Will. 4, c. 74.

SECT. 2. Conversion.

laid out in land (*k*). Accordingly money in court under the Lands Clauses Consolidation Act, 1845 (*l*), will not be paid out to a tenant in tail as a person absolutely entitled until he has executed a disentailing deed (*m*).

Persons under disability.

Infant.

Lunatic.

127. The person electing must be *sui juris*, and hence an infant cannot elect either to take money which is subject to conversion into land (*n*), or land which is subject to conversion into money (*o*); but the court, upon finding that it is for his benefit, will elect on his behalf (*p*). Similarly a lunatic cannot elect (*q*), but the court can elect on his behalf (*r*).

Married woman.

128. A married woman can elect as to money or land subject to conversion, where her interest in the converted property is her separate estate (*s*). If she is entitled to the proceeds of sale of land as non-separate property, this confers on her an "estate" in the land within the Fines and Recoveries Act, 1833 (*t*), and she can elect to take the land unconverted by deed acknowledged in which her husband concurs (*a*); if she is entitled to money subject to be laid out in land, she can elect in the same way, the section expressly applying to money subject to be invested in land (*b*). Where money is in court in a partition action (*c*), or under the Lands Clauses Consolidation Act, 1845 (*d*), and a married woman is absolutely entitled, it is *primâ facie* subject to reinvestment in land; but it will be paid out to her either on a deed acknowledged or on her separate examination in court (*e*), unless it is her separate property, when it will be paid out to her on her mere receipt.

(*k*) Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), s. 71.

(*l*) 8 & 9 Vict. c. 18.

(*m*) *Re Broadwood's Settled Estates* (1875), 1 Ch. D. 438; *Re Reynolds* (1876), 3 Ch. D. 61, C. A.

(*n*) *Seeley* v. *Jago* (1717), 1 P. Wms. 389; *Earlom* v. *Saunders* (1754), Amb. 241; *Carr* v. *Ellison* (1786), 2 Bro. C. C. 56; *Re Harrop's Estate* (1857), 3 Drew. 726.

(*o*) *Van* v. *Barnett* (1812), 19 Ves. 102, 109.

(*p*) *Robinson* v. *Robinson* (1854), 19 Beav. 494.

(*q*) *Ashby* v. *Palmer* (1816), 1 Mer. 296; *Re Wharton* (1854), 5 De G. M. & G. 33, C. A.; *Re Jump, Galloway* v. *Hope*, [1903] 1 Ch. 129.

(*r*) See *Re Douglas and Powell's Contract*, [1902] 2 Ch. 296; and compare *A.-G.* v. *Ailesbury (Marquis)* (1887), 12 App. Cas. 672.

(*s*) *Sharp* v. *St. Sauveur* (1871), 7 Ch. App. 343; *Re Davidson, Martin* v. *Trimmer, Davidson* v. *Trimmer* (1879), 11 Ch. D. 341, C. A.

(*t*) 3 & 4 Will. 4, c. 74, s. 77.

(*a*) See *ibid.*, s. 1; *Briggs* v. *Chamberlain* (1853), 11 Hare, 69; *Tuer* v. *Turner* (1855), 20 Beav. 560; see *Miller* v. *Collins*, [1896] 1 Ch. 576, C. A.; see, generally, title HUSBAND AND WIFE.

(*b*) Formerly she could elect on examination in court; or sometimes a sham purchase was made, and she then disposed of the land by fine (*Oldham* v. *Hughes* (1742), 2 Atk. 452, 453, 454).

(*c*) *Standering* v. *Hall* (1879), 11 Ch. D. 652; *Wallace* v. *Greenwood* (1880), 16 Ch. D. 362.

(*d*) 8 & 9 Vict. c. 18.

(*e*) *Re Tyler's Estate* (1860), 8 W. R. 540; *Re Hayes* (1861), 9 W. R. 769; *Re Robins' Estate* (1879), 27 W. R. 705; *Standering* v. *Hall, supra*; *Tennent* v. *Welch* (1888), 37 Ch. D. 622. As to payment out of small sums without these formalities, see *Knapping* v. *Tomlinson, Knapping* v. *Bannester* (1870), 18 W. R. 684; *Guest* v. *Neames*, [1884] W. N. 227.

Implied election to retain land.

129. An election to take property in its unconverted state may be express, and it is then effectual though by parol (*f*); or it may be presumed from circumstances (*g*), and slight circumstances are sufficient to show an intention to elect (*h*). In the case of land this intention will be presumed where the person entitled is in possession and retains the land for a considerable time (*i*); especially if he lays out money on the land (*k*), or pays off a charge on it (*l*), or takes possession of the title deeds (*m*), or otherwise deals with it as owner, as by granting a lease (*n*), or entering into an agreement for partition (*o*). But it has been held that two years is too short a time to raise the presumption (*p*). Where a trustee for sale is also the remainderman, and the object of the trust—*e.g.*, the payment of debts—has been answered without recourse to the land, an intention to reconvert may be inferred from his keeping the land unsold for a long time (*q*). But a person entitled under the same will to the proceeds of lands in possession, and of lands in remainder, does not, by showing an intention to reconvert the former, necessarily show also an intention to reconvert the latter (*r*). A devise of the property, describing it specifically as land at a particular place, will effect a reconversion (*s*).

Implied election to retain personalty.

130. Where personalty is subject to be invested in land, the mere receipt of the income from the personalty investments, though for a considerable time, does not raise a presumption of election to take the property unconverted (*t*). But if the beneficiary absolutely entitled receives payment of the capital money, it is in his hands to do as he likes with, and it is discharged from any trust for conversion. In such circumstances it is said to be

(*f*) *Edwards* v. *Warwick (Countess)* (1723), 2 P. Wms. 171; *Chaloner* v. *Butcher* (1736), cited 3 Atk. 685; *Pulteney* v. *Darlington (Earl)* (1783), 1 Bro. C. C. 223, 236; *Wheldale* v. *Partridge* (1803), 8 Ves. 227, 236; *contra, Bradish* v. *Gee* (1754), Amb. 229.

(*g*) *Harcourt* v. *Seymour* (1851), 2 Sim. (N. S.) 12, 45.

(*h*) *Pulteney* v. *Darlington (Earl)*, *supra*; *Van* v. *Barnett* (1812), 19 Ves. 102, 109.

(*i*) *Ashby* v. *Palmer* (1816), 1 Mer. 296, 301; *Dixon* v. *Gayfere* (No. 2), *Fluker* v. *Gordon* (1853), 17 Beav. 433; *Re Gordon, Roberts* v. *Gordon* (1877), 6 Ch. D. 531; *Re Davidson, Martin* v. *Trimmer, Davidson* v. *Trimmer* (1879), 11 Ch. D. 341, C. A.

(*k*) *Griesbach* v. *Fremantle* (1853), 17 Beav. 314; *Mutlow* v. *Bigg* (1875), 1 Ch. D. 385, C. A.

(*l*) *Re Davidson, Martin* v. *Trimmer, Davidson* v. *Trimmer*, *supra*.

(*m*) *Davies* v. *Ashford* (1845), 15 Sim. 42; *Potter* v. *Dudeney* (1887), 56 L. T. 395.

(*n*) *Mutlow* v. *Bigg*, *supra*; *Re Gordon, Roberts* v. *Gordon*, *supra*; *contra*, if the lease contains an option to purchase (*Re Lewis, Foxwell* v. *Lewis* (1885), 30 Ch. D. 654).

(*o*) *Sharp* v. *St. Sauveur* (1871), 7 Ch. App. 343.

(*p*) *Kirkman* v. *Miles* (1807), 13 Ves. 338; compare *Brown* v. *Brown* (1864), 33 Beav. 399.

(*q*) *Smith* v. *Gumbleton* (1909), 54 Sol. Jo. 181.

(*r*) *Meredith* v. *Vick* (1857), 23 Beav. 559.

(*s*) *Sharp* v. *St. Sauveur*, *supra*; *Meek* v. *Devenish* (1877), 6 Ch. D. 566, 573.

(*t*) *Gillies* v. *Longlands* (1851), 4 De G. & Sm. 372; *Re Pedder's Settlement* (1854), 5 De G. M. & G. 890, C. A.

SECT. 2. Conversion.

"at home," and passes in its actual state if the recipient dies without disposing of it; the former trust for conversion being no longer operative, there is no equity in favour of the heir as against the personal representative (*a*).

Where money "at home."

Similarly, where a settlor has covenanted to pay money to be laid out in the purchase of land, and the land, if purchased, would, in his lifetime and in the events that happen, belong to him in fee simple, the money due under the covenant is at home, the covenant is discharged, and, on his death, the heir cannot call upon the personal representative to find the money and pay it to him as land (*b*). Without actual receipt of money subject to a trust for conversion, the beneficiary may refer to or deal with it in such a way as to show that he regards it as personalty, and he will then be deemed to have elected to take it as such, as where he includes it in a statement of his personal property (*c*), or describes it as money which he is entitled to receive (*d*).

Election implied from form of limitations.

131. An election as to the form in which property is to be taken may be shown by the nature of the limitations which the beneficiary imposes. Thus money to be invested in land, with an ultimate limitation to the heirs of the beneficiary, will be taken to be personalty if he invests it in trust for himself, his executors and administrators (*e*); and in the same way, a grant of a lease, with a reservation of rent to the grantor and his heirs, has been held to indicate an intention to take the property as land, notwithstanding that the reservation could hardly have been in any other form (*f*).

SECT. 3.—*Election.*

The doctrine of election.

132. Where a testator by his will purports to give property to A. which in fact belongs to B., and at the same time out of his own property confers benefits on B., the literal construction and application of the will would allow B. to keep his own property to the disappointment of A., and also to take the benefits given to him by the will. Equity, however, in such circumstances, introduces the principle that a man shall not accept and reject the same instrument, and B. is not allowed to take the full benefit given him by the will unless he is prepared to carry into effect the whole of the testator's dispositions (*g*). He is accordingly

(*a*) *Pulteney* v. *Darlington* (*Earl*) (1783), 1 Bro. C. C. 223; (1796), 7 Bro. Parl. Cas. 530; *Wheldale* v. *Partridge* (1803), 8 Ves. 227, 235; see *Bowes* v. *Shrewsbury* (*Earl*) (1758), 5 Bro. Parl. Cas. 144. In *Rich* v. *Whitfield* (1866), L. R. 2 Eq. 583, personalty, which was directed to be invested in land, vested absolutely, subject to a prior life interest, in a child who died on the day of her birth, and remained uninvested in land for over fifty years till the death of the tenant for life. It was held to have been reconverted.

(*b*) *Chichester* v. *Bickerstaff* (1693), 2 Vern. 295.

(*c*) *Harcourt* v. *Seymour* (1851), 2 Sim. (N. S.) 12.

(*d*) *Cookson* v. *Cookson* (1845), 12 Cl. & Fin. 121, H. L., affirming S. C. *sub nom. Cookson* v. *Reay* (1842), 5 Beav. 22.

(*e*) *Lingen* v. *Sowray* (1711), 1 P. Wms. 172.

(*f*) *Crabtree* v. *Bramble* (1747), 3 Atk. 680, 689.

(*g*) As to the doctrine of election, see note to *Dillon* v. *Parker* (1818), 1 Swan. 359, at p. 394.

put to his election to take either under the instrument or against it (*h*). If he elects to take under the will he is bound, and may be ordered (*i*), to convey his own property to A.; if he elects to take against the will and to keep his own property, and so disappoints A., then he cannot take any benefits under the will without compensating A. out of such benefits to the extent of the value of the property of which A. is disappointed (*k*). It follows that if B.'s property is such that it cannot be assigned—as where it consists of heirlooms—he is not put to his election (*l*).

The doctrine of election requires that there shall be a claim under the will and a claim dehors the will and adverse to it. It is not applied as between two clauses in the same will (*m*). It applies although part of the benefits in the testator's own property conferred by the will may fail (*n*). Where two wills of the same testator, disposing of different properties, form one complete scheme of testamentary disposition, a beneficiary electing against one will can only claim under the other on terms of paying compensation (*o*).

(*h*) *Birmingham* v. *Kirwan* (1805), 2 Sch. & Lef. 444, *per* Lord REDESDALE, L.C., at p. 449; *Codrington* v. *Lindsay* (1873), 8 Ch. App. 578, *per* Lord SELBORNE, L.C., at p. 587; *Cooper* v. *Cooper* (1874), L. R. 7 H. L. 53, *per* Lord CAIRNS, L.C., at p. 63, *per* Lord HATHERLEY, at p. 70; *Codrington* v. *Codrington* (1875), L. R. 7 H. L. 854, 861, varying S. C. *sub nom. Codrington* v. *Lindsay, supra;* see *Noys* v. *Mordaunt* (1706), 2 Vern. 581 and *Streatfield* v. *Streatfield* (1735), Cas. *temp.* Talb. 176, both in 1 White & Tud. L. C., 7th ed., pp. 414, 416; *Bor* v. *Bor* (1756), 3 Bro. Parl. Cas. 167; *Whistler* v. *Webster* (1794), 2 Ves. 367, 370; *Ker* v. *Wauchope* (1819), 1 Bli. 1, 21, H. L.; and see *Re Vardon's Trusts* (1884), 28 Ch. D. 124 (reversed (1885) 31 Ch. D. 275, C. A.), where the cases are collected; *Re Brooksbank, Beauclerk* v. *James* (1886), 34 Ch. D. 160, 163. The doctrine applies where a settlor with a limited power of revocation revokes in excess of the power, and while purporting to dispose of the interests which were not revocable gives benefits to the persons entitled to them under the settlement (*Coutts* v. *Acworth* (1870), L. R. 9 Eq. 519).

(*i*) *Blake* v. *Bunbury* (1792), 1 Ves. 514, 527; *Gretton* v. *Haward* (1819), 1 Swan. 409, 420.

(*k*) *Blake* v. *Bunbury, supra*, and, as reported, 4 Bro. C. C. 21; *Rancliffe* (*Lord*) v. *Parkyns* (*Lady*) (1818), 6 Dow, 149, 179, H. L.; *Gretton* v. *Haward, supra; Pickersgill* v. *Rodger* (1876), 5 Ch. D. 163. If the gift to A. fails through A. being unable to take, the effect will be to throw the subject of the gift into the residue, so that the residuary legatee profits by the election, and takes either B.'s property or compensation (*Re Brooksbank, Beauclerk* v. *James, supra*).

(*l*) *Re Chesham* (*Lord*), *Cavendish* v. *Dacre* (1886), 31 Ch. D. 466.

(*m*) *Wollaston* v. *King* (1869), L. R. 8 Eq. 165, *per* JAMES, V.-C., at p. 174. And the failure of a gift in a codicil owing to the legatee being an attesting witness, whereby the property passes to the legatee and others under the residuary gift in the will, does not raise a case of election (*Burton* v. *Newbery* (1875), 1 Ch. D. 234, 242; compare *Sheddon* v. *Goodrich* (1803), 8 Ves. 481, 497; *Bizzey* v. *Flight* (1876), 3 Ch. D. 269, 274). But where a legatee takes under the same will a beneficial legacy and an onerous legacy, and the two are intended to form one aggregate gift, he must accept or reject both (*Talbot* v. *Radnor* (*Earl*) (1834), 3 My. & K. 252; *Re Hotchkys, Freke* v. *Calmady* (1886), 32 Ch. D. 408, C. A.; *Frewen* v. *Law Life Assurance Society*, [1896] 2 Ch. 511; *Re Kensington* (*Baron*), *Longford* (*Earl*) v. *Kensington* (*Baron*), [1902] 1 Ch. 203, 207); but otherwise if the gifts can be construed as distinct (*Warren* v. *Rudall, Ex parte Godfrey* (1860), 1 John. & H. 1, 13; *Syer* v. *Gladstone* (1885), 30 Ch. D. 614).

(*n*) *Newman* v. *Newman* (1783), 1 Bro. C. C. 186.

(*o*) *Douglas-Menzies* v. *Umphelby*, [1908] A. C. 224, P. C.

SECT. 3. **Election.**

Election not dependent on testator's knowledge.

133. The application of the doctrine of election does not depend on whether or not the testator knows that he has no title to the property which he purports to dispose of. If he knows that it is another's, and gives that other benefits under the will, he may be supposed to intend to put that other to his election (*p*). But it is not necessary that the testator should have had in his mind the equitable principle of election (*q*). The principle equally applies where he is in error as to his power of disposition, and thinks that the property of which he purports to dispose is his own (*r*). The court does not speculate as to whether the testator would have made a different disposition had he known of his error, but takes the will as it is, and requires the beneficiaries to give effect to it (*s*).

Election under deeds.

134. The doctrine of election is most frequently applied to dispositions by will, but it applies equally to deeds and other instruments *inter vivos* (*t*). Thus, where a settlement purports to settle certain property, but is not effectual to do so, a person who claims that property adversely to the settlement cannot at the same time take advantage of other provisions of the settlement in his favour (*a*). Two ante-nuptial settlements of even date, one of realty and the other of personalty, have been held to be one settlement for the purpose of putting to his election a person whose property was affected by one, and who claimed a benefit under the other (*b*). It is doubtful whether the doctrine of election applies to a grant from the Crown (*c*).

(*p*) See *Wilkinson* v. *Dent* (1871), 6 Ch. App. 339, 341. In *Forrester* v. *Cotton* (1760), 1 Eden, 531, 535, it was said that the testator must know that he had no right to dispose of the lands, and that, knowing it, he takes upon himself to dispose of them. But this does not represent the accepted rule.

(*q*) *Cooper* v. *Cooper* (1874), L. R. 7 H. L. 53, 67; and the doctrine is not excluded by the fact that, as to other property, the testator has expressly required legatees to take their legacies in satisfaction of sums due to them (*Wilkinson* v. *Dent*, *supra*); though if it appears that the testator meant to confine election to a particular property, it will not extend to other property (*East* v. *Cook* (1750), 2 Ves. Sen. 30; see the explanation of this case in *Wilkinson* v. *Dent*, *supra*).

(*r*) *Walpole* v. *Conway* (*Lord*) (1740), Barn. (CH.) 153, 159; *Kirkham* v. *Smith*, (1749), 1 Ves. Sen. 258; *Swan* v. *Holmes* (1854), 19 Beav. 471, 477; *Wollaston* v. *King* (1869), L. R. 8 Eq. 165, 173; see *Welby* v. *Welby* (1813), 2 Ves. & B. 187, *per* GRANT, M.R., at p. 199.

(*s*) *Whistler* v. *Webster* (1794), 2 Ves. 367, 370; *Thellusson* v. *Woodford* (1806), 13 Ves. 209, 221.

(*t*) See *Codrington* v. *Lindsay* (1873), 8 Ch. App. 578, 587, where the cases on instruments of different kinds are collected; and see *Llewellyn* v. *Mackworth*, (1740), Barn. (CH.) 445; *Bigland* v. *Huddlestone* (1789), 3 Bro. C. C. 285, n.; *Cumming* v. *Forrester* (1820), 2 Jac. & W. 334, 345; *Mosley* v. *Ward* (1861), 29 Beav. 407; *Griffith-Boscawen* v. *Scott* (1884), 26 Ch. D. 358.

(*a*) *Anderson* v. *Abbott* (1857), 23 Beav. 457; *Willoughby* v. *Middleton* (1862), 2 John. & H. 344; *Brown* v. *Brown*, (1866), L. R. 2 Eq. 481. But where a person who himself takes no interest under the settlement, claims property comprised in, but not bound by, the settlement under a party to the settlement who takes a benefit under it, there is apparently no case of election (*Campbell* v. *Ingilby* (1856), 21 Beav. 567; affirmed on different grounds (1857), 1 De G. & J. 393, C. A.) see *Brown* v. *Brown*, *supra*; but compare the reference to *Campbell* v. *Ingilby*, *supra*, in *Codrington* v. *Lindsay*, *supra*, at p. 593.

(*b*) *Bacon* v. *Cosby* (1851), 4 De G. & Sm. 261.

(*c*) *Cumming* v. *Forrester* (1820), 2 Jac. & W. 334, 345. As to royal grants, see title CONSTITUTIONAL LAW, Vol. VI., pp. 479—483.

Election under exercise of power.

135. The doctrine of election applies to an erroneous exercise of a limited power of appointment, whereby property is appointed to a stranger, a benefit being at the same time conferred by the appointor out of his own property on an object of the power. The object of the power cannot claim this benefit and also exclude the stranger and take in default of appointment (*d*). There is no distinction between an invalid gift of property which a testator believed to be his own and an invalid gift of property which the testator knew not to be his own, but over which he erroneously believed he had a power of appointment (*e*). But where there has been a proper appointment to an object of the power, invalid modifications of the appointment are altogether void, and cannot be used to raise a case of election (*f*). And the doctrine of election is not available for curing illegality; hence an appointment to a stranger which is in its nature void for illegality—as where it infringes the rule against perpetuities—does not raise a case of election (*g*).

Scope of doctrine of election.

Heir-at-law.

136. The doctrine of election applies as between all kinds of property and interests in property, and as between all classes of persons claiming property. For the purposes of election no distinction can be drawn between personal estate and real estate, between specific and residuary devisees or legatees, or between legatees and next of kin of an intestate (*h*). And where a testator disposes in favour of another of land belonging to his heir-at-law,

(*d*) *Whistler* v. *Webster* (1794), 2 Ves. 367; and so where, under a power to appoint to children of one marriage, an appointment is made in favour of children of a second marriage (*White* v. *White* (1882), 22 Ch. D. 555); see also title POWERS.

(*e*) *Cooper* v. *Cooper* (1870), 6 Ch. App. 15, 20; *Re Brooksbank*, *Beauclerk* v. *James* (1886), 34 Ch. D. 160.

(*f*) *Carver* v. *Bowles* (1831), 2 Russ. & M. 301, 308; *Woolridge* v. *Woolridge* (1859), John. 63; consequently precatory words added to the appointment will not put the appointee to election (*Blacket* v. *Lamb* (1851), 14 Beav. 482; *Langslow* v. *Langslow* (1856), 21 Beav. 552; *Churchill* v. *Churchill* (1867), L. R. 5 Eq. 44; compare *Tomkyns* v. *Blane* (1860), 28 Beav. 422); unless the benefit conferred by the will is subject to forfeiture on non-compliance (*King* v. *King* (1864), 15 I. Ch. R. 479).

(*g*) *Re Nash*, *Cook* v. *Frederick*, [1910] 1 Ch. 1, 10, C. A., approving *Wollaston* v. *King* (1869), L. R. 8 Eq. 165; *Re Warren's Trusts* (1884), 26 Ch. D. 208; *Re Handcock's Trusts* (1889), 23 L. R. Ir. 34, C. A.; *Re Oliver's Settlement*, *Evered* v. *Leigh*, [1905] 1 Ch. 191; *Re Beales' Settlement*, *Barrett* v. *Beales*, [1905] 1 Ch. 256; *Re Wright*, *Whitworth* v. *Wright*, [1906] 2 Ch. 288; and overruling *Re Bradshaw*, *Bradshaw* v. *Bradshaw*, [1902] 1 Ch. 436.

(*h*) *Cooper* v. *Cooper*, *supra*, at p. 21; see *Kirkham* v. *Smith* (1749), 1 Ves. Sen. 258, 260; *Webb* v. *Shaftesbury* (*Earl*), *Shaftesbury* (*Earl*) v. *Arrowsmith* (1802). 7 Ves. 480, 488; and compare *McDonald* v. *McDonald* (1875), L. R. 2 Sc. & Div. 482. The doctrine applies to copyholds (*Highway* v. *Banner* (1785), 1 Bro. C. C. 584; *Frank* v. *Standish* (1772), 1 Bro. C. C. 588, n.). It was the rule that creditors in whose favour a devise in trust for payment of their debts had been made could not be put to their election between their remedies under the will and outside the will (*Kidney* v. *Coussmaker* (1806), 12 Ves. 136, 154); but now that creditors have their remedy against all assets, the doctrine is obsolete. And the doctrine applies where a testator purports to release a debt due to a third party upon whom he confers a benefit (*Synge* v. *Synge* (1874), 9 Ch. App. 128).

SECT. 3. **Election.**

and devises land of his own to the heir-at-law, the heir is put to his election (*i*).

(*i*) Formerly the heir-at-law took nothing under such a devise, because he took the devised land by his better title as heir-at-law. But though strictly he derived no benefit under the will, yet the mere intention of the testator was held to put him to his election (*Welby* v. *Welby* (1813), 2 Ves. & B. 187; *Thellusson* v. *Woodford* (1806), 13 Ves. 209, 224; *Schroder* v. *Schroder* (1854), Kay, 578). Under the Inheritance Act, 1833 (3 & 4 Will. 4, c. 106), s. 3, the heir in such a case now takes as devisee.

Similar questions arose (1) where a devise of real estate was ineffectual because the will was not properly attested, though effectual to pass personal estate; (2) where, in a devise of a copyhold estate, the estate had not been surrendered to the use of the will; and (3) where the testator purported to dispose of property belonging to him at his death, though not at the date of the will. In the first case the heir, if a legacy was bequeathed to him, was not bound to elect between the legacy and the estate which, through failure of the devise, he took as heir-at-law. This was upon the ground that the will could not be read as to the devise (*Sheddon* v. *Goodrich* (1803), 8 Ves. 481, 497; *Gardiner* v. *Fell* (1819), 1 Jac. & W. 22). But if the will contained an express direction that anyone who disputed it should forfeit all benefits under it, the heir was put to his election (*Boughton* v. *Boughton* (1750), 2 Ves. Sen. 12); see *Wilson* v. *Wilson* (1847), 1 De G. & Sm. 152. This case can no longer arise, since the same attestation is now required for wills of real and of personal estate (Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 9). In the case of a devise of copyhold lands not surrendered to the uses of the will, and of after-acquired lands, there was no technical objection to reading the will, and the heir-at-law was put to his election between these lands, which devolved on him by descent, and any benefit given him by the will; see as to copyholds, *Frank* v. *Standish* (1772), 1 Bro. C. C. 588, n.; *Pettiward* v. *Prescott* (1802), 7 Ves. 541, and as to after-acquired lands, *Thellusson* v. *Woodford*, *supra*, affirmed *sub nom. Rendlesham* v. *Woodford* (1813), 1 Dow, 249, H. L.; *Schroder* v. *Schroder*, *supra*; *Hance* v. *Truwhitt* (1862), 2 John. & H. 216. But a surrender to the use of the will is no longer necessary (stat. (1815) 55 Geo. 3, c. 192, repealed by and in effect re-enacted by Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26)). Moreover, the will speaks from the death, and hence a devise of lands acquired between the date of the will and the date of the testator's death is effectual (Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 24).

Where a devise by an English will of land in Scotland or elsewhere is ineffectual through failure to comply with the local law, and the person inheriting is a beneficiary under the will, he is put to his election (*Brodie* v. *Barry* (1813), 2 Ves. & B. 127; *Dewar* v. *Maitland* (1866), L. R. 2 Eq. 834, where the cases where the heir is and is not put to his election are contrasted by STUART, V.-C.; *Orrell* v. *Orrell* (1871), 6 Ch. App. 302; *Harrison* v. *Harrison* (1873), 8 Ch. App. 342); but the property must be specifically described; a devise in general words will only operate on the land capable of passing under it (*Maxwell* v. *Maxwell* (1852), 2 De G. M. & G. 705, C. A.).

Before the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), a will of an infant was valid as to personal estate, though not as to real estate; so that the heir-at-law might become entitled by descent owing to the failure of the devise, and to personal estate under the will; but he was not put to his election (*Hearle* v. *Greenbank* (1749), 3 Atk. 695, 715); so, where a married woman's will is void owing to incapacity, her heir or next of kin is not put to his election (*Re De Burgh Lawson, De Burgh Lawson* v. *De Burgh Lawson* (1885), 34 W. R. 39 (heir-at-law); *Blaiklock* v. *Grindle* (1868), L. R. 7 Eq. 215 (next of kin); see *Re Anderson, Pegler* v. *Gillatt*, [1905] 2 Ch. 70; and compare *Re Atkinson, Walter* v. *Atkinson*, [1899] 2 Ch. 1, C. A.). Whether it was the same where her will would defeat her husband's marital right so as to put him to election between such right and benefits taken under the will is not clear (*Rich* v. *Cockell*, *Rich* v. *Hull* (1804), 9 Ves. 369); but since the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), it seems that the husband is put to his election (*Re Harris, Leacroft* v. *Harris*, [1909] 2 Ch. 206, where *Rich* v. *Cockell*, *Rich* v. *Hull*, *supra*, is discussed).

Where the marriage occurred on or before the 1st of January, 1834, the husband

Intention to dispose of the particular property must be clear.

137. To raise a case of election under a will upon the ground that the testator has attempted to dispose of property over which he had no disposing power, it must be clearly shown that the testator intended to dispose of the particular property (*k*); and this intention must appear on the face of the will, either by express words or by necessary conclusion from the circumstances disclosed by the will (*l*). The presumption is that a testator intends to dispose only of his own property (*m*); and general words will not be construed so as to include other property (*n*), nor will parol evidence be admitted to show that the testator believed such other property to be his own so as to allow it to be comprised in general words (*o*). Similarly, where a testator has a limited interest in

was not able directly to deprive his wife of her right to dower out of lands to which that right had once attached; but if he conferred upon her other benefits by his will, she might be put to her election between her dower and such benefits (see *Birmingham* v. *Kirwan* (1805), 2 Sch. & Lef. 444, 450). This was the case if the will showed that the husband intended to dispose of the property which was subject to dower in a manner inconsistent with the right to dower (*Butcher* v. *Kemp* (1820), 5 Madd. 61; *Parker* v. *Sowerby* (1854), 4 De G. M. & G. 321, C. A.; *Nottley* v. *Palmer* 1854), 2 Drew. 93; see, where she was not put to election, *Holdich* v. *Holdich* (1842), 2 Y. & C. Ch. Cas. 18; *Ellis* v. *Lewis* (1844), 3 Hare, 310). A devise to the widow of an interest in part of the lands was not inconsistent with her claim to dower (*Lawrence* v. *Lawrence* (1699), 2 Vern. 365); but under the Dower Act, 1833 (3 & 4 Will. 4, c. 105), a devise to the widow of any interest in the land out of which she is dowable defeats her claim to dower in the rest of the land (*Re Thomas, Thomas* v. *Howell* (1886), 34 Ch. D. 166, 170); and this statute, by putting the right to dower under the husband's control, has rendered the numerous authorities on the subject practically obsolete. The principle as to dower applied to freebench (*Nottley* v. *Palmer, supra; Thompson* v. *Burra* (1873), L. R. 16 Eq. 592). In other cases where a widow has a legal claim on her husband's property which he cannot defeat, she may still be put to her election, as in the *jus relictæ* and *terce* of Scotch law (*Douglas-Menzies* v. *Umphelby*, [1908] A. C. 224, P. C.); see also title HUSBAND AND WIFE.

(*k*) *Dashwood* v. *Peyton* (1811), 18 Ves. 27, 41; *Rancliffe* (*Lord*) v. *Parkyns* (*Lady*) (1818), 6 Dow, 149, 179, H. L.; *Wintour* v. *Clifton* (1856), 8 De G. M. & G. 641, 650.

(*l*) *Blake* v. *Bunbury* (1792), 4 Bro. C. C. 21, 24. The widow of a testator will be put to her election by a devise of all the testator's interest in property which belongs solely to her (*Whitley* v. *Whitley* (1862), 31 Beav. 173).

(*m*) *Rancliffe* (*Lord*) v. *Parkyns* (*Lady*), *supra; Usticke* v. *Peters* (1858), 4 K. & J. 437; *Cosby* v. *Ashtown* (*Lord*) (1859), 10 I. Ch. R. 219; *Thornton* v. *Thornton* (1861), 11 I. Ch. R. 474, 480; *Pickersgill* v. *Rodger* (1876), 5 Ch. D. 163, 170; see *Re Harris, Leacroft* v. *Harris*, [1909] 2 Ch. 206.

(*n*) *Forrester* v. *Cotton* (1760), 1 Eden, 531, 535; *Miller* v. *Thurgood* (1864), 33 Beav. 496, 500; *Re Bidwell's Settlement* (1862), 11 W. R. 161. But in a settlement general words which are clearly intended to bring in property not in law included in the settlement may be allowed their full effect (*Willoughby* v. *Middleton* (1862), 2 John. & H. 344). As to the effect of a bequest by a husband of "all his jewels" on jewels which are the paraphernalia of his wife, see *Jervoise* v. *Jervoise* (1853), 17 Beav. 566.

(*o*) *Stratton* v. *Best* (1791), 1 Ves. 285. In several cases it was considered that evidence dehors the will might be admitted to show that the testator considered the property his own, and so intended to include it in general words—*e.g.*, evidence of an assignment (though ineffectual) to the testator (*Rutter* v. *Maclean* (1799), 4 Ves. 531, 537; see *Pole* v. *Somers* (*Lord*) (1801), 6 Ves. 309); or of accounts showing that he had dealt with it as his own (*Pulteney* v. *Darlington* (*Lord*) (1776), cited 3 Ves. 529; see 2 Ves. 560; *Druce* v. *Denison* (1801), 6 Ves. 385). But such evidence is inadmissible (*Doe* d. *Oxenden* v. *Chichester* (1816), 4 Dow, 65, 89, 90, H. L.; *Dummer* v. *Pitcher* (1833), 2 My. & K. 262; *Clementson*

SECT. 3. Election.

property, and purports to dispose of the property itself, the presumption is that he intends to dispose only of his limited interest (*p*); and, if it is sought to carry the disposition further, it must be shown that he intended to dispose of more than that interest. But for this purpose positive declaration is not necessary. Regard may be had to the context of the will, and to the inaptitude of the testamentary limitations if applied to the testator's actual interest (*q*); and where a co-owner of property devises the property specifically without restriction to his share, and confers a benefit on another co-owner, this will usually raise a case of election against such co-owner (*r*). But a devise of an estate which is subject to incumbrances does not by itself import an intention to devise it free from incumbrances, so as to put incumbrancers who take under the will to their election (*s*).

It may appear from a recital that a testator has disposed of his own property under an erroneous belief as to the interests in other property of certain beneficiaries under his will, giving less to some on the footing that they would be compensated by their interests in the other property. But such a recital is not equivalent to a disposition of such other property, so as to raise a case of election against the persons who unduly benefit under the will (*t*).

Election depends on compensation.

138. In applying the doctrine of election equity proceeds upon the principle not of forfeiture, but of compensation; that is, the beneficiary who elects against the instrument and keeps his own

v. *Gandy* (1836), 1 Keen, 309; *Dixon* v. *Samson* (1837), 2 Y. & C. (EX.) 566; *Galvin* v. *Devereux*, [1903] 1 I. R. 185; see note to *Dillon* v. *Parker* (1818), 1 Swan. 359, 402; but see the *dictum* of JESSEL, M.R., in *Pickersgill* v. *Rodger* (1876), 5 Ch. D. 163, 171, in favour of admitting parol evidence).

(*p*) *Maddison* v. *Chapman* (1861), 1 John. & H. 470; *Howell* v. *Jenkins* (1862), 2 John. & H. 706; (1863) 1 De G. J. & Sm. 617, C. A.; *Henry* v. *Henry* (1872), 6 I. R. Eq. 286; *Dummer* v. *Pitcher* (1833), 2 My. & K. 262. But if the only interest of the testator is a life interest, and the intention appearing on the will is to dispose of his interest, if any, there is no case of election (*Galvin* v. *Devereux*, [1903] 1 I. R. 185).

(*q*) *Wintour* v. *Clifton* (1856), 8 De G. M. & G. 641; *Usticke* v. *Peters* (1858), 4 K. & J. 437; *Welby* v. *Welby* (1813), 2 Ves. & B. 187; see *Shuttleworth* v. *Greaves* (1838), 4 My. & Cr. 35; *Padbury* v. *Clark* (1850), 2 Mac. & G. 298; *Honywood* v. *Forster* (1860), 30 Beav. 14.

(*r*) *Fitzsimons* v. *Fitzsimons* (1860), 28 Beav. 417; *Swan* v. *Holmes* (1854), 19 Beav. 471; *Miller* v. *Thurgood* (1864), 33 Beav. 496; *Wilkinson* v. *Dent* (1871), 6 Ch. App. 339; *Henry* v. *Henry*, *supra*, at p. 295; see *Padbury* v. *Clark*, *supra*; and compare *Chave* v. *Chave* (1830), 2 John. & H. 713 n., *contra*; and *Re Bidwell's Settlement* (1862), 11 W. R. 161. A bequest to a third person of stock standing in the joint names of a testator and his wife, where benefits are conferred on the wife, will put her to her election (*Grosvenor* v. *Durston* (1858), 25 Beav. 97; *Re Carpenter*, *Carpenter* v. *Disney* (1884), 51 L. T. 776).

(*s*) *Stephens* v. *Stephens* (1857), 1 De G. & J. 62; *Henry* v. *Henry*, *supra*, at p. 297. But a devise inconsistent with the continuance of the incumbrances will put the incumbrancers, if they are beneficiaries under the will, to their election (*Blake* v. *Bunbury* (1792), 1 Ves. 514, 523); and compare *Sadlier* v. *Butler* (1867), 1 I. R. Eq. 415, where the incumbrancer was put to his election.

(*t*) *Box* v. *Barrett* (1866), L. R. 3 Eq. 244. That a recital, without more, cannot amount to a gift, or show an intention to give, see *Dashwood* v. *Peyton* (1811), 18 Ves. 27, 41; nor is there a case for election where a testator, erroneously reciting that a hotchpot clause will apply, refrains from appointing the unappointed residue of a fund (*Langslow* v. *Langslow* (1856), 21 Beav. 552).

property is not required to abandon all the benefits which are conferred upon him by the instrument. Such benefits are treated in equity as a fund out of which compensation must be made to the disappointed beneficiary; and, after such compensation, the electing beneficiary is entitled to any surplus which may remain (*a*). The duty to make compensation imposes a personal liability on the electing beneficiary which will furnish ground for an action (*b*); or, after his death, for a claim against his estate (*c*). Where the person to elect dies, and the properties go in different directions, the obligation to compensate falls on the persons who succeed to the benefits out of which, according to the above rule, compensation ought to have been made (*d*). The amount of compensation payable is to be ascertained, in the case of a will, as at the date of the testator's death, and not at the time when the election is made (*e*).

No election unless fund for compensation.

139. From the principle that election proceeds on the footing of compensation it follows that no case for election will be raised against a person whose property a testator has purported to dispose of, unless he takes under the will a benefit out of property which the testator can actually dispose of. It is only such benefit which gives the necessary fund for compensation. The doctrine of election cannot be applied, except where, if an election is made contrary to the will, the interest that would pass by the will can be laid hold of to compensate the beneficiary who is disappointed by the election. Therefore, in all cases there must be some free disposable property given by the will to the person whom it is sought to put to his election (*f*).

(*a*) *Welby* v. *Welby* (1813), 2 Ves. & B. 187, 191; *Rancliffe* (*Lord*) v. *Parkyns* (*Lady*) (1818), 6 Dow, 149, 179, H. L.; *Gretton* v. *Haward* (1819), 1 Swan. 409. About the date of these decisions the question of forfeiture or compensation was regarded as doubtful (see *per* Lord ELDON, L.C., in *Green* v. *Green* (1816), 2 Mer. 86, 93; *Tibbits* v. *Tibbits* (1821), Jac. 317, 319). But an exhaustive review of the authorities was given by the reporter in a note to *Gretton* v. *Haward*, *supra*, in which their result was summed up as follows:—"(1) In the event of election to take against the instrument, courts of equity assume jurisdiction to sequester the benefit intended for the refractory donee, in order to secure compensation to those whom his election disappoints; (2) The surplus, after compensation, does not devolve as undisposed of, but is restored to the donee, the purpose being satisfied for which alone the court controlled his legal right." Since this statement the uncertainty referred to by Lord ELDON has disappeared, and the later cases are uniform in affirming the principle of compensation (see, for example, *Ker* v. *Wauchope* (1819), 1 Bli. 1, 25, H. L.; *Schroder* v. *Schroder* (1854), Kay 578; *Rogers* v. *Jones* (1876), 3 Ch. D. 688; *Pickersgill* v. *Rodger* (1876), 5 Ch. D. 163, 173; *Smith* v. *Lucas* (1881), 18 Ch. D. 531, 545; *Re Vardon's Trusts* (1884), 28 Ch. D. 124, 131; *Re Chesham* (*Lord*), *Cavendish* v. *Dacre* (1886), 31 Ch. D. 466, 473). The fund available for compensation will be apportioned among the disappointed legatees rateably according to their interests (*Howell* v. *Jenkins* (1863), 1 De G. J. & Sm. 617, C. A.).

(*b*) *Rogers* v. *Jones* (1877), 7 Ch. D. 345.

(*c*) *Greenwood* v. *Penny* (1850), 12 Beav. 403.

(*d*) *Pickersgill* v. *Rodger* (1876), 5 Ch. D. 163, 174.

(*e*) *Re Hancock*, *Hancock* v. *Pawson*, [1905] 1 Ch. 16.

(*f*) *Bristow* v. *Warde* (1794), 2 Ves. 336; the statement of the principle by Lord LOUGHBOROUGH, L.C., at p. 350, is verbally inaccurate, and is altered in the text to accord with the apparent meaning (*Re Fowler's Trust* (1859), 27 Beav. 362; *Re Aplin's Trust* (1865), 13 W. R. 1062; compare *Wallinger* v. *Wallinger* (1869), L. R. 9 Eq. 301).

SECT. 3. Election.

Hence, where a testator purports to exercise a limited power of appointment by appointing to a stranger, and appoints also to an object of the power, the latter may claim to participate, as in default of appointment, in the share appointed to the stranger, without compensating the stranger out of the properly appointed share (*g*). No part of the fund is at the disposal of the testator. To raise a case of election the testator must both make a direct appointment to a stranger to the power (*h*) and a gift of the testator's free property to an object of the power (*i*).

Person taking under derivative title.

140. Where a testator purports to dispose of property which is not his own, no case of election arises against a person who takes such property by a derivative title after the testator's death, and who is also a beneficiary under the will (*j*). At the date when the will comes into operation he must be in a position to claim in his own right an interest in the property (*k*). A beneficiary is not put to his election, because he has a derivative title under another person who was the true owner at the time of the death (*l*). Where such other person was also a beneficiary under the will and elected against it, paying compensation, there is the additional consideration that the payment has freed the property from the obligation of further election (*m*).

Person electing entitled to information.

141. No person can be required to elect without a clear knowledge of both the funds or properties between which he has to elect (*n*). Hence he is entitled to be allowed time to consider as to his election (*o*), and, if necessary, the election will be postponed till accounts of the property concerned have been taken (*p*). If there is an action pending, the necessary accounts and inquiries can be taken and made in the action (*q*); otherwise, the person who wishes to decide as to election can commence an action to ascertain the

(*g*) See note (*f*), p. 123, *ante*.

(*h*) An appointment to an object of the power subject to a request to him to give the property to a stranger will not suffice, the request being merely void (*Blacket* v. *Lamb* (1851), 14 Beav. 482).

(*i*) *Whistler* v. *Webster* (1794), 2 Ves. 367.

(*j*) Thus, where a testator disposes of property of a married woman, and confers by his will benefits on her husband, the husband, on becoming entitled to his wife's property as administrator, is not put to his election (*Grissell* v. *Swinhoe* (1869), L. R. 7 Eq. 291; see *Howells* v. *Jenkins* (1862), 2 John. & H. 706; *Brown* v. *Brown* (1866), L. R. 2 Eq. 481, 485).

(*k*) Where the owner of property which the testator has purported to dispose of is dead, it is sufficient if the beneficiary under the testator's will is entitled to an interest in such property as next of kin of the deceased owner, notwithstanding that his interest is subject to payment of the debts of such owner (*Cooper* v. *Cooper* (1870), 6 Ch. App. 15, 21; (1874) L. R. 7 H. L. 53).

(*l*) *Cooper* v. *Cooper*, *supra*; compare *Armstrong* v. *Lynn* (1875), 9 I. R. Eq. 186.

(*m*) *Cavan* (*Lady*) v. *Pulteney* (1795), 2 Ves. 544.

(*n*) *Whistler* v. *Webster*, *supra*, at p. 371; see *Pusey* v. *Desbouverie* (1734), 3 P. Wms. 315; *Chalmers* v. *Storil* (1813), 2 Ves. & B. 222.

(*o*) See *Codrington* v. *Lindsay* (1873), 8 Ch. App. 578, 593; *Re Hancock*, *Hancock* v. *Pawson*, [1905] 1 Ch. 16, 19.

(*p*) *Hender* v. *Rose* (1718), 3 P. Wms. 124, n.; *Newman* v. *Newman* (1783), 1 Bro. C. C. 186; *Boynton* v. *Boynton* (1785), 1 Bro. C. C. 445.

(*q*) *Douglas* v. *Douglas*, *Douglas* v. *Webster* (1871), L. R. 12 Eq. 617.

value of the properties (*r*). An election made before the party has had an opportunity of ascertaining his rights and the value of them (*s*), or under a mistake as to matters on which those rights depend (*t*), will not be binding; though, if election has once been deliberately made, persons claiming under the electing party are bound thereby without distinct evidence being given that he was aware of his rights (*a*).

Election where several persons interested.

142. Where several persons are interested in the property disposed of by the testator, and are also beneficiaries under his will, an election by one does not bind the others; and this is so whether they are entitled simultaneously as co-owners (*b*), or in succession as tenant for life and remaindermen (*c*). All the persons interested have a right to exercise their judgment as to the way in which they will elect (*b*). Nor are next of kin bound by the election of the administrator (*b*). Compensation may be payable by some persons electing against the will to others so electing, and such compensation must then be included by the latter in the benefits taken by them under the will (*d*).

Time for election.

143. A person required by the court to elect within a specified time will, if he does not elect within that time, be treated as having elected against the instrument (*e*). But otherwise no definite time limit can be assigned for election; and if the party is neither required to elect, nor does any acts from which election can be inferred, his right to elect will remain open until it becomes inequitable to assert it (*f*). And this will be the case if he has allowed the property devised away from himself to be enjoyed for a long time—*e.g.*, ten years (*g*)—by the devisee.

Implied election.

144. Election is a question of fact and must be ascertained as such (*h*). It may be express, or may be implied from the acts of the person bound to elect. To constitute an implied election there must be clear proof that the person put to his election was aware of the nature and extent of his rights; and that, having that knowledge, he intended to elect (*i*). Where there has been ignorance

(*r*) *Butricke* v. *Broadhurst* (1790), 1 Ves. 171; *Dillon* v. *Parker* (1818), 1 Swan. 359, 381, n.; but in *Douglas* v. *Douglas*, *Douglas* v. *Webster* (1871), L. R. 12 Eq. 617, at p. 637, WICKENS, V.-C., intimated that the rule might require restriction.

(*s*) *Pusey* v. *Desbouverie* (1734), 3 P. Wms. 315.

(*t*) *Kidney* v. *Coussmaker* (1806), 12 Ves. 136, 153.

(*a*) *Dewar* v. *Maitland* (1866), L. R. 2 Eq. 834, 838.

(*b*) *Fytche* v. *Fytche* (1868), L. R. 7 Eq. 494.

(*c*) *Ward* v. *Baugh* (1799), 4 Ves. 623; *Hutchison* v. *Skelton* (1856), 2 Macq. 492, 495, H. L.; compare *Long* v. *Long* (1800), 5 Ves. 445, where the point was not decided.

(*d*) *Re Booth*, *Booth* v. *Robinson*, [1906] 2 Ch. 321.

(*e*) *Streatfield* v. *Streatfield* (1735), Cas. *temp.* Talb. 176; see 1 Swan. 447, where the decree which shows this is given.

(*f*) *Butricke* v. *Broadhurst*, *supra*.

(*g*) *Tibbits* v. *Tibbits* (1816), 19 Ves. 656, 662.

(*h*) *Roundel* v. *Currer* (1786), 2 Bro. C. C. 67, 73.

(*i*) *Worthington* v. *Wiginton* (1855), 20 Beav. 67, *per* ROMILLY, M.R., at p. 74; see *Stratford* v. *Powell* (1807), 1 Ball & B. 1; *Dillon* v. *Parker* (1818), 1 Swan. 359, 382; *Edwards* v. *Morgan*, *Morgan* v. *Edwards* (1824), 13 Price, 782, affirmed *sub nom. Morgan* v. *Edwards* (1827), 1 Bli. (N. S.) 401; *Wintour* v. *Clifton* (1856), 21 Beav. 447, 468; *Spread* v. *Morgan* (1865), 11 H. L. Cas. 588.

SECT. 3. Election.

of the right, an enjoyment of the benefits conferred by the will for a considerable time will not prevent the party from claiming to elect (*k*). But where, with knowledge of his obligation to elect, a person enjoys property given by the will or exercises acts of ownership over it, he will be held to have elected to confirm the will, and will be debarred from keeping his own property as well (*l*). Similar acts in relation to his own property will show an election against the will (*m*). It is necessary, however, to have regard to the history of both the properties between which election was to be made, and possession of or acts of ownership over both will raise no presumption of election (*n*). An implied election is binding on the representatives of the person electing (*o*), though, if the election has not been clearly made, the representatives may, perhaps, elect on offering compensation (*p*).

Married women.

Restraint on anticipation.

145. The capacity of a married woman to elect depends on her capacity to give up the property belonging to her which the instrument purports to dispose of, and it is essential that both the properties between which she has to elect should be free from restraint on anticipation. As regards the property which does not pass under the instrument, the restraint prevents her from giving it up so as to confirm the instrument; as regards the property which does pass under the instrument, the restraint prevents it from becoming a fund for compensation if she elects against the instrument (*q*); and, indeed, the imposition of the restraint on alienation shows an intention on the part of the author

(*k*) *Wake* v. *Wake* (1791), 3 Bro. C. C. 255 (three years' receipt of an annuity); *Reynard* v. *Spence* (1841), 4 Beav. 103 (five years' receipt); *Sopwith* v. *Maughan* (1861), 30 Beav. 235 (provision in lieu of dower enjoyed by widow for sixteen years, but, as the certificate found, "in ignorance of her right to dower").

(*l*) *Butricke* v. *Broadhurst* (1790), 3 Bro. C. C. 88; *Worthington* v. *Wiginton* (1855), 20 Beav. 7; *Whitley* v. *Whitley* (1862), 31 Beav. 173. The receipt of a legacy shows an intention to take under the will (*Northumberland* (*Earl*) v. *Aylesford* (*Earl*) (1760), Amb. 540; S. C. *sub nom. Northumberland* (*Duke*) v. *Egremont* (*Earl*) (1768), Amb. 657; *Ardesoife* v. *Bennet* (1772), Dick. 463); and the court does not readily disturb arrangements to which the parties have assented; see *Tomkyns* v. *Ladbroke* (1755), 2 Ves. Sen. 591, 593, and cases collected in 1 Swan. p. 381, n.

(*m*) Such as a sale of the property (*Rogers* v. *Jones* (1876), 3 Ch. D. 688).

(*n*) *Dillon* v. *Parker* (1818), 1 Swan. 359, at p. 380; *Padbury* v. *Clark* (1850), 2 Mac. & G. 298; *Morgan* v. *Morgan* (1853), 4 I. Ch. R. 606, 614, *Spread* v. *Morgan* (1865), 11 H. L. Cas. 588, at p. 613. But where an heir enjoyed lands ineffectually devised to him for a limited interest to which, therefore, he was entitled by descent, and also lands well devised, he was presumed to have elected to take under the will (*Dewar* v. *Maitland* (1866), L. R. 2 Eq. 834).

(*o*) *Northumberland* (*Earl*) v. *Aylesford* (*Earl*), *supra*; *Ardesoife* v. *Bennet*, *supra*; *Dewar* v. *Maitland*, *supra*; and, indeed, cases of implied election generally arise where the party has died. Where he is alive he can contradict the implication (*Sopwith* v. *Maughan*, *supra*, at p. 239).

(*p*) See *Dillon* v. *Parker*, *supra*, at p. 385.

(*q*) *Smith* v. *Lucas* (1881), 18 Ch. D. 531, 545; *Re Wheatley*, *Smith* v. *Spence* (1884), 27 Ch. D. 606; *Re Vardon's Trusts* (1885), 31 Ch. D. 275, C. A., overruling on this point *Willoughby* v. *Middleton* (1862), 2 John. & H. 344. A condition attached to a legacy to a married woman that she shall convey her separate estate, as to which she is restrained from alienation, does not raise a case of election, and the legacy fails (*Robinson* v. *Wheelwright* (1855), 21 Beav. 214).

of the instrument that the married woman shall not be put to election (*r*). And this intention prevails although at the time for election the woman has become discovert (*s*).

Non-separate property.

If the property belonging to a married woman which the instrument purports to dispose of belongs to her as her separate estate, she can elect as though she were a *feme sole*. If it is not her separate estate, but she can dispose of it by observing certain formalities, she can also elect by the observance of these formalities. Otherwise she cannot elect out of court (*a*); but in appropriate proceedings the court will direct an inquiry as to what is for her benefit, and will elect on her behalf accordingly (*b*); or if the matter is clear, will elect without inquiry (*c*).

Lunatics.

146. The committee of a lunatic so found by inquisition can elect on his behalf under the direction of the court (*d*); where he was not so found, the court formerly elected—after inquiry, if necessary—under its general jurisdiction to act on behalf of

(*r*) *Re Wheatley, Smith* v. *Spence* (1884), 27 Ch. D. 606, 613.

(*s*) *Haynes* v. *Foster*, [1901] 1 Ch. 361.

(*a*) *Williams* v. *Mayne* (1867), 1 I. R. Eq. 519; *Harle* v. *Jarman*, [1895] 2 Ch. 419; *contra, Ardesoife* v. *Bennet* (1772), Dick. 463; and see note to *Gretton* v. *Haward* (1819), 1 Swan. 409, 413. Questions of election proper—that is, where the person electing has to choose between two things—are to be distinguished from cases where a married woman chooses whether to affirm or repudiate a settlement which was originally not binding on her, either because she was an infant when she executed it, or because she did not execute it at all (*Harle* v. *Jarman, supra*). Where the married woman is an infant, she can, after attaining full age and during the coverture, elect to confirm the settlement, even though the effect is to render subject to the settlement property which she could not by reason of coverture dispose of; and this is on the ground that the settlement was voidable only, and not void, and that it would be fraudulent for her afterwards to repudiate the settlement, or better, perhaps, that she is estopped from doing so (*Barrow* v. *Barrow* (1858), 4 K. & J. 409; *Wilder* v. *Pigott* (1882), 22 Ch. D. 263; *Re Hodson, Williams* v. *Knight*, [1894] 2 Ch. 421; *Harle* v. *Jarman, supra;* see *Williams* v. *Baily* (1866), L. R. 2 Eq. 731, 734). And if she does not, within a reasonable time after attaining twenty-one, avoid the settlement, she is bound by it (*Edwards* v. *Carter*, [1893] A. C. 360; *Re Hodson, Williams* v. *Knight, supra; Viditz* v. *O'Hagan*, [1899] 2 Ch. 569, 575, reversed on another ground, [1900] 2 Ch. 87, C. A.); see *Ashton* v. *M'Dougall* (1842), 5 Beav. 56. And the principle has been extended so as to enable a woman who was adult on marriage to confirm an ante-nuptial marriage settlement not originally binding on her, and thereby to settle property of which she was, while covert, incompetent to dispose (*Greenhill* v. *North British and Mercantile Insurance Co.*, [1893] 3 Ch. 474). But this is apparently erroneous; the principle only applies where there has been a settlement before marriage which is binding unless avoided; see *Harle* v. *Jarman, supra*. Consequently, a post-nuptial settlement cannot be confirmed except by an instrument which would pass the property at the time of confirmation (*Seaton* v. *Seaton* (1888), 13 App. Cas. 61); see *Burnaby* v. *Equitable Reversionary Interest Society* (1885), 28 Ch. D. 416, 424. Where the wife's settlement made by her before marriage, while an infant, relates to her separate property, she can *à fortiori* confirm it after attaining full age (*Smith* v. *Lucas* (1881), 18 Ch. D. 531). Where she takes benefits in the property of other persons under a post-nuptial settlement, which also includes her own property and is not binding on her, and subsequently becomes discovert and claims against the settlement, she is put to her election (*Codrington* v. *Codrington* (1875), L. R. 7 H. L. 854; see *Hamilton* v. *Hamilton*, [1892] 1 Ch. 396).

(*b*) *Cooper* v. *Cooper* (1874), L. R. 7 H. L. 53, 67; see *Davis* v. *Page* (1804), 9 Ves. 350.

(*c*) *Wilson* v. *Townsend* (*Lord John*) (1795), 2 Ves. 693.

(*d*) *Re Sefton* (*Earl*), [1898] 2 Ch. 378, C. A.

SECT. 3. Election.

persons under disability (*e*); but now the *quasi*-committee has the same powers as a committee (*f*).

Infants.

Where the person to elect is an infant, the court, if there is no doubt as to what is for his benefit, elects for him at the hearing of the matter in which the question arises (*g*); if there is doubt, an inquiry is directed what course is for the benefit of the infant, and the court elects in accordance with the result of the inquiry (*h*).

SECT. 4.—*Satisfaction.*

Different cases of satisfaction.

147. Satisfaction is the donation of a thing with the intention that it shall be taken either wholly or partly in extinguishment of some prior claim of the donee (*i*). It may occur (1) when a covenant to settle property is followed by a gift by will or settlement in favour of the person entitled beneficially under the covenant (*j*); (2) when a testamentary disposition is followed during the testator's lifetime by a gift or settlement in favour of the devisee or legatee (*k*); and (3) when a legacy is given to a creditor (*l*). In all these cases the question of satisfaction is one of the intention of the settlor or testator (*m*); and if he expressly declares that the later disposition is to be in satisfaction of the earlier obligation or disposition, the matter is governed by this expression of his intention, and effect is given to the later disposition accordingly (*n*). In the absence of

(*e*) *Wilder* v. *Pigott* (1882), 22 Ch. D. 263, 268; see *Jones* v. *Lloyd* (1874), L. R. 18 Eq. 265, 275, and title LUNATICS AND PERSONS OF UNSOUND MIND.

(*f*) Lunacy Act, 1908 (8 Edw. 7, c. 47), s. 1.

(*g*) *Blunt* v. *Lack* (1856), 3 Jur. (N. S.) 195, C. A.; *Lamb* v. *Lamb* (1857), 5 W. R. 772; *Re Montagu, Faber* v. *Montagu*, [1896] 1 Ch. 549.

(*h*) *Bigland* v. *Huddlestone* (1789), 3 Bro. C. C. 285, n.; *Brown* v. *Brown* (1866), L. R. 2 Eq. 481, 486; *Bennett* v. *Houldsworth* (1877), 6 Ch. D. 671, 680. Originally the election was deferred until the infant came of age (*Streatfield* v. *Streatfield* (1735-6), Cas. *temp.* Talb. 176, 183; *Boughton* v. *Boughton* (1750), 2 Ves. Sen. 12, 16); see note to *Gretton* v. *Haward* (1819), 1 Swan. 409, 413, and cases there cited, and title INFANTS AND CHILDREN.

(*i*) See the definition in 2 White & Tud. L. C., 7th ed., p. 379, adopted by Lord ROMILLY in *Chichester* (*Lord*) v. *Coventry* (1867), L. R. 2 H. L. 71, 95.

(*j*) See *Hinchcliffe* v. *Hinchcliffe* (1797), 3 Ves. 516; *Weall* v. *Rice* (1831), 2 Russ. & M. 251; *Thynne* (*Lady E.*) v. *Glengall* (*Earl*) (1848), 2 H. L. Cas. 131.

(*k*) *Ex parte Pye, Ex parte Dubost* (1811), 18 Ves. 140; 2 White & Tud. L. C., 7th ed., p. 366; *Pym* v. *Lockyer* (1841), 5 My. & Cr. 29. This, though similar in its effect to satisfaction, is strictly ademption (*Chichester* (*Lord*) v. *Coventry, supra*, at p. 90); see the rule stated in *Trimmer* v. *Bayne* (1802), 7 Ves. 508, 515. The settlement may be by way of covenant to pay (*Cooper* v. *Macdonald* (1873), L. R. 16 Eq. 258).

(*l*) *Talbot* v. *Shrewsbury* (*Duke*) (1714), Prec. Ch. 394; 2 White & Tud. L. C., 7th ed., p. 375.

(*m*) *Weall* v. *Rice, supra*, at p. 265; *Hopwood* v. *Hopwood* (1859), 7 H. L. Cas. 728, 737; *Chichester* (*Lord*) v. *Coventry, supra*, at p. 82. Hence regard must be paid to the circumstances at the date of the instrument alleged to constitute satisfaction, and not to the actual result (*Cartwright* v. *Cartwright*, [1903] 2 Ch. 306).

(*n*) *Davis* v. *Chambers* (1857), 7 De G. M. & G. 386; see *Twisden* v. *Twisden* (1804), 9 Ves. 413; *Hardingham* v. *Thomas* (1854), 2 Drew. 353. But a direction that portions are to be deemed to be satisfied by subsequent advances made by a specified person during his life is not operative as regards benefits passing under his will (*Cooper* v. *Cooper* (1873), 8 Ch. App. 813); or on his intestacy (*Twisden* v. *Twisden, supra*); and see *Cooper* v. *Cooper, supra*, as to certain inconsistencies in the earlier cases.

SECT. 4. Satisfaction.

such expression, certain presumptions as to his intention are raised in equity, and evidence, intrinsic and, in certain cases, extrinsic, may be used to rebut or to support such presumptions (*o*). A case of satisfaction only arises where the person who makes the payment is himself the party bound to pay, or is the owner of the estate charged with the payment (*p*); or is exercising a power of appointment (*q*). The three cases stated above are shortly described as (1) satisfaction of portions by legacies or subsequent portions; (2) ademption of legacies by portions; and (3) satisfaction of debts by legacies. In the first two cases the court leans in favour of satisfaction; in the third case it leans against it (*r*).

Presumption of satisfaction of portion by legacy and legacy by portion.

148. In the cases of a portion followed by a legacy, and of a legacy followed by a portion, where the gifts are substantially of the same nature and in favour of the same person, there arises a presumption of satisfaction (1) where the settlor and testator is the father of the donee, or has placed himself *in loco parentis* to the donee (*s*); (2) where the first disposition is expressed to be made for a specific purpose, and the second disposition effects that purpose. In the first case the presumption is founded on the leaning of the court against double portions (*t*); in the second it is founded upon the intention of the testator or settlor as appearing from the instruments and from the circumstances of the later disposition (*a*). The presumption arises also as regards two dispositions, both made for the purpose of satisfying a specified moral obligation (*b*).

(*o*) See p. 136, *post*.

(*p*) *Samuel* v. *Ward* (1856), 22 Beav. 347, 350.

(*q*) *Re Ashton, Ingram* v. *Papillon*, [1897] 2 Ch. 574.

(*r*) *Thynne* (*Lady E.*) v. *Glengall* (*Earl*), (1848) 2 H. L. Cas. 131, at p. 153. A question as to presumption against double gifts arises also where legacies are left to the same person by different testamentary instruments, or different legacies by the same instrument; as to this, see *Ridges* v. *Morrison* (1784), 1 Bro. C. C. 389; *Coote* v. *Boyd* (1789), 2 Bro. C. C. 521; *Benyon* v. *Benyon* (1810), 17 Ves. 34; *Currie* v. *Pye* (1811), 17 Ves. 462; *Hurst* v. *Beach* (1821), 5 Madd. 351; *Yockney* v. *Hansard* (1844), 3 Hare, 620; *Lee* v. *Pain* (1845), 4 Hare, 201; *Roch* v. *Callen* (1848), 6 Hare, 531; *Whyte* v. *Whyte* (1873), L. R. 17 Eq. 50; and title WILLS.

(*s*) If a child has to account on the footing of satisfaction, persons claiming under him are under the same liability (*Re Scott, Langton* v. *Scott*, [1903] 1 Ch. 1, C. A.). The rule against double portions to children does not apply in Scotland (*Johnstone* v. *Haviland*, [1896] A. C. 95).

(*t*) See *Ex parte Pye, Ex parte Dubost* (1811), 8 Ves. 140, *per* Lord ELDON, L.C., at p. 151; *Weall* v. *Rice* (1831), 2 Russ. & M. 251, 267; *Chichester* (*Lord*) v. *Coventry* (1867), L. R. 2 H. L. 71, 86; *Montagu* v. *Sandwich* (*Earl*) (1886), 32 Ch. D. 525, 534, C. A.; *Re Lacon, Lacon* v. *Lacon*, [1891] 2 Ch. 482, C. A., *per* LINDLEY, L.J., at p. 492; *per* BOWEN, L.J., at p. 497.

(*a*) See *Monck* v. *Monck* (*Lord*) (1810), 1 Ball & B. 298, *per* Lord MANNERS, L.C., at p. 303; and compare *Roome* v. *Roome* (1744), 3 Atk. 181, 183; *Powel* v. *Cleaver* (1789), 2 Bro. C. C. 499; *Re Smythies, Weyman* v. *Smythies*, [1903] 1 Ch. 259; *Re Furness, Furness* v. *Stalkartt*, [1901] 2 Ch. 346, 349; *Re Corbett, Corbett* v. *Cobham* (*Lord*), [1903] 2 Ch. 326. In *Pankhurst* v. *Howell* (1870), 6 Ch. App. 136, a legacy of a sum of money to the testator's wife to be paid within ten days of his death was not adeemed by a gift of the same amount made during his last illness in order that she might have money in hand on his death; see *Re Fletcher, Gillings* v. *Fletcher* (1888), 38 Ch. D. 373, 377.

(*b*) *Re Pollock, Pollock* v. *Worrall* (1885), 28 Ch. D. 552, C. A. There is no

SECT. 4. Satisfaction.

Both gifts must be in nature of portions.

149. The presumption of satisfaction in the first case only arises when the two gifts are in the nature of portions (*c*). A portion is a sum of money given to a child by way of advancement, on marriage or for the purpose of establishing him in business (*d*), and in general it is only such a gift which will operate as a satisfaction of a prior gift (*e*); though, apparently, where a large sum has been given, and nothing is known as to the circumstances, it will be treated as raising the presumption (*f*). It follows that gifts of small sums (*g*), or payments of an annuity during the lifetime of the testator (*h*), will not raise the presumption. Moreover, in the case of ademption the gift must be subsequent to the date of the will (*i*).

Satisfaction *pro tanto*.

150. The doctrine of satisfaction does not require that the second provision should be equal in value to or greater than the first; a smaller provision will, in a case which is otherwise suitable for raising the presumption, be a satisfaction *pro tanto* of the earlier provision (*k*); and, in the case of ademption, a later smaller provision does not destroy altogether the provision in the will; it only destroys it *pro tanto* (*l*). The value of the provision given by

presumption of satisfaction of a *donatio mortis causa* by a bequest of the same amount contained in a will executed after the gift (*Hudson* v. *Spencer*, [1910] 2 Ch. 285).

(*c*) *Re Lacon, Lacon* v. *Lacon*, [1891] 2 Ch. 482, C. A., *per* BOWEN, L.J., at p. 498. There is no presumption of satisfaction where two portions are derived from different estates (*Douglas* v. *Willes* (1849), 7 Hare, 318, 328).

(*d*) *Taylor* v. *Taylor* (1875), L. R. 20 Eq. 155, *per* JESSEL, M.R., at p. 158; see *Schofield* v. *Heap* (1858), 27 Beav. 93; *Re Lacon, Lacon* v. *Lacon, supra*. And it must be a benefit provided by the settlor, not merely a liability which he has incurred to the child—for example, by breach of trust (*Crichton* v. *Crichton*, [1895] 2 Ch. 853, 859).

(*e*) *Re Scott, Langton* v. *Scott*, [1903] 1 Ch. 1, C. A. Formerly, money provided by a father to pay his son's debts was treated as an advance (*Boyd* v. *Boyd* (1867), L. R. 4 Eq. 305; *Re Blockley, Blockley* v. *Blockley* (1885), 29 Ch. D. 250); but the view of JESSEL, M.R., in *Taylor* v. *Taylor, supra*, has prevailed, and the provision of sums for such a purpose does not raise a presumption of satisfaction (*Re Scott, Langton* v. *Scott, supra*).

(*f*) *Leighton* v. *Leighton* (1874), L. R. 18 Eq. 458, 468; *Re Scott, Langton* v. *Scott, supra*, at pp. 13, 16.

(*g*) *Schofield* v. *Heap, supra; Watson* v. *Watson* (1864), 33 Beav. 574; *Re Peacock's Estate* (1872), L. R. 14 Eq. 236, at p. 240. The court has never added up small sums in order to show that if the child claims those sums as well as the larger provision made for him by the parent, he would be taking a double portion (*Suisse* v. *Lowther* (*Lord*) (1843), 2 Hare, 424, *per* WIGRAM, V.-C., at p. 434).

(*h*) See *Hatfeild* v. *Minet* (1878), 8 Ch. D. 136, C. A.

(*i*) Gifts made before the date of the will cannot operate as an ademption (*Re Peacock's Estate* (1872), L. R. 14 Eq. 236; *Taylor* v. *Cartwright* (1872), L. R. 14 Eq. 167, 176; *Leighton* v. *Leighton, supra*); unless so agreed by the donee (*Upton* v. *Prince* (1735), Cas. *temp.* Talb. 71).

(*k*) *Warren* v. *Warren* (1783), 1 Bro. C. C. 305; *Thynne* (*Lady E.*) v. *Glengall* (*Earl*) (1848), 2 H. L. Cas. 131, 154.

(*l*) There was at one time an impression that ademption by a smaller gift might destroy the provision in the will entirely (*Ex parte Pye, Ex parte Dubost* (1811), 18 Ves. 140, 151); but the cases were reviewed by Lord COTTENHAM, L.C., in *Pym* v. *Lockyer* (1841), 5 My. & Cr. 29, and he held that in such a case the ademption took effect only *pro tanto*, and this has been accepted as the settled rule (*Kirk* v. *Eddowes* (1844), 3 Hare, 509; *Re Pollock, Pollock* v. *Worrall* (1885), 28 Ch. D. 552, C. A.).

SECT. 4. Satisfaction.

a subsequent settlement must be ascertained as at the date of the settlement, and the amount deducted from the legacy (*m*).

In case of satisfaction of obligation, donee may elect.

151. In a case of ademption the beneficiary has no choice as to whether he will take the earlier or the later provision. The earlier depends solely on the bounty of the testator, and the ademption operates by way of revocation of the bounty, either wholly or in part. Where, however, a settlor has by a settlement undertaken an obligation, he has not the right of terminating that obligation by the substitution of a different provision by his will or by a later settlement (*n*). Hence where such different provision would operate as satisfaction, so that the beneficiary cannot take both provisions, he is entitled to elect between the two (*o*).

Person *in loco parentis*.

152. The presumption against double portions arises when the provisions are made by the father of, or by a person in *loco parentis* to, the donee (*p*). A person is *in loco parentis* when he has placed himself in the situation of the lawful father of the donee (*q*), so far as such situation relates to the duty of the father to make provision for the donee (*r*). Whether a person has placed himself in this relation is a question of fact as to which parol evidence is admissible (*s*). The relation will be readily inferred where the donee resides with, and is maintained by, the donor (*t*); or if the donee is an orphan and is maintained by the donor, though not residing with him (*a*). But a donor may be *in loco parentis* to a donee where the donee has a father living, and resides with and is maintained by the father, especially if the donor contributes to the family income (*b*). The mere leaving of a legacy does not show

(*m*) *Watson* v. *Watson* (1864), 33 Beav. 574; *Re Innes, Barclay* v. *Innes* (1908), 125 L. T. Jo. 60.

(*n*) Without the consent of those entitled under the settlement the settlor cannot substitute the benefits he may have chosen to confer by his will for those which he had already secured by deed (*Chichester* (*Lord*) v. *Coventry* (1867), L. R. 2 H. L. 71, *per* Lord CRANWORTH, at p. 87).

(*o*) *Chichester* (*Lord*) v. *Coventry, supra, per* Lord ROMILLY, M.R., at p. 91; see *Hinchcliffe* v. *Hinchcliffe* (1797), 3 Ves. 516, 528; *Thynne* (*Lady E.*) v. *Glengall* (*Earl*) (1848), 2 H. L. Cas. 131, 155; and compare *Pole* v. *Somers* (*Lord*) (1801), 6 Ves. 309.

(*p*) *Suisse* v. *Lowther* (*Lord*) (1843), 2 Hare, 424, 435; compare *Powel* v. *Cleaver* (1789) 2 Bro. C. C. 499.

(*q*) *Ex parte Pye, Ex parte Dubost* (1811), 18 Ves. 140, 154.

(*r*) *Powys* v. *Mansfield* (1837), 3 My. & Cr. 359; *Fowkes* v. *Pascoe* (1875), 10 Ch. App. 343, 350; the rule is sometimes stated as including provisions by a parent or a person in *loco parentis*; but the word "parent" must be restricted to "father," since it is only on him that the duty of making provision for the child *primâ facie* falls (*Re Ashton, Ingram* v. *Papillon*, [1897] 2 Ch. 574).

(*s*) Strictly the evidence is of intention by the donor to put himself *in loco parentis*; from such intention the presumption against double portions arises, and parol evidence is admissible to prove or disprove the facts upon which the presumption is to depend, namely, whether, in the language of Lord ELDON in *Ex parte Pye, Ex parte Dubost, supra*, he had meant to put himself *in loco parentis* (*per* Lord COTTENHAM, L.C., in *Powys* v. *Mansfield, supra*, at p. 370; see *Booker* v. *Allen* (1831), 2 Russ. & M. 270, 299).

(*t*) *Watson* v. *Watson, supra*. In *Twining* v. *Powell* (1845), 2 Coll. 262, the testatrix also referred to the legatee as her adopted child.

(*a*) *Booker* v. *Allen* (1831), 2 Russ. & M. 270.

(*b*) *Powys* v. *Mansfield, supra*. "A rich unmarried uncle," said Lord COTTENHAM, L.C., in that case, "taking under his protection the family of a

SECT. 4. Satisfaction.

an intention on the part of the testator to place himself *in loco parentis* to the legatee (*c*). A grandfather or a collateral relation is in the position of a stranger for the purpose of the rule, and evidence must be given of his intention to put himself *in loco parentis* (*d*). It used to be held that a father was in a similar position in respect of his illegitimate child (*e*); but in such a case there is an obvious duty to make provision for the child, and probably the presumption would now arise without evidence (*f*).

Strength of presumption of satisfaction in different cases.

153. The rule against double portions is only a rule of presumption, and the presumption is liable to be rebutted; but the strength of the presumption varies according to the nature of the instruments and the order in which they are executed. The presumption is strongest in the case where a testamentary provision for a child is followed by a settlement. Here both provisions are still under the testator's control when he executes the later instrument. The presumption is less strong where a settlement, which creates an obligation remaining unperformed, is followed by a testamentary provision. The testator is not free from the obligation of the settlement when he makes his will, and it is not so readily presumed that he meant the latter to take the place of the former (*g*). And where the settlement precedes the will, a direction in the will to pay debts may be held to include the liability under the settlement so as to rebut the presumption of satisfaction (*h*); but only if it is of such a nature as properly to constitute a debt (*i*).

The strength of the presumption is further reduced when the double provision is contained in consecutive settlements, since in the case of a will the testator is supposed to be disposing of the whole of his property and distributing it among the different objects

brother, who has not the means of adequately providing for them, and furnishing through the father to the children the means of their maintenance and education, may surely be said to intend to put himself, for the purpose in question, *in loco parentis* to the children, although they never leave their father's roof."

(*c*) *Shudal* v. *Jekyll* (1742), 2 Atk. 516; *Lyddon* v. *Ellison* (1854), 19 Beav. 565; *Re Smythies, Weyman* v. *Smythies*, [1903] 1 Ch. 259.

(*d*) As to a grandfather, see *Roome* v. *Roome* (1744), 3 Atk. 181, 183; *Powel* v. *Cleaver* (1789), 2 Bro. C. C. 499, 517; *Perry* v. *Whitehead* (1801), 6 Ves. 544; *Lyddon* v. *Ellison*, *supra*, at p. 572; compare *Ellis* v. *Ellis* (1802), 1 Sch. & Lef. 1; as to collaterals, see *Shudal* v. *Jekyll*, *supra*.

(*e*) *Grave* v. *Salisbury* (*Earl*) (1785), 1 Bro. C. C. 425; *Perry* v. *Whitehead*, *supra*; *Ex parte Pye, Ex parte Dubost* (1811), 18 Ves. 140, 152.

(*f*) In *Re Lawes, Lawes* v. *Lawes* (1881), 20 Ch. D. 81, C. A., JESSEL, M.R., at p. 86, treated a father as being *in loco parentis* towards his illegitimate son.

(*g*) *Chichester* (*Lord*) v. *Coventry* (1867), L. R. 2 H. L. 71, 87; *Re Tussaud's Estate, Tussaud* v. *Tussaud* (1878), 9 Ch. D. 363, C. A.; and as to this distinction, see *Dawson* v. *Dawson* (1867), L. R. 4 Eq. 504, 512; *Cooper* v. *Macdonald* (1873), L. R. 16 Eq. 258, 268.

(*h*) *Chichester* (*Lord*) v. *Coventry*, *supra*, at pp. 85, 88; *Dawson* v. *Dawson*, *supra*; see *Lethbridge* v. *Thurlow* (1851), 15 Beav. 334; *Re Franklin, Franklin* v. *Franklin* (1907), 52 Sol. Jo. 12. Where the will precedes the settlement, a direction to pay debts can have no such effect (*Trimmer* v. *Bayne* (1802), 7 Ves. 508; *Dawson* v. *Dawson*, *supra*; *Cooper* v. *Macdonald*, *supra*).

(*i*) *Bennett* v. *Houldsworth* (1877), 6 Ch. D. 671; *Re Vernon, Garland* v. *Shaw* (1906), 95 L. T. 48.

of his bounty (*k*); but not so in the case of a settlement. And if the first settlement contains a power of revocation which is not exercised, this will be an indication that the provisions are intended to be cumulative (*l*).

Slight differences do not rebut presumption.

154. Slight differences between the two provisions—that is, such as in the opinion of the judge leave the two provisions of substantially the same nature—do not rebut the presumption against double portions (*m*). Thus the presumption is not rebutted by slight differences as to the time of payment of the two portions (*n*), and sums agreed to be advanced may be satisfied *pro tanto* by a share of residue (*o*); and similarly a bequest of a share of residue may be adeemed by a subsequent advance of a specific sum (*p*). Satisfaction by a residue and ademption of a residue cannot for this purpose be distinguished (*q*).

The gifts must be *ejusdem generis*.

But the second portion must be *ejusdem generis* with the first. Thus a pecuniary legacy is not adeemed by the father afterwards taking his son into partnership and giving him an interest in the business stock (*r*). If, however, the father himself sets a pecuniary value on the property given, or gives it with reference to its pecuniary value, it ceases to be of a different nature for this purpose (*s*). Similarly, land is not to be taken in satisfaction for money, nor money for land (*t*), unless the testator estimates the value of the land at a fixed sum, and desires it to be made up to a particular amount (*a*). And an interest subject to a contingency will not be a satisfaction of a vested interest (*b*), unless the contingency is so remote that it may be disregarded (*c*).

(*k*) *Palmer* v. *Newell* (1855), 20 Beav. 32.

(*l*) *Palmer* v. *Newell* (1856), 8 De. G. M. & G. 74, 78, C. A.; and see *Cartwright* v. *Cartwright*, [1903] 2 Ch. 306, where satisfaction was rebutted by the differences in the limitations.

(*m*) *Weall* v. *Rice* (1831), 2 Russ. & M. 251, 268.

(*n*) *Hartopp* v. *Hartopp* (1810), 17 Ves. 184; compare *Lethbridge* v. *Thurlow* (1851), 15 Beav. 334.

(*o*) *Schofield* v. *Heap* (1858), 27 Beav. 93.

(*p*) *Thynne* (*Lady E.*) v. *Glengall* (*Earl*) (1848), 2 H. L. Cas. 131.

(*q*) *Montefiore* v. *Guedalla* (1859), 1 De G. F. & J. 93, 101, C. A. But where the residue is left to other persons jointly with the children, advances to the children are brought into account only so as to increase the share of residue going to the children (*Meinertzagen* v. *Walters* (1872), 7 Ch. App. 670), and if the residue is left between a stranger and a single child, the presumption of satisfaction is not admitted at all, since the effect would be to compel the child to bring advances into account for the benefit of the stranger, but not *vice versâ* (*Re Heather, Pumfrey* v. *Fryer*, [1906] 2 Ch. 230).

(*r*) *Holmes* v. *Holmes* (1783), 1 Bro. C. C. 555; *Re Jaques, Hodgson* v. *Braisby*, [1903] 1 Ch. 267, C. A.; dissenting from *Re Vickers, Vickers* v. *Vickers* (1888), 37 Ch. D. 525, where NORTH, J., considered *Holmes* v. *Holmes, supra*, overruled by the observations of JESSEL, M.R., in *Re Lawes, Lawes* v. *Lawes* (1881), 20 Ch. D. 81, 87, C. A.

(*s*) *Bengough* v. *Walker* (1808), 15 Ves. 507; *Re Lawes, Lawes* v. *Lawes, supra*.

(*t*) *Bellasis* v. *Uthwatt* (1737), 1 Atk. 426, 428; and see *Davys* v. *Boucher* (1839), 3 Y. & C. (EX.) 397.

(*a*) *Chichester* (*Lord*) v. *Coventry* (1867), L. R. 2 H. L. 71, *per* Lord ROMILLY, M.R., at p. 96, referring to *Bengough* v. *Walker, supra*.

(*b*) *Bellasis* v. *Uthwatt, supra*; *Hanbury* v. *Hanbury* (1788), 2 Bro. C. C. 352.

(*c*) *Powys* v. *Mansfield* (1837), 3 My. & Cr. 359, 374.

SECT. 4. Satisfaction.

Difference in limitations.

155. Differences between the limitations in the two provisions will only exclude the rule against double portions where they are so great as to indicate that the donor did not intend the later to be in satisfaction of the earlier (*d*). Satisfaction is compatible with greater differences of limitation when the will precedes the settlement, since the testator is at liberty to vary as he pleases the bounty given by his will. Thus, where a father has by his will given a portion to his daughter absolutely, this may well be satisfied by a settlement under which she takes a life interest. It is simply such a settlement as she might be expected herself to make if she received the portion under the will (*e*).

But in accordance with the principle already stated (*f*), where the settlement precedes the will greater weight is given to differences in the limitations. The testator is already under an obligation to dispose of property in manner defined by the settlement, and his will is no satisfaction unless, in making it, he could have supposed himself to be satisfying that obligation (*g*).

(*d*) *Trimmer* v. *Bayne* (1802), 7 Ves. 508, 515.

(*e*) *Chichester* (*Lord*) v. *Coventry* (1867), L. R. 2 H. L. 71, 88; *Stevenson* v. *Masson* (1873), L. R. 17 Eq. 78; see *Re Innes, Barclay* v. *Innes* (1908), 125 L. T. Jo. 60; and a legacy given absolutely to a son may be adeemed by a subsequent settlement of money on the marriage of the son (*Hopwood* v. *Hopwood* (1859), 7 H. L. Cas. 728). This is not necessarily prevented by a later codicil expressly declaring other portions to be in satisfaction of legacies, but not referring to the legacy in question (*ibid.*). Similarly, where the will settles a sum on a daughter and her children, a subsequent settlement on the daughter and her children will be an ademption, notwithstanding differences in the trusts (*Re Furness, Furness* v. *Stalkartt*, [1901] 2 Ch. 346).

(*f*) See p. 132, *ante*.

(*g*) *Chichester* (*Lord*) v. *Coventry*, *supra*, at p. 89. The three leading cases on this subject are *Durham* (*Earl*) v. *Wharton* (1836), 3 Cl. & Fin. 146, H. L.; *Thynne* (*Lady E.*) v. *Glengall* (*Earl*) (1848), 2 H. L. Cas. 131; and *Chichester* (*Lord*) v. *Coventry*, *supra*.

In *Durham* (*Earl*) v. *Wharton*, *supra*, where the will preceded the settlement, there were substantial differences in the trusts; in particular by the will £10,000 was given in trust for the testator's daughter and her children; under the settlement £15,000 was to be paid to the husband who at the same time made provision for the daughter and for younger children. But the rule against double portions prevailed; see *Re Furness, Furness* v. *Stalkartt, supra*.

In *Thynne* (*Lady E.*) v. *Glengall* (*Earl*), *supra*, the settlement preceded the will, and the chief differences were that, by the settlement, the power of appointment among children was given to husband and wife jointly, under the will to the wife alone; under the settlement, the children of the marriage, under the will, the daughter's children generally, were objects of the power. It was held that these were not differences which negatived the presumption of satisfaction. The limitations of the will were in effect a fulfilment of the obligations of the settlement. In *Chichester* (*Lord*) v. *Coventry*, *supra*, also, the settlement (which was by covenant to pay £10,000 on demand) preceded the will, but it was held that there was no satisfaction, partly on the ground that a direction to pay debts contained in the will included the obligation under the settlement, which might at any time have been turned into a present debt by demand; but also because the differences between the limitations of the £10,000 in the settlement and those of the will were so marked as to be sufficient to overcome any presumption against a double provision; see *Re Tussaud's Estate, Tussaud* v. *Tussaud* (1878), 9 Ch. D. 363, C. A.; *Re Vernon, Garland* v. *Shaw* (1906), 95 L. T. 48; *Re Franklin, Franklin* v. *Franklin* (1907), 52 Sol. Jo. 12. But where a portion is, by the effect of the settlement, charged on all the settlor's real estate, and he subsequently by will makes such provision for the donee as to raise the presumption of satisfaction, this is not rebutted by the circumstance that he

SECT. 4. Satisfaction.

Difference in beneficiaries.

156. A provision by will may be adeemed in whole or in part by a subsequent advance, although the persons mentioned in the will and those to whom the advance is made are not the same. This difference is a matter to be considered in determining whether or not there is ademption; but if the decision is in favour of ademption, the ademption is final, and affects all the persons within the scope of the testamentary provision (*h*). Satisfaction of a settlement by a will is different, and may operate as to certain persons benefited by the settlement, and not as to others. Consequently those who benefit both under the settlement and under the will are put to their election; but a beneficiary under the settlement who does not take under the will—as where a daughter's husband takes a life interest under the settlement but not under the will (*i*)—cannot be put to election, and he retains his right under the settlement (*k*). Conversely, if there are beneficiaries under the will who are not within the settlement, the beneficiaries under both settlement and will must elect. If they elect to take under the will, the provision of the will is substituted for that in the settlement, and the beneficiaries mentioned only in the will are let in to share in the whole property; if they elect against the will, then they cannot benefit under the will without compensating the

devises his real estate "subject to the charges and incumbrances thereon" (*Montagu* v. *Sandwich* (*Earl*) (1886), 32 Ch. D. 525, C. A.).

(*h*) *Chichester* (*Lord*) v. *Coventry* (1867), L. R. 2 H. L. 71, 90; *Twining* v. *Powell* (1845), 2 Coll. 262.

(*i*) See *Mayd* v. *Field* (1876), 3 Ch. D. 587.

(*k*) *Chichester* (*Lord*) v. *Coventry*, *supra*, *per* Lord ROMILLY, M.R., at pp. 92, 93, 95: "If a father, on the marriage of his daughter, should settle £10,000 on her for life, remainder to the children of the marriage, a bequest of £10,000 to that daughter would satisfy her life interest in the £10,000, but would not satisfy or touch the interests of her children." In *McCarogher* v. *Whieldon* (1867), L. R. 3 Eq. 236, a father, on the marriage of his son, covenanted to give, by will or otherwise, one-fifth of his real and personal estate at his death on trust for the son for a protected life interest, then for the wife and issue of the marriage. By his will he gave his real and personal estate for all his children living at his death. There were five such children. This gift did not operate as a satisfaction as regards the wife and children, and they retained their rights under the settlement; but it operated as a satisfaction as regards the son, and he had to elect whether to take his life interest under the settlement or one-fifth of the residue remaining after satisfaction of the covenant. He elected to take under the will. This meant that he was cut out of the covenant, and the life estate of his wife thereunder was accelerated; see *Mayd* v. *Field*, *supra*; and compare *Bethell* v. *Abraham* (1874), 22 W. R. 745, C. A., 3 Ch. D. 590, n. In *Re Blundell*, *Blundell* v. *Blundell*, [1906] 2 Ch. 222, a bequest to a wife absolutely was a satisfaction as to her life interest under a preceding settlement, but not as to the interests of her husband and children, notwithstanding that, under an after-acquired property clause in the settlement, her legacy had to be brought into the settlement. But in general where the will follows the settlement, the circumstance that certain persons included in the settlement are not included in the testamentary provision precludes the presumption (*Re Tussaud's Estate*, *Tussaud* v. *Tussaud* (1878), 9 Ch. D. 363, 368, C. A.; and see *Hall* v. *Hill* (1841), 1 Dr. & War. 94; *Re Vernon*, *Garland* v. *Shaw* (1906), 95 L. T. 48).

Moreover, where the settlement follows the will the presumption will not arise (in the absence of express direction) if the persons taking under the several instruments are altogether different. Thus a legacy in favour of a daughter and her children is not adeemed by a subsequent gift in favour of her husband absolutely (*Cooper* v. *Macdonald* (1873), L. R. 16 Eq. 258, 269); see *Baugh* v. *Read* (1790), 1 Ves. 257; and compare *Twining* v. *Powell* (1845), 2 Coll. 262.

SECT. 4. Satisfaction.

beneficiaries under the will alone for the loss thus caused to them (*l*).

Admission of parol evidence.

157. Parol evidence cannot be admitted to add to or vary a written instrument (*m*); but where from two written instruments, taken in conjunction with the surrounding circumstances, the court raises a presumption of satisfaction, then parol evidence is admissible to rebut the presumption, and therefore also to support it (*n*). In the case of a will and a settlement, the rule is the same whether the will precedes or follows the settlement (*o*). And where a disposition has been made by one written instrument, parol evidence may be given of the circumstance of a subsequent transaction which has not been reduced to writing, for the purpose of showing an intention on the part of the donor that it should be a satisfaction (*p*).

Satisfaction of debt by legacy.

158. Where a testator, being at the time of making his will (*q*) indebted, leaves to his creditor a legacy of a sum equal to or greater than the debt, the legacy is presumed to be a satisfaction of the debt, and the creditor cannot have both his debt and the legacy (*r*),

(*l*) This would have been the case in *Thynne* (*Lady E.*) v. *Glengall* (*Earl*) (1848), 2 H. L. Cas. 131, had there been children of a second marriage (see the hypothesis worked out by Lord ROMILLY, M.R., in *Chichester* (*Lord*) v. *Coventry* (1867), L. R. 2 H. L. 71, at p. 93).

(*m*) But it may be given to explain the surrounding circumstances; see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 448.

(*n*) *Trimmer* v. *Bayne* (1802), 7 Ves. 508; *Kirk* v. *Eddowes* (1844), 3 Hare, 509, and cases there referred to; *Hall* v. *Hill* (1841), 1 Dr. & War. 94; *Curtin* v. *Evans* (1875), 9 I. R. Eq. 553, 557; *Montagu* v. *Sandwich* (*Earl*) (1886), 32 Ch. D. 525, 535, C. A.; *Re Scott, Langton* v. *Scott*, [1903] 1 Ch. 1, C. A., where the presumption was rebutted; see *Debeze* v. *Mann* (1787), 2 Bro. C. C. 165, 519. In such cases the evidence is not admitted on either side for the purpose of proving, in the first instance, with what intent either writing was made, but for the purpose only of ascertaining whether the presumption which the law has raised be well or ill founded (*Kirk* v. *Eddowes*, *supra*, *per* WIGRAM, V.-C., at p. 517). In *Weall* v. *Rice* (1831), 2 Russ. & M. 251, LEACH, M.R., at p. 268, treated extrinsic evidence as being admissible both to raise and to rebut the presumption, and in *Booker* v. *Allen* (1831), 2 Russ. & M. 270, he admitted extrinsic evidence to raise the presumption where the provisions of the instruments were so different as to prevent it from being raised by intrinsic evidence. But the other authorities cited show that the presumption must first be raised on the language of the instruments, and on the relationship of the parties as one of the surrounding circumstances, before parol evidence of intention against or for satisfaction can be admitted. Otherwise the parol evidence would be admitted simply to vary the written instrument (*Re Tussaud's Estate, Tussaud* v. *Tussaud* (1878), 9 Ch. D. 363, 374, C. A.).

(*o*) *Re Tussaud's Estate, Tussaud* v. *Tussaud*, *supra*, at p. 373.

(*p*) *Kirk* v. *Eddowes*, *supra*.

(*q*) A legacy will not be presumed to be a satisfaction of a debt not existing at the date of the will, since an intention to that effect cannot be imputed to the testator (*Fowler* v. *Fowler* (1735), 3 P. Wms. 353; *Thomas* v. *Bennet* (1725), 2 P. Wms. 341; *Haynes* v. *Mico* (1781), 1 Bro. C. C. 129, 131; *Plunkett* v. *Lewis* (1844), 3 Hare, 316, 330); and the fact that the debt is created contemporaneously with the will is a strong reason against satisfaction (*Horlock* v. *Wiggins*, *Wiggins* v. *Horlock* (1888), 39 Ch. D. 142, C. A.).

(*r*) *Talbot* v. *Shrewsbury* (*Duke*) (1714), Prec. Ch. 394; 2 White & Tud. L. C., 7th ed., p. 375; *Re Rattenberry, Ray* v. *Grant*, [1906] 1 Ch. 667; but a legacy of less amount than the debt is not a satisfaction *pro tanto* (*Atkinson* v. *Webb* (1704), 2 Vern. 478; *Cranmer's Case* (*circ.* 1711), 2 Salk. 508; *Eastwood* v. *Vinke* (1731), 2 P. Wms. 613, 616; *Thynne* (*Lady E.*) v. *Glengall* (*Earl*) (1848),

and if the debt is discharged before the testator's death the legacy will not be payable (*s*). But this is a presumption which is not favoured by the court, and it will be rebutted by slight circumstances, whether appearing on the will or incident to the nature of the debt and of the legacy, which suggest that the testator did not intend the legacy to operate as a satisfaction (*t*).

Thus it will be rebutted where the will contains a direction for the payment of debts and legacies (*a*), and even where the direction is only for payment of debts (*b*), or where the will states a particular motive for the legacy other than satisfaction of the debt (*c*).

The presumption will also be rebutted where the legacy is so

2 H. L. Cas. 131, 153; see *Graham* v. *Graham* (1749), 1 Ves. Sen. 262; *Bor* v. *Bor* (1756), 3 Bro. Parl. Cas. 167, 179), unless there is evidence that the legacy was intended as part payment and that the creditor assented (*Hammond* v. *Smith* (1864), 33 Beav. 452). There is only satisfaction where the creditor and the legatee are the same; hence there is no satisfaction where the debt is due to the husband and the legacy is given to his wife (*Hall* v. *Hill* (1841), 1 Dr. & War. 94); or where the debt is due from the testator as trustee and the legacy is to one of the *cestuis que trust* (*Fairer* v. *Park* (1876), 3 Ch. D. 309; see *Smith* v. *Smith* (1861), 3 Giff. 263, 272). A legacy given in satisfaction of a debt is liable to abate with other legacies (*Re Wedmore, Wedmore* v. *Wedmore*, [1907] 2 Ch. 277). As to a gift of residue to creditors in proportions corresponding to their debts, see *Philips* v. *Philips* (1844), 3 Hare, 281.

(*s*) *Re Fletcher, Gillings* v. *Fletcher* (1858), 38 Ch. D. 373.

(*t*) *Thynne* (*Lady E.*) v. *Glengall* (*Earl*) (1848), 2 H. L. Cas. 131. The presumption is founded on the maxim *debitor non præsumitur donare*—or, that a man should be just before he is bountiful; but of course there is in principle no room for such maxims where the debtor leaves sufficient to pay both debts and legacies (*Chancey's Case* (1717), 1 P. Wms. 408; *Fowler* v. *Fowler* (1735), 3 P. Wms. 353; *Mathews* v. *Mathews* (1755), 2 Ves. Sen. 635); and while it is settled that where there is a debt due in the testator's life, and nothing but a plain general legacy of equal or greater amount given to the creditor, the presumption will prevail, yet the court will not go further, and it will avail itself of slight circumstances to exclude the presumption (*Richardson* v. *Greese* (1743), 3 Atk. 65, 68; *Hinchcliffe* v. *Hinchcliffe* (1797), 3 Ves. 516, 529; *Re Horlock, Calham* v. *Smith*, [1895] 1 Ch. 516, 519); it will "rely on the minutest shade of difference to escape from that false principle" (*Hassell* v. *Hawkins* (1859), 4 Drew. 468, 470). There is no difference in this respect between debts due to children of the testator and debts due to strangers (*Tolson* v. *Collins* (1799), 4 Ves. 483; *Stocken* v. *Stocken* (1831), 4 Sim. 152).

(*a*) *Chancey's Case, supra; Richardson* v. *Greese, supra; Field* v. *Mostin* (1778), 1 Dick. 543; *Jefferies* v. *Michell* (1855), 20 Beav. 15; *Hassell* v. *Hawkins, supra*. But where the will contains such a direction, and the testator subsequently contracts a debt and then by codicil leaves an equal or greater legacy to the creditor, the presumption is not rebutted (*Gaynon* v. *Wood* (1759), 1 P. Wms. 410, n.).

(*b*) *Re Huish, Bradshaw* v. *Huish* (1889), 43 Ch. D. 260; see *Cole* v. *Willard* (1858), 25 Beav. 568; *Pinchin* v. *Simms* (1861), 30 Beav. 119; *Dawson* v. *Dawson* (1867), L. R. 4 Eq. 504, 514; *Atkinson* v. *Littlewood* (1874), L. R. 18 Eq. 595, 604; compare *Glover* v. *Hartcup* (1864), 34 Beav. 74; *Chichester* (*Lord*) v. *Coventry* (1867), L. R. 2 H. L. 71. It had previously been held that the mere direction to pay debts was not enough to rebut the presumption (*Edmunds* v. *Low* (1857), 3 K. & J. 318); though it was an element to be considered in regard to the question of intention (*Rowe* v. *Rowe* (1848), 2 De G. & Sm. 294, 298). The direction to pay debts covers the testator's indebtedness on a covenant in favour of his wife or other beneficiary, although payment under the covenant is not to be made till after his death (*Cole* v. *Willard, supra; Atkinson* v. *Littlewood, supra*, at p. 605; see *Chichester* (*Lord*) v. *Coventry, supra*, at p. 85; *contra, Wathen* v. *Smith* (1819), 4 Madd. 325).

(*c*) See *Mathews* v. *Mathews, supra*.

SECT. 4. Satisfaction.

different as not to be a proper equivalent for the debt; as where it is payable at a later time than the debt, so as to be less advantageous to the creditor (*d*), or where it is different in kind. Such difference may exist either in the things themselves, as where they are not *ejusdem generis*—thus a devise of land is not a satisfaction of a debt (*e*)—or in their incidents, as where the legacy is either contingent (*f*) or of uncertain amount (*g*). And the presumption may be excluded by differences in the title to the debt and legacy, as where the debt belongs to a married woman for her separate use and the legacy is not so given (*h*); or the debt and legacy are secured by different charges on property (*i*); or the debt and the legacy are vested in different trustees (*k*); or the debt is due on a negotiable instrument (*l*). Where a testator is liable as trustee for a breach of trust, a bequest of money for the purposes of the

(*d*) Thus, where the debt is due at the testator's death, the legacy must not be made payable at a fixed date after the death (*Nicholls* v. *Judson* (1742), 2 Atk. 300; *Clark* v. *Sewell* (1744), 3 Atk. 96; *Re Roberts*, *Roberts* v. *Parry* (1902), 50 W. R. 469); and where the debt is due at a fixed date after the death, the legacy must not be made payable at a later date (*Haynes* v. *Mico* (1781), 1 Bro. C. C. 129; see *Jeacock* v. *Falkener* (1783), 1 Bro. C. C. 295, 297). Moreover, if the debt is due at a fixed date after death, and the legacy is given without a fixed date, there is no satisfaction, since the legacy is not, according to the ordinary rule, payable for a year (*Re Horlock*, *Calham* v. *Smith*, [1895] 1 Ch. 516); and similarly where an annuity given by deed is payable at a fixed date within the year, and an annuity is given by will generally (*Re Dowse*, *Dowse* v. *Glass* (1881), 50 L. J. (CH.) 285), or different fixed times are settled for the two annuities (*Atkinson* v. *Webb* (1704), Prec. Ch. 236; *Hales* v. *Darell* (1840), 3 Beav. 324). But if the debt is payable at the death, and the legacy is given generally, the fact that the legacy may not be paid for a year does not rebut the presumption of satisfaction (*Re Rattenberry*, *Ray* v. *Grant*, [1906] 1 Ch. 667); and since a legacy so given in satisfaction of a debt carries interest from the death (*Clark* v. *Sewell*, *supra*, at p. 99), there is no difference as to interest which will rebut the presumption (*Re Rattenberry*, *Ray* v. *Grant*, *supra*). An acceleration in the date of payment is consistent with satisfaction (*Wathen* v. *Smith* (1819), 4 Madd. 325, 332). It has been recognised that the exceptions, equally with the rule, are unsatisfactory (*Re Horlock*, *Calham* v. *Smith*, *supra*).

(*e*) *Eastwood* v. *Vinke* (1731), 2 P. Wms. 613, 616; *Byde* v. *Byde* (1761), 1 Cox, Eq. Cas. 44, 48; see *Forsight* v. *Grant* (1791), 1 Ves. 298; *Richardson* v. *Elphinstone* (1794), 2 Ves. 463.

(*f*) *Crompton* v. *Sale* (1729), 2 P. Wms. 553; *Tolson* v. *Collins* (1799), 4 Ves. 483; *Crichton* v. *Crichton*, [1895] 2 Ch. 853.

(*g*) Thus a residue or a share of residue is not a satisfaction of a debt (*Barret* v. *Beckford* (1750), 1 Ves. Sen. 519; *Devese* v. *Pontet* (1785), 1 Cox, Eq. Cas. 188, 192; *Thynne* (*Lady E.*) v. *Glengall* (*Earl*) (1848), 2 H. L. Cas. 131, 155). There may be satisfaction of a debt of unascertained amount (*Edmunds* v. *Low* (1857), 3 K. & J. 318, 323; *Smith* v. *Smith* (1861), 3 Giff. 263, 269), unless it is on an open account in respect of which nothing, so far as the testator knows, may be owing (*Rawlins* v. *Powel* (1715), 1 P. Wms. 297).

(*h*) *Bartlett* v. *Gillard* (1827), 3 Russ. 149, 156; *Fourdrin* v. *Gowdey* (1834), 3 My. & K. 383, 410; *Rowe* v. *Rowe* (1848), 2 De G. & Sm. 294, 298; *Fairer* v. *Park* (1876), 3 Ch. D. 309, 314; *contra*, *Atkinson* v. *Littlewood* (1874), L. R. 18 Eq. 595; and see *Edmunds* v. *Low*, *supra*, as to the effect of the marriage of a woman who was creditor-legatee, whereby the debt might formerly become payable to her husband.

(*i*) *Bartlett* v. *Gillard*, *supra*; *Hales* v. *Darell*, *supra*; but see *Atkinson* v. *Littlewood*, *supra*.

(*k*) *Pinchin* v. *Simms* (1861), 30 Beav. 119.

(*l*) *Carr* v. *Eastabrooke* (1797), 3 Ves. 561; *Re Roberts*, *Roberts* v. *Parry* (1902), 50 W. R. 469.

SECT. 4. Satisfaction.

trust will *primâ facie* be a satisfaction of the breach of trust (*m*), and sums charged on the testator's estate may be satisfied by a legacy to the owner of the charge (*n*). A declaration in the will that certain legacies are in satisfaction of debts will assist to rebut the presumption of satisfaction in the case of a debt not so mentioned (*o*).

Parol evidence.

159. Since the presumption of satisfaction is opposed to the language of the will, parol evidence is admissible to rebut it and also to affirm it (*p*).

Debt from parent to child.

160. Where a debt exists from a parent to a child, an advancement, in the parent's lifetime, upon the child's marriage or on some other occasion, of a portion equal to or exceeding the debt is *primâ facie* a satisfaction of the debt (*q*). The presumption may be rebutted by circumstances showing that satisfaction was not intended (*r*); but it will not be rebutted merely because the gift is expressed to be in consideration of natural love and affection, or, in the case of a gift on the marriage of a daughter, because her husband was ignorant of her rights (*s*).

SECT. 5.—*Performance.*

Performance of covenant to purchase lands.

161. A man under an obligation, who does an act which is suitable to be the means of performing the obligation, will be presumed in equity to have done the act with that intention. Thus, where a man covenants to purchase and settle lands (*t*), and afterwards purchases lands which are suitable to be the subject of the settlement but does not settle them, it will be presumed that he purchased them with the intention of performing his covenant (*a*);

(*m*) *Bensusan* v. *Nehemias* (1851), 4 De G. & Sm. 381.

(*n*) *Shadbolt* v. *Vanderplank* (1861), 29 Beav. 405.

(*o*) *Atkinson* v. *Webb* (1704), Prec. Ch. 236; *Jeacock* v. *Falkener* (1783), 1 Bro. C. C. 295, 297; *Charlton* v. *West* (1861), 30 Beav. 124.

(*p*) See *Plunkett* v. *Lewis*, (1844), 3 Hare, 316, 323; *Hall* v. *Hill* (1841), 1 Dr. & War. 94, 122. In *Fowler* v. *Fowler* (1735), 3 P. Wms. 353, such evidence was considered not admissible, but it is only to be rejected when the intention in favour of satisfaction is expressed in the will itself; see *Hall* v. *Hill*, *supra*; in *Wallace* v. *Pomfret* (1805), 11 Ves. 542, this distinction was overlooked; compare p. 136, *ante*.

(*q*) *Plunkett* v. *Lewis*, *supra*; *Reade* v. *Reade* (1881), 9 L. R. Ir. 409, C. A.; see *Wood* v. *Briant* (1742), 2 Atk. 521; *Seed* v. *Bradford* (1750), 1 Ves. Sen. 501; *Chave* v. *Farrant* (1810), 18 Ves. 8; compare *Hardingham* v. *Thomas* (1854), 2 Drew. 353. The advancement must be subsequent to the debt (*Plunkett* v. *Lewis*, *supra*, at p. 330).

(*r*) As where the gift is of less amount, or uncertain or contingent in its nature (*Crichton* v. *Crichton*, [1895] 2 Ch. 853). And as to the circumstances which will rebut the presumption, see S. C., [1896] 1 Ch. 870, C. A.

(*s*) *Plunkett* v. *Lewis*, *supra*.

(*t*) Or to convey and settle lands (*Deacon* v. *Smith* (1746), 3 Atk. 323). It is the same where the obligation to purchase arises under a statute (*Tubbs* v. *Broadwood* (1831), 2 Russ. & M. 487, 493).

(*a*) *Lechmere* v. *Lechmere* (*Lady*) (1735), Cas. *temp.* Talb. 80; 2 White & Tud. L. C., 7th ed., p. 399; the principle is that "where a man covenants to do an act, and he does an act which may be converted to a completion of this covenant, it shall be supposed that he meant to complete it" (*Sowden* v. *Sowden* (1785), 1 Cox, Eq. Cas. 165, *per* Lord KENYON, M.R., at p. 166; see *Perry* v. *Phelips* (1798), 4 Ves. 108, 116). A purchase of lands will be a performance, though the covenant was to settle lands or a rentcharge of a specified annual

SECT. 5. Performance.

and if he dies intestate as to these lands, they will be treated, as against his heir-at-law, as being bound by the trusts of the settlement (*b*); and the purchase will operate as a satisfaction of the covenant (*c*), either entirely, or, if the lands purchased are less in value than the amount covenanted to be laid out, *pro tanto* (*d*).

The presumption in favour of performance only arises where the lands are purchased subsequently to the covenant (*e*), and the interest purchased is of the same nature as that specified in the covenant (*f*). But it will not be rebutted by the fact that the purchase is not a literal compliance with the terms of the covenant: thus, where the covenant requires that the purchase shall be made with the consent of the trustees (*g*), or that the money shall be paid to the trustees to be applied by them in the purchase of lands (*h*), a purchase by the settlor himself without reference to the trustees will be a performance; and it is the same where the lands are purchased at different times (*i*). The presumption of intention is not rebutted by the fact that the settlor has mortgaged the lands; but the mortgagee's title is not affected, and it is only the equity of redemption in the hands of the heir which is subject to the settlement (*k*). Moreover, the trusts do not create a charge upon the lands during the lifetime of the settlor (*l*). It is only

value (*Deacon* v. *Smith* (1746), 3 Atk. 323). The principle applies, *à fortiori*, where trustees hold funds subject to investment in land, and a purchase by them will be taken to be a performance of the trust (*Mathias* v. *Mathias* (1858), 3 Sm. & G. 552); as to purchase by a beneficiary who has obtained the money from the trustees, see *Lench* v. *Lench* (1805), 10 Ves. 511. But expenditure by a tenant for life in permanent improvements to the settled land will not be a satisfaction of a covenant to pay money to the trustees (*Horlock* v. *Smith* (1853), 17 Beav. 572; see *Wiles* v. *Gresham* (1854), 2 Drew. 258; 5 De G. M. & G. 770, C. A.).

(*b*) *Deacon* v. *Smith, supra*; *Garthshore* v. *Chalie* (1804), 10 Ves. 1, 18.

(*c*) *Wilcocks* v. *Wilcocks* (1706), 2 Vern. 558.

(*d*) *Lechmere* v. *Carlisle* (*Earl*) (1733), 3 P. Wms. 211; on appeal *Lechmere* v. *Lechmere* (*Lady*) (1735), Cas. *temp.* Talb. 80; 2 White & Tud. L. C., 7th ed., p. 399.

(*e*) *Lechmere* v. *Carlisle* (*Earl*), *supra*.

(*f*) Thus, purchase of leaseholds for life, or the reversion expectant on such leaseholds, is not a performance of a covenant to purchase estates in fee simple in possession (*Lechmere* v. *Carlisle* (*Earl*), *supra*; see *Lewis* v. *Hill* (1749), 1 Ves. Sen. 274), though a reversion on leaseholds for life may suffice if there is only one life outstanding (*Deacon* v. *Smith, supra*). A purchase of a moiety of a house is not a performance of a covenant to purchase lands of inheritance (*Pinnell* v. *Hallett* (1751), Amb. 106); and a purchase of copyholds is not a performance of a covenant to settle freeholds (*A.-G.* v. *Whorwood* (1750), 1 Ves. Sen. 534, p. 541; *contra*, *Wilks* v. *Wilks* (1713), 5 Vin. Abr. 293, Sugden, Vendors and Purchasers, 14th ed., p. 710); at any rate, when the settlement is in favour of a tenant for life without impeachment of waste (*Pinnell* v. *Hallett, supra*).

(*g*) *Deacon* v. *Smith, supra*.

(*h*) *Sowden* v. *Sowden* (1785), 1 Cox, Eq. Cas. 165; 1 Bro. C. C. 582.

(*i*) *Lechmere* v. *Carlisle* (*Earl*), *supra*; *Deacon* v. *Smith, supra*.

(*k*) *Re Symes, Ex parte Poole* (1847), De G. 581; but according to a *dictum* of Lord HARDWICKE in *Deacon* v. *Smith, supra*, at p. 327, a subsequent sale or mortgage shows an intention that the lands shall not be bound by the articles, though not where the land is purchased subject to a mortgage.

(*l*) *Mornington* (*Countess*) v. *Keane* (1858), 2 De G. & J. 292, C. A.; compare *Wellesley* v. *Wellesley* (1839), 4 My. & Cr. 561; and as to covenants affecting after-acquired property, see *Tailby* v. *Official Receiver* (1888), 13 App. Cas. 523, 548. A covenant to settle specific lands already acquired binds them, and so, too, although they have only been contracted for (*Warde* v. *Warde* (1852), 16 Beav.

when he has died, without completing the settlement by conveyance to the trustees, that the doctrine of performance applies so as to bring the lands into the settlement. Where the purchase is treated as performance, the value of the lands will be taken to be the price paid for them, provided the purchase is *bonâ fide* (*m*).

Performance by intestacy.

162. The doctrine of performance has been extended to the case where a man is under a covenant to provide money at or after his death, and upon his death intestate a share of his estate devolves upon the covenantee (*n*); and equally so though the covenantee is his wife (*o*). This operates as a performance of the covenant either in whole or in part, according to the amount received under the intestacy (*p*); although the share of residue is not necessarily payable till the end of a year from the death, while the money due under the covenant is payable earlier (*p*). It is immaterial whether the covenant is that the covenantor shall leave, or that his executors shall pay (*q*); but the principle does not apply where the money has become due in the covenantor's life, so that an action could have been brought for breach of covenant (*r*). It applies where the covenant is for conveyance to the covenantor's wife of a specified share of all his real and personal estate; and she cannot take her distributive third share of the personal estate in addition, whether that share comes to her on an entire intestacy (*s*), or because her husband's will has become inoperative (*t*). But it does not apply where the benefit under the covenant is an annuity or life interest only (*a*); and since the covenant is entire, and the distributive share in the intestacy is not a performance as to a life interest under it, it is not a performance as to a sum payable under it absolutely (*a*).

103). On a subsequent exchange of the lands for other lands and a sum of money, the lands will be taken in substitution, and the money will be a specialty debt (*Powdrell* v. *Jones* (1854), 2 Sm. & G. 335).

(*m*) See *Pinnell* v. *Hallett* (1751), Amb. 106; *Tyrconnell* (*Lord*) v. *Ancaster* (*Duke*) (1754), Amb. 237; compare *Wace* v. *Bickerton* (1850), 3 De G. & Sm. 751.

(*n*) *Blandy* v. *Widmore* (1716), 1 P. Wms. 324; 2 White & Tud. L. C., 7th ed., p. 407. The principle has been applied to a covenant to exercise a limited testamentary power, so that, on non-exercise of the power, the covenant is satisfied by the covenantee receiving the amount in default of appointment (*Thacker* v. *Key* (1869), L. R. 8 Eq. 408, 415). But as to the validity of such a covenant, see *Palmer* v. *Lock* (1880), 15 Ch. D. 294, C. A.; *Re Evered*, *Molineux* v. *Evered*, [1910] 2 Ch. 147, 156, C. A.

(*o*) *Lee* v. *D'Aranda* (1747), 1 Ves. Sen. 1; 3 Atk. 419.

(*p*) *Garthshore* v. *Chalie* (1804), 10 Ves. 1, 7. The amount received under the intestacy includes the sum of £500 which the widow takes, if there are no issue of the husband, under the Intestates' Estates Act, 1890 (53 & 54 Vict. c. 29); see *Re Hogan*, *Hogan* v. *Hogan*, [1901] 1 I. R. 168.

(*q*) *Lee* v. *D'Aranda*, *supra*.

(*r*) *Oliver* v. *Brighouse or Brickland* (1732), cited 1 Ves. Sen. 1; 3 Atk. 420, 422; *Lee* v. *D'Aranda*, *supra*; see *Lang* v. *Lang* (1837), 8 Sim. 451.

(*s*) *Garthshore* v. *Chalie*, *supra*. This does not depend on the widow having taken out administration, although stress was laid on this point in *Haynes* v. *Mico* (1781), 1 Bro. C. C. 129; see *Garthshore* v. *Chalie*, *supra*, at p. 12.

(*t*) *Goldsmid* v. *Goldsmid* (1818), 1 Swan. 211.

(*a*) *Couch* v. *Stratton* (1799), 4 Ves. 391; *Salisbury* v. *Salisbury* (1848), 6 Hare, 526. And the widow can take under a covenant a life interest in the entire estate, and also her distributive share in the intestacy (*Young* v. *Young* (1871), 5 I. R. Eq. 615).

SECT. 5. **Performance.**

No performance by testamentary provision.

163. Where a covenantor who has covenanted to provide money at or after his death actually makes provision for the covenantee by will, this will not *primâ facie* be a performance of the covenant, since a legacy implies bounty. To operate as a performance it must appear that the legacy was given with that intention (*b*), or the circumstances must be such as bring the case within the rule as to satisfaction of a debt by a legacy (*c*).

SECT. 6.—*Marshalling.*

The doctrine of marshalling.

164. Where one claimant, A., has two funds, X and Y, to which he can resort for satisfaction of his claim, whether legal or equitable, and another claimant, B., can resort to only one of these funds, Y, equity interposes so as to secure that A. shall not by resorting to Y disappoint B. And, consequently, if the matter is under the control of the court, A. will be required in the first place to satisfy himself out of X, and only to resort to Y in case of deficiency; and if A. has already been paid out of Y, it will allow B. to stand in his place as against X (*d*). This is known as the doctrine of marshalling, and is adopted in order to prevent one claimant from depriving another claimant of his security (*e*). The doctrine is applied chiefly in regard to securities and to the administration of assets.

Application of marshalling.

165. In order that the doctrine of marshalling may be applied as regard claims by creditors, it is, in general, necessary (1) that they shall be against a single debtor; if one creditor has a claim against C. and D., and another creditor has a claim against D. only, the latter creditor cannot require the former to resort to C. unless the liability is such that D. could throw the primary liability on C., as where C. and D. are principal and surety (*f*); (2) that the two funds should be at the disposal of the debtor (*g*); and

(*b*) *Haynes* v. *Mico* (1781), 1 Bro. C. C. 129; *Devese* v. *Pontet* (1785), Prec. Ch. 240, n. (ed. Finch); see these cases discussed in *Garthshore* v. *Chalie* (1804), 10 Ves. 1; *Goldsmid* v. *Goldsmid* (1818), 1 Swan. 211, 218; and see *Wood* v. *Wood* (1844), 7 Beav. 183.

(*c*) See p. 136, *ante*.

(*d*) But the court does not interfere with the right of the first incumbrancer to satisfy himself out of the first security available (*Wallis* v. *Woodyear* (1855), 2 Jur. (N. S.) 179; see *Binns* v. *Nichols* (1866), L. R. 2 Eq. 256).

(*e*) *Aldrich* v. *Cooper* (1803), 8 Ves. 382, *per* Lord ELDON, L.C., at p. 395: "A person having two funds shall not by his election disappoint the party having only one fund; and equity, to satisfy both, will throw him, who has two funds, upon that which can be affected by him only; to the intent that the only fund to which the other has access may remain clear to him." "In the sense of a court of equity, the marshalling of assets is such an arrangement of the different funds under administration as shall enable all the parties having equities thereon to receive their due proportion, notwithstanding any intervening interests, liens, or other claims of particular persons to prior satisfaction out of a portion of those funds" (Story, s. 558). For the general principle, see *Clifton* v. *Burt* (1720), 1 P. Wms. 678, and reporter's note, p. 679; *Lanoy* v. *Athol* (*Duke and Duchess*) (1742), 2 Atk. 444, 446; *Trimmer* v. *Bayne* (1803), 9 Ves. 209; *Selby* v. *Selby* (1828), 4 Russ. 336.

(*f*) *Ex parte Kendall* (1811), 17 Ves. 514, 520.

(*g*) If they are not, then the persons interested in the fund not under his

(3) that the two funds should be in existence when the question of marshalling arises (*h*).

The doctrine will be applied in favour of volunteers (*i*). Hence, if a settlor, after the settlement, creates a mortgage on the settled property so as to give it priority over the settlement (*k*), his unsettled property will be marshalled in favour of the beneficiaries under the settlement, and the mortgage debt thrown on that property (*l*). But it will not be applied to the prejudice of third persons (*m*), although they are volunteers; and where several estates—X, Y, and Z—belonging to the same owner are subject to mortgages, and he executes a voluntary settlement of Z, and then creates a further mortgage on Y alone, the second mortgagee of Y is not entitled to marshal so as to disappoint the beneficiaries under the settlement (*n*).

Marshalling of securities.

166. If the owner of two properties mortgages both to the same person, and afterwards mortgages only one to a second mortgagee, the court will marshal the two properties so as to throw the first mortgage as far as possible on the property not included in the second mortgage (*o*). This principle applies whatever be the nature of the estates—whether, for instance,

control have a right to throw his debts on the other which is under his control, and against them there is no marshalling. "To authorize marshalling, it is obviously necessary not only that a claim should exist against a fund, subject in common with another fund to a paramount liability; but also that those interested in that other fund should not have a right to throw the liability on the fund of the claimant" (*Douglas* v. *Cooksey* (1868), 2 I. R. Eq. 311, *per* WALSH, M.R., at p. 315). Similarly, where a debtor is bound to exonerate one fund, a person claiming through him has no right to have that fund marshalled in his favour. "It would be utterly impossible to apply the doctrine [of marshalling] to a case where the creditor with a right against only one fund is in truth himself bound to the party entitled to the other security" (*Dolphin* v. *Aylward* (1870), L. R. 4 H. L. 486, 505, *per* Lord WESTBURY, meaning, apparently, "to the party entitled to the property subject to the other security").

(*h*) *Re Professional Life Assurance Co.* (1867), L. R. 3 Eq. 668, 680; see *Re International Life Assurance Society* (1876), 2 Ch. D. 476, C. A.

(*i*) *Lomas* v. *Wright* (1883), 2 My. & K. 769; unless their titles confine them to different properties (*Boazman* v. *Johnston* (1830), 3 Sim. 377).

(*k*) Formerly he could do this, notwithstanding that the mortgagee took with notice of the settlement; but since the Voluntary Conveyances Act, 1893 (56 & 57 Vict. c. 21), the mortgagee will not obtain priority unless he takes the legal estate without notice.

(*l*) *Hales* v. *Cox* (1863), 32 Beav. 118; *Mallott* v. *Wilson*, [1903] 2 Ch. 494, 505.

(*m*) See *Averall* v. *Wade* (1835), L. & G. *temp.* Sugd. 252; *Hughes* v. *Williams* (1852), 3 Mac. & G. 683; and compare *Ker* v. *Ker* (1864), 4 I. R. Eq. 15. A surety for a mortgage debt, who pays off the debt and takes a transfer of the security, can hold it against another mortgagee claiming to marshal, but only to the extent of the debt and of costs properly incurred (*South* v. *Bloxam* (1865), 2 Hem. & M. 457; see *Dixon* v. *Steel*, [1901] 2 Ch. 602).

(*n*) *Aldridge* v. *Forbes* (1839), 9 L. J. (CH.) 37; *Dolphin* v. *Aylward*, *supra*, at p. 501; see as to unsecured creditors, *Anstey* v. *Newman* (1870), 39 L. J. (CH.) 769.

(*o*) See *per* Lord HARDWICKE, L.C., in *Lanoy* v. *Athol* (*Duke and Duchess*), (1742), 2 Atk. 444; *Re Cornwall*, *Baldwin* v. *Belcher* (1842), 3 Dr. & War. 173, 176; *Re Roddy's Estate* (1861), 11 I. Ch. R. 369; *Gibson* v. *Seagrim* (1855), 20 Beav. 614; *Webb* v. *Smith* (1885), 30 Ch. D. 192, C. A. In *Lanoy* v. *Athol* (*Duke and Duchess*), *supra*, it was said that the second mortgage must be without notice of the first, but notice is not material.

SECT. 6. Marshalling.

they are freehold or copyhold (*p*); and it extends to charges (*q*) and liens (*r*). But in accordance with the rule that marshalling will not be allowed to the prejudice of a third party, where two estates, X and Y, are mortgaged to A., and X to B., and then Y is mortgaged to C., B. cannot require A. to satisfy himself out of Y and so exclude C.; but A. must satisfy himself rateably out of the two estates (*s*). If, however, C.'s mortgage is expressly subject to prior satisfaction of A. and B.'s debts, then B. is entitled to marshal (*t*).

Marshalling of assets.

167. The doctrine of marshalling is applied in the administration of estates, though the occasion for it has been diminished by statutory changes as to the recovery of debts. Formerly, certain classes of specialty debts were recoverable out of both the real and personal estate of a deceased debtor, while simple contract debts were recoverable only out of the personal estate. As between creditors, accordingly, the simple contract creditors were entitled to have the assets marshalled in their favour, so as to throw the specialty creditors on the real estate (*a*). This distinction between specialty and simple contract creditors is now abolished, and all are entitled to be paid rateably, first out of personal and then out of real estate (*b*).

But marshalling is also applied as between beneficiaries, so that if a creditor, with his remedy against the real and personal estate, has been paid out of the personal estate, a pecuniary legatee is entitled to be paid out of the real estate (*c*). This, however, is

(*p*) *Aldrich* v. *Cooper* (1803), 8 Ves. 382, 388; *Tidd* v. *Lister*, *Bassil* v. *Lister* (1852), 10 Hare, 140; on appeal (1854), 3 De G. M. & G. 857, 872.

(*q*) Such as a portion secured by charge (*Rancliffe* (*Lord*) v. *Parkyns* (*Lady*) (1818), 6 Dow, 149, 214, H. L.); or a jointure (*Lanoy* v. *Athol* (*Duke and Duchess*) (1742), 2 Atk. 444).

(*r*) Such as a vendor's lien (see *Trimmer* v. *Baynes* (1803), 9 Ves. 209; *Sproule* v. *Prior* (1836), 8 Sim. 189); though the question in these cases cannot arise since Locke King's Act (Real Estate Charges Act, 1854 (17 & 18 Vict. c. 113)); But there must be an actual lien. A mere claim to set off will not do (*Webb* v. *Smith* (1885), 30 Ch. D. 192, C. A.).

(*s*) *Barnes* v. *Rackster* (1842), 1 Y. & C. Ch. Cas. 401; *Gibson* v. *Seagrim* (1855), 20 Beav. 614, 619; *Trumper* v. *Trumper* (1872), L. R. 14 Eq. 295; affirmed (1873), 8 Ch. App. 870; compare *Re Lawder's Estate* (1861), 11 I. Ch. R. 346; *Re Rorke's Estate* (1865), 15 I. Ch. R. 316; *Flint* v. *Howard*, [1893] 2 Ch. 54, C. A.

(*t*) *Re Mower's Trusts* (1869), L. R. 8 Eq. 110.

(*a*) *Aldrich* v. *Cooper*, *supra*, at p. 394; see *Sagitary* v. *Hyde* (1687), 1 Vern. 455; and reporter's notes.

(*b*) See pp. 35, 37, *ante*. Under the Real Estate Charges Acts, 1854, 1867, and 1877 (17 & 18 Vict. c. 113; 30 & 31 Vict. c. 69; 40 & 41 Vict. c. 34), debts forming a specific charge or lien on real or leasehold estate of a deceased person are, as between the different persons claiming under him, to be borne by such estate, and where the creditor resorts to other property, the persons thus disappointed are entitled to be recouped out of the real or leasehold estate; see title EXECUTORS and ADMINISTRATORS. As to apportionment, where both real and personal estate are charged, see *Lipscomb* v. *Lipscomb* (1868), L. R. 7 Eq. 501; and as between different real properties, see *De Rochefort* v. *Dawes* (1871), L. R. 12 Eq. 540.

(*c*) "The mere bounty of the testator enables the legatee to call for this species of marshalling:—that, if those creditors having the right to go to the real estate descended will go to the personal estate, the choice of the creditors

SECT. 6. Marshalling.

restricted to the real estate which has not been specifically devised, but has been allowed to descend to the heir; for if the testator has devised his real estate, the devisee has a right preferable to that of the legatee (*d*); unless the devised estate is charged with debts by the will, and then, if the debts are paid out of the personal estate, the legatee is entitled to have the devised estate marshalled (*e*). Moreover, if the devised estate is subject to a mortgage which the testator has directed to be paid out of the personal estate, the pecuniary legatees are entitled to stand in the shoes of the mortgagee against the devised estate to the extent to which such payment disappoints them (*f*).

Legacies.

168. Before the Wills Act, 1837 (*g*), a residuary devise of real estate was treated as specific (*h*), and it is the same since that Act (*i*); so that a pecuniary legatee is not entitled to marshal against a residuary devisee (*j*). And where some legacies are charged on real and personal estate, and others on personal estate only, the latter legatees are entitled to have the real estate marshalled (*k*). Where, in the case of testators dying before 5th August, 1891 (*l*), charitable legacies were, under the former Mortmain Act (*m*), void as regards the real estate and impure personalty, the assets were

shall not determine whether the legatees shall be paid or not" (*Aidrich* v. *Cooper* (1803), 8 Ves. 382, 396; see *Clifton* v. *Burt* (1720), 1 P. Wms. 678, and reporter's notes; *Tombs* v. *Roch* (1846), 2 Coll. 490; *Paterson* v. *Scott* (1852), 1 De G. M. & G. 531, C. A.).

(*d*) *Hanby* v. *Roberts* (1751), Amb. 127, 129. And so, too, where the devisee is heir (*Strickland* v. *Strickland* (1839), 10 Sim. 374).

(*e*) *Rickard* v. *Barrett* (1857), 3 K. & J. 289; *Foster* v. *Cook* (1791), 3 Bro. C. C. 347. A direction to pay debts sufficiently charges them on the real estate to give the pecuniary legatees a right to marshal (*Re Stokes, Parsons* v. *Miller* (1892), 67 L. T. 223; *Re Salt, Brothwood* v. *Keeling*, [1895] 2 Ch. 203; *Re Roberts, Roberts* v. *Roberts*, [1902] 2 Ch. 834, overruling *Re Bate, Bate* v. *Bate* (1890), 43 Ch. D. 600). And the effect of the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), is not to make the charge of debts meaningless so as to interfere with marshalling (*Re Kempster, Kempster* v. *Kempster* (1906), 54 W. R. 385; compare *Re Balls, Trewby* v. *Balls*, [1909] 1 Ch. 791).

(*f*) That is, if the testator has excluded the application of Locke King's Acts (*Re Smith, Smith* v. *Smith*, [1899] 1 Ch. 365); see *Lutkins* v. *Leigh* (1734), Cas. *temp.* Talb. 53; *Johnson* v. *Child* (1844), 4 Hare, 87; *Porcher* v. *Wilson* (1866), 14 W. R. 1011. This rule, as ROMER, J., pointed out in *Re Smith, Smith* v. *Smith, supra*, is difficult to justify on principle.

(*g*) 7 Will. 4 & 1 Vict. c. 26.

(*h*) *Forrester* v. *Leigh* (*Lord*) (1753), Amb. 171; *Mirehouse* v. *Scaife* (1837), 2 My. & Cr. 695.

(*i*) *Hensman* v. *Fryer* (1867), 3 Ch. App. 420, 426; *Lancefield* v. *Iggulden* (1874), 10 Ch. App. 136.

(*j*) *Collins* v. *Lewis* (1869), L. R. 8 Eq. 708; *Farquharson* v. *Floyer* (1876), 3 Ch. D. 109; not following on this point *Hensman* v. *Fryer, supra*.

(*k*) *Masters* v. *Masters* (1718), 1 P. Wms. 421; *Bonner* v. *Bonner* (1807), 13 Ves. 379; *Scales* v. *Collins* (1852), 9 Hare, 656. If a widow's right to paraphernalia can be considered as now in existence (see *Masson, Templier & Co.* v. *De Fries*, [1909] 2 K. B. 831, C. A.), the principle as regards legacies applies *à fortiori* to such a claim, and she is accordingly entitled to have the assets marshalled in her favour (*Tipping* v. *Tipping* (1721), 1 P. Wms. 729; *Tynt* v. *Tynt* (1729), 2 P. Wms. 542; *Incledon* v. *Northcote* (1746), 3 Atk. 430, 438; *Boynton* v. *Parkhurst* (1784), 1 Bro. C. C. 576; *Aldrich* v. *Cooper* (1803), 8 Ves. 382, 397).

(*l*) The date of the commencement of the Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73).

(*m*) Charitable Uses Act, 1735 (9 Geo. 2, c. 36).

SECT. 6. Marshalling.

not marshalled so as to throw these legacies on the pure personal estate (*n*), unless the testator had so directed (*o*).

Other cases of marshalling.

The doctrine of marshalling is applied also as regards the claims of the Crown against the whole property of the debtor, where other creditors can take only part (*p*); in bankruptcy (*q*); and in admiralty (*r*); and it is the foundation of the rights of a surety to the securities of the creditor (*s*).

SECT. 7.—*Merger of Estates and Charges.*

In equity merger depends on intention.

169. At law, when a less estate was vested in the same person as a greater estate without any intermediate estate between them, the less estate merged in the greater and was extinguished, without regard to the intention of the parties concerned (*t*). Equity is not guided by the rules of law as to merger, and both as regards the merger of a less estate in a greater, and a merger of a charge in the land, the question depends upon the intention, actual or presumed, of the person in whom the interests become united (*u*). In this respect the prevalence of the equitable doctrine is secured by s. 25 (4) of the Judicature Act, 1873 (*v*), which provides that there shall not be any merger by operation of law only of any estate the beneficial interest in which would not be deemed to be merged or extinguished in equity.

Merger of estates.

170. It follows that a less estate is not merged in a greater if there is an express or presumed intention that it shall be kept alive. Where no intention is expressed the intention may be presumed from the circumstances, as where the estates are held by the same person in different rights—*e.g.*, one beneficially and the other as trustee (*a*)—or where it is for the advantage of the holder of the two estates that the less estate should be kept alive (*b*).

(*n*) *Mogg* v. *Hodges* (1750), 2 Ves. Sen. 52; *Foster* v. *Blagden* (1771), Amb. 704; *Hillyard* v. *Taylor* (1773), Amb. 713; *Hobson* v. *Blackburn* (1836), 1 Keen, 273; *Re Piercy, Whitwham* v. *Piercy*, [1898] 1 Ch. 565, C. A.

(*o*) *Wills* v. *Bourne* (1873), L. R. 16 Eq. 487; *Miles* v. *Harrison* (1874), 9 Ch. App. 316; *Re Ovey, Broadbent* v. *Barrow* (1885), 31 Ch. D. 113, 118; *Re Arnold, Ravenscroft* v. *Workman* (1888), 37 Ch. D. 637; see *Re Somers-Cocks, Wegg-Prosser* v. *Wegg-Prosser*, [1895] 2 Ch. 449; and see title CHARITIES, Vol. IV., p. 152.

(*p*) *Aldrich* v. *Cooper* (1803), 8 Ves. 382, 388; *Sagitary* v. *Hyde* (1687), 1 Vern. 455.

(*q*) *Re Stephenson, Ex parte Stephenson* (1847), De G. 586 (proceeds of goods distrained marshalled in favour of mortgagee of a part only); *Re Holland, Ex parte Alston* (1868), 4 Ch. App. 168; *Re Stratton, Ex parte Salting* (1883), 25 Ch. D. 148, C. A.

(*r*) *The Trident* (1839), 1 Wm. Rob. 29, 35; *The Edward Oliver* (1867), L. R. 1 A. & E. 379; *The Eugénie* (1873), L. R. 4 A. & E. 123; see title SHIPPING and NAVIGATION.

(*s*) *Aldrich* v. *Cooper*, *supra*, at p. 389; *Duncan, Fox & Co.* v. *North and South Wales Bank* (1880), 6 App. Cas. 1, 12; see title GUARANTEE.

(*t*) *Burton* v. *Barclay* (1831), 7 Bing. 745, 756; see *Doe* d. *Rawlings* v. *Walker* (1826), 5 B. & C. 111, 121.

(*u*) *Forbes* v. *Moffatt* (1811), 18 Ves. 384, 390.

(*v*) 36 & 37 Vict. c. 66.

(*a*) *Chambers* v. *Kingham* (1878), 10 Ch. D. 743.

(*b*) *Ingle* v. *Vaughan Jenkins*, [1900] 2 Ch. 368. As regards merger a long term

SECT. 7.
Merger of Estates and Charges.

Merger of charges.

171. Where a person entitled to land acquires a charge upon it, and at the same time expresses his intention that the charge shall not merge, this is sufficient to keep it alive (*c*). It is not necessary to take a transfer of the charge to a trustee. This is only useful as evidence of an intention to avoid merger, where no intention is expressed, and there would otherwise be a presumption of merger (*d*). On the other hand, if there is an express or presumed intention in favour of merger, the charge will be extinguished, notwithstanding that it is outstanding in a trustee (*e*).

Presumption of merger.

172. Where no intention is expressed, or the person is incapable of expressing any, the court considers what is most advantageous for him, and decides for or against merger accordingly (*f*). And on this are founded two presumptions: First, when the ownership in fee simple of the land and the absolute ownership of the charge become vested in the same person, and there is no special reason for keeping the charge alive, the presumption is in favour of merger; the title is simplified by the charge being extinguished, and its continued existence is useless to the owner (*g*); and it is the same where the owner in fee simple pays off the charge (*h*). The presumption applies also to a tenant in tail (*i*), unless he is by statute forbidden to bar the entail (*k*), so that he cannot become owner in fee simple. But it does not apply where the fee is liable to be defeated by an executory devise (*l*). Secondly, where the charge is acquired by a limited owner, or where a limited owner pays it off, the presumption is against merger. It is not for his advantage that his charge should sink for the benefit of the remainderman (*m*). And merger will be prevented if there is a prior life interest in the charge which does not terminate in the lifetime of the owner of the land (*n*).

Absolute ownership.

Limited ownership.

is treated as less than a freehold estate, such as an estate for life; see *Capital and Counties Bank, Ltd.* v. *Rhodes*, [1903] 1 Ch. 631, C. A.

(*c*) *Watts* v. *Symes* (1851), 1 De G. M. & G. 240, C. A.; *Adams* v. *Angell* (1877), 5 Ch. D. 634, C. A.

(*d*) *Hood* v. *Phillips* (1841), 3 Beav. 513; see *Bailey* v. *Richardson* (1852), 9 Hare, 734; and p. 148, *post*.

(*e*) *Astley* v. *Milles* (1827), 1 Sim. 298; *Pitt* v. *Pitt* (1856), 22 Beav. 294.

(*f*) *Forbes* v. *Moffatt* (1811), 18 Ves. 384; *Grice* v. *Shaw* (1852), 10 Hare, 76; *Tyrwhitt* v. *Tyrwhitt* (1863), 32 Beav. 244; *Thorne* v. *Cann*, [1895] A. C. 11, 18.

(*g*) *Donisthorpe* v. *Porter* (1762), 2 Eden, 162; *Forbes* v. *Moffatt*, *supra*; *Grice* v. *Shaw*, *supra*; *Swinfen* v. *Swinfen* (No. 3) (1860), 29 Beav. 199, 203.

(*h*) *Buckinghamshire* (*Earl*) v. *Hobart* (1818), 3 Swan. 186.

(*i*) *Drinkwater* v. *Combe* (1825), 2 Sim. & St. 340.

(*k*) *Shrewsbury* (*Countess*) v. *Shrewsbury* (*Earl*) (1790), 3 Bro. C. C. 120.

(*l*) *Drinkwater* v. *Combe*, *supra*.

(*m*) *Burrell* v. *Egremont* (*Earl*) (1844), 7 Beav. 205, 232; *Pitt* v. *Pitt*, *supra*. If a remainderman in tail, whose estate is preceded by another estate tail, pays off a charge, the presumption is originally against merger, and this continues although his estate falls into possession (*Wigsell* v. *Wigsell* (1825), 2 Sim. & St. 364, 369; *Horton* v. *Smith* (1858), 4 K. & J. 624, 628). And similarly, where a tenant for life, with ultimate remainder in fee simple, who has paid off a charge, becomes immediately entitled in fee simple by the failure of intermediate estates, the charge does not thereupon merge (*Wyndham* v. *Egremont* (*Earl*) (1775), Amb. 753; *Trevor* v. *Trevor* (1833), 2 My. & K. 675).

(*n*) *Wilkes* v. *Collin* (1869), L. R. 8 Eq. 338.

SECT. 7.
Merger of Estates and Charges.

Where the presumptions are excluded.

173. These presumptions only furnish *primâ facie* rules as to merger, and they yield to the intention, whether express or implied (*o*). The actual intention may be inferred from acts done, either at the time of the union of the charge with the estate, or subsequently during the life of the owner (*p*). Taking a transfer of the charge in the name of a trustee is evidence against merger, but is not by itself conclusive (*q*). Subsequent dispositions of the property, whether by will (*r*) or *inter vivos*, may show that the property was intended to pass free from the charge; and this will usually be the case if there is an alienation for value (*a*). And the presumptions have no place where the owner is incapable of having an intention. Hence, where the court pays off a charge on the estate of an infant tenant in tail, there is no merger (*b*).

Moreover, the first presumption does not apply in the case of an owner in fee simple who pays off a charge, if it is for his benefit that the charge should be kept alive. And this is the case where there are subsequent charges which would be advanced by its extinction. But an exception exists as regards a mortgagor, and he cannot pay off a first mortgage and then set it up against a subsequent charge which he has himself created (*c*); and the exception was formerly extended to a purchaser of the equity of redemption, so as to prevent him from keeping alive an incumbrance which he had paid off against other incumbrances of which he had notice (*d*). But this extension has been disapproved of (*e*). The purchaser can keep alive a prior incumbrance by expressing an intention to that effect; and although no intention is expressed, yet it will be sufficient if the circumstances indicate the intention (*f*). And it seems correct to say generally that in the case of a purchaser of an equity of redemption the ordinary rule will now prevail; and where it is for his advantage that a charge which he has paid off shall be kept alive, an intention to this effect

(*o*) *Grice* v. *Shaw* (1852), 10 Hare, 76, 79.

(*p*) *Hatch* v. *Skelton* (1855), 20 Beav. 453.

(*q*) *Hood* v. *Phillips* (1841), 3 Beav. 513. A declaration by the owner that the charge is to be held in trust for himself, his executors, administrators and assigns, will prevent merger (*Tyrwhitt* v. *Tyrwhitt* (1863), 32 Beav. 244); and so where the owner in fee buys up a lease (*Gunter* v. *Gunter* (1857), 23 Beav. 571).

(*r*) *Hood* v. *Phillips*, *supra*.

(*a*) *Gower* v. *Gower* (1783), 1 Cox, Eq. Cas. 53 (marriage settlement); *Tyler* v. *Lake* (1831), 4 Sim. 351 (mortgage); *Bulkeley* v. *Hope* (1855), 1 K. & J. 482; but see *Neame* v. *Moorsom* (1866), L. R. 3 Eq. 91.

(*b*) *Alsop* v. *Bell* (1857), 24 Beav. 451; and so, apparently, as regards a lunatic, since the court does not interfere to alter the rights of the personal representatives; see *Ware* v. *Polhill* (1805), 11 Ves. 257, 278. But where the charge and estate devolve, otherwise than by purchase, upon a lunatic owner in fee simple, there is a merger (*Compton* (*Lord*) v. *Oxenden* (1793), 2 Ves. 261).

(*c*) *Otter* v. *Vaux* (*Lord*) (1856), 6 De G. M. & G. 638, 642.

(*d*) *Toulmin* v. *Steere* (1817), 3 Mer. 210, *per* GRANT, M.R.

(*e*) *Adams* v. *Angell* (1877), 5 Ch. D. 634, C. A.; see *Watts* v. *Symes* (1851), 1 De G. M. & G. 240, C. A.; *Stevens* v. *Mid-Hants Rail. Co.*, *London Financial Association* v. *Stevens* (1873), 8 Ch. App. 1064, 1069; *Thorne* v. *Cann*, [1895] A. C. 11.

(*f*) *Phillips* v. *Gutteridge* (1859), 4 De G. & J. 531, C. A.; *Adams* v. *Angell*, *supra*; *Thorne* v. *Cann*, *supra*. And a stranger who pays off a mortgage is in general entitled to the benefit of it (*Butler* v. *Rice*, [1910] 2 Ch. 277).

will be presumed, unless there are indications of a contrary intention (*g*).

SECT. 7. Merger of Estates and Charges.

174. Upon a similar principle equity will keep alive conditions which have become inoperative at law. Thus where land is devised to the testator's heir-at-law subject to a condition to pay a pecuniary legacy, the condition is at law useless to the legatee, since it is the heir himself who will take advantage of the condition broken. But payment of the legacy is enforced in equity; and the heir, and a purchaser from him with notice, must make it good (*h*). And it is the same though the devise on condition is to a stranger. The heir on entering for breach of the condition is a trustee for the legatee (*i*).

Conditions kept alive.

SECT. 8—*Subrogation.*

175. Where one person has a claim against another, a third person is, in certain circumstances, allowed to have the benefit of the claim and the remedy for enforcing it, although it has not been assigned to him, and he is then said to be subrogated to the rights of the first person. The doctrine of subrogation is applied at law in cases of insurance, where the insurance is a contract of indemnity only. The underwriter or assurer, upon paying the assured his loss, is entitled to the benefit of all remedies of the assured against persons liable for the loss, whether in contract or in tort (*k*), and is entitled to sue in the name of the assured (*l*).

Subrogation at law.

176. In equity the doctrine has been applied in three cases: (1) Where a person has supplied money to a wife for necessaries; (2) where a person has lent money to a company which borrowed it in excess of its borrowing powers, and the money has been applied in reducing the liabilities of the company; and (3) where an executor has incurred debts in carrying on the business of a testator.

Subrogation in equity.

In the first case the persons who provided the necessaries would have had a remedy against the husband, and he who has found the money and satisfied their claims is allowed in equity to stand in their place as regards the remedy on these claims (*m*).

Wife's necessaries.

In the second case no debt is created against the company, and

Ultra vires borrowing.

(*g*) *Thorne* v. *Cann*, [1895] A. C. 11; *Liquidation Estates Purchase Co.* v. *Willoughby*, [1898] A. C. 321; and see S. C., [1896] 1 Ch. 726, C. A., *per* LINDLEY, L.J., at p. 734.

(*h*) *Smith* v. *Alterly* (1648), Freem. (CH.) 136; *sub nom. Smith* v. *Atterby*, 3 Rep. Ch. 93; see *Winchelsea (Earl)* v. *Norcliff* (1686), Freem. (CH.) 95, 96, n. (b).

(*i*) *Mohun's (Lord) Case* (undated), cited in *Cook* v. *Fountain* (1672), 3 Swan. 585, at p. 592; *Anon* (1704), Freem. (CH.) 278.

(*k*) *Randal* v. *Cockran* (1748), 1 Ves. Sen. 98; *Castellain* v. *Preston* (1883), 11 Q. B. D. 380, 388, C. A.; *Dufourcet* v. *Bishop* (1886), 18 Q. B. D. 373; see *Assicurazioni Generali de Trieste* v. *Empress Assurance Corporation, Ltd.*, [1907] 2 K. B. 814.

(*l*) *Mason* v. *Sainsbury* (1782), 3 Doug. (K. B.) 61; *London Assurance Co.* v. *Sainsbury* (1783), 3 Doug. (K. B.) 245; *Simpson* v. *Thomson* (1877), 3 App. Cas. 279; *King* v. *Victoria Insurance Co.*, [1896] A. C. 250, P. C. As to the right of the insured himself to sue and have control of the action, see *Commercial Union Assurance Co.* v. *Lister* (1874), 9 Ch. App. 483; see also, generally, titles GUARANTEE; INSURANCE.

(*m*) *Harris* v. *Lee* (1718), 1 P. Wms. 482; *Jenner* v. *Morris* (1861), 3 De G. F. & J. 45, C. A.; *Deare* v. *Soutten* (1869), L. R. 9 Eq. 151, 154, overruling *May*

SECT. 8. Subrogation.

prima facie the lender has no remedy for recovering the loan. But to the extent to which the money has been applied in discharging the claims of other creditors, the lender has been said to be subrogated to their rights (*n*); though the case has been stated alternatively by saying that, to the extent to which liabilities are reduced, the borrowing is not in substance in excess of the borrowing powers (*o*); and at any rate the lender is not placed in the shoes of prior creditors who are paid with his money, so as to acquire their priority for all purposes. Thus he does not rank before later creditors who have been partly paid with his money (*p*), and he is not entitled to the benefit of any securities of the creditor paid off (*q*).

Creditor of executor

In the third case the executor is personally liable for the debts of the business, but he has a right of indemnity against the assets of the testator's estate, so far as they are authorised to be employed in the business (*r*); the creditor, on the other hand, has no legal claim against the estate, but he is allowed in equity to enforce on his own behalf the executor's right of indemnity. He is subrogated to this right, while he retains also his legal claim against the executor (*s*); but, in asserting the right, he is subject to any defences which would avail against the executor (*t*).

Part V.—Equitable Relief against Penalties and Forfeitures.

SECT. 1.—*Penalties.*

Relief against penalties.

177. Equity relieves against penalties when the intention of the penalty is to secure the payment of a sum of money or the attainment of some other object, and when the event upon which

v. *Skey* (1849), 16 Sim. 588. In *Jenner* v. *Morris*, *supra*, Lord CAMPBELL, L.C., treated the subrogation as resting on an equitable assignment of their claims by the tradespeople to the person who paid them. TURNER, L.J., regarded it as an instance of equity supplying the omission of the law to provide a legal remedy.

(*n*) *Re National Permanent Benefit Building Society, Ex parte Williamson* (1869), 5 Ch. App. 309, 313; *Blackburn Building Society* v. *Cunliffe, Brooks & Co.* (1882), 22 Ch. D. 61, C. A.; *Wenlock (Baroness)* v. *River Dee Co.* (1887), 19 Q. B. D. 155, C. A.

(*o*) *Re Wrexham, Mold, and Connah's Quay Railway*, [1899] 1 Ch. 440, C. A., *per* LINDLEY, M.R., at p. 446; see Ashb., p. 333; and compare judgment in *Blackburn Building Society* v. *Cunliffe, Brooks & Co.*, *supra*, at p. 71. On the same principle, where an agent borrows in excess of his authority, the lender can in equity recover the loan from the principal to the extent to which the money has in fact been applied in paying the principal's debts (*Bannatyne* v. *MacIver*, [1906] 1 K. B. 103, C. A.).

(*p*) *Re Wrexham, Mold, and Connah's Quay Railway*, *supra*.

(*q*) *Bannatyne* v. *MacIver*, *supra*, at p. 109.

(*r*) *Ex parte Garland* (1804), 10 Ves. 110. As to the case of an executor carrying on a business, see title EXECUTORS AND ADMINISTRATORS.

(*s*) *Re Johnson, Shearman* v. *Robinson* (1880), 15 Ch. D. 548, 555; *Dowse* v. *Gorton*, [1891] A. C. 190; *Re Frith, Newton* v. *Rolfe*, [1902] 1 Ch. 342; see *Re Blundell, Blundell* v. *Blundell* (1890), 44 Ch. D. 1, C. A.

(*t*) *Re Johnson, Shearman* v. *Robinson*, *supra*; compare *Re Frith, Newton* v. *Rolfe*, *supra*.

the penalty is made payable can be adequately compensated by payment of interest or otherwise (*u*). Thus relief is granted in equity against the penalty in a money bond, and also against penal sums made payable on breach of bonds, covenants, and agreements for payment of money by instalments, or for doing or omitting to do a particular act (*a*). But the relief is only granted where compensation can be made for the breach (*b*). And by statute similar relief was introduced into the practice of the common law courts (*c*). Before relief can be given it has to be ascertained whether the specified sum is in fact a penalty or liquidated damages (*d*). If it is a penalty, then the actual damages only are payable, not exceeding the amount of the penalty (*e*). On the other hand, the fact that a sum is made payable by way of penalty for breach of a negative covenant does not in general deprive the covenantee of his right to an injunction (*f*).

Non-payment of money.

178. Where there is a stipulation that, on non-payment of a smaller sum, a larger sum shall be paid, the larger sum is a penalty, and will be relieved against (*g*); as where, upon non-payment of interest upon a mortgage debt at the stated times, interest at a higher rate is made payable. Such interest is penal interest, and is not recoverable or chargeable in account between mortgagee and mortgagor (*h*). And any clause forfeiting an interest in property on non-payment of money is treated in equity as penal, and relief

(*u*) "The true ground of relief against penalties is from the original intent of the case, where the penalty is designed only to secure money, and the court gives him all that he expected or desired" (*Peachy* v. *Somerset* (*Duke*) (1721), 1 Stra. 447, *per* Lord MACCLESFIELD, L.C., at p. 453; 2 White & Tud. L. C., 7th ed., p. 250; *Davis* v. *Thomas* (1831), 1 Russ. & M. 506, *per* LEACH, M.R., at p. 507). But the relief goes beyond money bonds, and extends to all cases where the sum specified is in fact a penalty and secures some collateral object (*Sloman* v. *Walter* (1784), 1 Bro. C. C. 418, *per* Lord THURLOW, L.C.; *Protector Loan Co.* v. *Grice* (1880), 5 Q. B. D. 592, C. A.; *Law* v. *Redditch Local Board*, [1892] 1 Q. B. 127, C. A., *per* KAY, L.J., at p. 134; see also title BONDS, Vol. III., pp. 93—96).

(*a*) *Seton* v. *Slade*, *Hunter* v *Seton* (1802), 7 Ves. 265, 273; *Forward* v. *Duffield* (1747), 3 Atk. 555 (relief against penalty in charterparty). And relief was granted although the violation of the condition of the bond was wilful (*Wilson* v. *Barton* (1671), Nels. 148).

(*b*) *Tall* v. *Ryland* (1670), 1 Cas. in Ch. 183; *Withers* v. *Kilrea* (1670), 1 Cas. in Ch. 189, n.

(*c*) As to common money bonds, by stat. (1705) 4 & 5 Ann. c. 3, ss. 12, 13; Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), s. 25 (repealed, Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Vict. c. 49), but see s. 7); *Preston* v. *Dania* (1872), L. R. 8 Exch. 19; *Re Dixon*, *Heynes* v. *Dixon*, [1900] 2 Ch. 561, C. A., *per* RIGBY, L.J., at p. 578; as to bonds or penalties to secure payment of money by instalments, or the performance of any covenants or agreements, by stat. (1696) 8 & 9 Will. 3, c. 11, s. 8; *Betts* v. *Burch* (1859), 4 H. & N. 506, 511; see title BONDS, Vol. III., p. 94.

(*d*) See title DAMAGES, Vol. X., p. 328.

(*e*) *Law* v. *Redditch Local Board*, *supra*. Formerly an issue at law, *quantum damnificatus*, was directed (*Benson* v. *Gibson* (1746), 3 Atk. 395; *Hardy* v. *Martin* (1783), 1 Bro. C. C. 419, n.; *Sloman* v. *Walter*, *supra*; *Errington* v. *Aynesly* (1788), 2 Bro. C. C. 341).

(*f*) *French* v. *Macale* (1842), 2 Dr. & War. 269, 274; see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 495.

(*g*) *Thompson* v. *Hudson* (1869), L. R. 4 H. L. 1, 15.

(*h*) *Holles* v. *Wyse* (1693), 2 Vern. 289; *Strode* v. *Parker* (1694), 2 Vern. 316;

SECT. 1. Penalties.

will be given on payment of the money, with interest as compensation for the delay (*i*). Upon this principle was founded the right of relief against a conveyance by way of mortgage after the conveyance had become absolute at law (*j*); a right which constituted the equity of redemption.

Provision for reducing amount payable.

179. Where money is actually payable, or to become payable, a provision may validly be made for diminishing the amount, or making it payable by instalments, or allowing other concessions to the debtor upon stipulated terms; and if the debtor complies with the terms he is entitled to the benefit of the provision (*k*). But he must purchase the benefit by strict compliance with the terms; and, if he is in default, the full debt is payable and he cannot claim relief as against a penalty (*l*). Upon this principle, when a higher rate of interest has been stipulated for in a mortgage, interest at a lower rate may be substituted on condition of punctual payment (*m*); and where a debt is made payable by instalments, a stipulation that on non-payment of any instalment the entire debt shall become due is not in the nature of a penalty (*n*).

Right dependent on performance of a condition.

180. Where under a contract, conveyance, or will a beneficial right is to arise upon the performance by the beneficiary of some act in a stated manner, or at a stated time, the act must be performed accordingly in order to obtain the enjoyment of the right, and in the absence of fraud, accident, or surprise, equity will not relieve against a breach of the terms (*o*). In the case of a

Seton v. *Slade*, *Hunter* v. *Seton* (1802), 7 Ves. 265, 273. But a commission in addition to interest, payable on default in payment of instalments, is not a penalty (*General Credit and Discount Co.* v. *Glegg* (1883), 22 Ch. D. 549).

(*i*) See *Re Dagenham* (*Thames*) *Dock Co.*, *Ex parte Hulse* (1873), 8 Ch. App. 1022, where, on non-payment of the balance of purchase-money, the vendors were to resume possession of the property without any obligation to repay the part of the purchase-money already paid.

(*j*) Perhaps this was first allowed when the non-payment on the appointed day was due to accident. In the first half of the seventeenth century the right of redemption had become fully established (Ashb., p. 47; see Story, s. 1014). When mortgages came to be recognised as merely securities for money, this reason for the allowance of the equity of redemption disappeared (see *Seton* v. *Slade*, *Hunter* v. *Seton*, *supra*; *Casborne* v. *Scarfe* (1737), 1 Atk. 603; 2 White & Tud. L. C., 7th ed., p. 6); and as to the relation of mortgagor and mortgagee, see *Cholmondeley* (*Marquis*) v. *Clinton* (*Lord*) (1820), 2 Jac. & W. 1, 182; Co. Litt. 205 a, Butler's note (1).

(*k*) *Thompson* v. *Hudson* (1869), L. R. 4 H. L. 1, 15.

(*l*) Thus, where the creditor agrees to accept part of the debt in full satisfaction if paid within a stated time, equity will not relieve against the provision as to time (*Ford* v. *Chesterfield* (*Earl*) (1854), 19 Beav. 428; *Sewell* v. *Musson* (1683), 1 Vern. 210; *Ex parte Bennet* (1743), 2 Atk. 527; *Re Neil*, *Ex parte Burden* (1881), 16 Ch. D. 675, C. A.).

(*m*) *Powis* (*Marquis*) v. *Maynard* (1747), 3 Atk. 519; *Stanhope* v. *Manners* (1763), 2 Eden, 197. Punctual payment means payment on the day fixed for payment (*Leeds and Hanley Theatre of Varities* v. *Broadbent*, [1898] 1 Ch. 343, C. A.; see *Keene* v. *Biscoe* (1878), 8 Ch. D. 201).

(*n*) *Sterne* v. *Beck* (1863), 1 De G. J. & Sm. 595, C. A.; *Wallingford* v. *Mutual Society* (1880), 5 App. Cas. 685; *Protector Loan Co.* v. *Grice* (1880), 5 Q. B. D. 592, C. A.

(*o*) Thus, where there is a sale with a right of repurchase within a specified time, and the sale is in the first instance absolute, so that the transaction is not really a mortgage, the right of repurchase is lost unless exercised within the

condition contained in a will, ignorance of the condition is no ground for relief (*p*).

SECT. 2.—*Forfeitures.*

Breach of covenant in lease.

181. Equity does not assume a general jurisdiction to relieve against the forfeiture of the estate of a lessee for breach of the covenants in the lease (*q*). At one time it was thought that this would be done in cases where compensation could be made for the breach (*r*); but so extensive a power was disclaimed, and the relief was confined to forfeiture for non-payment of rent (*s*). The relief in this case was justified on the ground that the right of re-entry was to be regarded simply as a security for the rent, and it was granted on payment of the arrears of rent and costs (*t*). There was no express limitation of time within which the relief would be granted, and if the lease had been determined by re-entry, the lessor was ordered to grant a new lease (*u*). But by statute equitable relief was limited to six months after possession recovered in ejectment, and the necessity for a new lease was dispensed with (*a*). Ultimately jurisdiction to grant relief in the case of non-payment of rent was conferred on the courts of common law (*b*); and jurisdiction to grant relief in this and other cases of forfeiture (with certain exceptions) is now vested in the High Court (*c*).

time (*Barrell* v. *Sabine* (1684), 1 Vern. 268; *Joy* v. *Birch* (1836), 4 Cl. & Fin. 57, H. L.); and so, where a mortgagor releases his equity of redemption with a clause of repurchase (*Ensworth* v. *Griffiths* (1706), 5 Bro. Parl. Cas. 184; *Davis* v. *Thomas* (1831), 1 Russ. & M. 506). And the court cannot vary the terms on which a right of pre-emption is given by will, so as to allow any relaxation (*Brooke* v. *Garrod* (1857), 2 De G. & J. 62); or on which a debt is remitted (*Glover* v. *Portington* (1664), Freem. (CH.) 182); or any other privilege conferred (*Franco* v. *Alvares* (1746), 3 Atk. 342, p. 345).

(*p*) *Re Hodges' Legacy* (1873), L. R. 16 Eq. 92; *Astley* v. *Essex* (*Earl*) (1874), L. R. 18 Eq. 290; see *Fry's* (*Lady Anne*) *Case* (1672), 1 Vent. 199.

(*q*) The cases for relief in equity are fraud, accident, surprise or mistake (*Hill* v. *Barclay* (1811), 18 Ves. 56, 62; *Gregory* v. *Wilson* (1852), 9 Hare, 683, 689; see *Bamford* v. *Creasy* (1862), 3 Giff. 675; *Bargent* v. *Thompson* (1864), 4 Giff. 473); but not negligence (*Barrow* v. *Isaacs & Son*, [1891] 1 Q. B. 417, C. A.).

(*r*) *Hack* v. *Leonard* (1724), 9 Mod. Rep. 90; *Davis* v. *West* (1806), 12 Ves. 475; *Sanders* v. *Pope* (1806), 12 Ves. 282.

(*s*) *Wadman* v. *Calcraft* (1804), 10 Ves. 67; *Hill* v. *Barclay* (1811), 18 Ves. 56; *Reynolds* v. *Pitt* (1812), 19 Ves. 134; *Bracebridge* v. *Buckley* (1816), 2 Price, 200, 215; *Gregory* v. *Wilson*, *supra*. Thus there was no relief for breach of a covenant to repair, including a covenant to lay out a specified sum in repairs (*Bracebridge* v. *Buckley*, *supra*, overruling *Sanders* v. *Pope*, *supra*). If there were other breaches, relief for non-payment of rent could not be granted (*Bowser* v. *Colby* (1841), 1 Hare, 109, 134).

(*t*) *Howard* v. *Fanshawe*, [1895] 2 Ch. 581, 588. It was granted whether the lease was determined under a power of re-entry, or under a proviso that it should be void (*Bowser* v. *Colby*, *supra*).

(*u*) *Bowser* v. *Colby*, *supra*, at p. 130; see *Dendy* v. *Evans*, [1910] 1 K. B. 263, C. A.

(*a*) First by the Landlord and Tenant Act, 1730 (4 Geo. 2, c. 28); see *Bowser* v. *Colby*, *supra*, at p. 125; then by the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), ss. 210—212. The provision of s. 212 continuing the old lease applies although the lessor has recovered possession out of court, and not under a judgment (*Howard* v. *Fanshawe*, *supra*).

(*b*) Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), s. 1; *Hare* v. *Elms*, [1893] 1 Q. B. 604.

(*c*) Under the Common Law Procedure Act, 1860, and the Conveyancing Acts,

SECT. 2. Forfeitures.

Time not of essence of contract.

182. Analogous to relief against forfeiture is the rule of equity that time is not of the essence of a contract unless the parties have either expressly so stipulated, or the nature of the contract requires it (*d*). But where there has been default or unreasonable delay by one party, the other party may give notice requiring completion within a specified time, and if the time specified is reasonable it becomes of the essence of the contract (*e*). At the present time stipulations in contracts, as to time or otherwise, which would not before the passing of the Judicature Act, 1873, have been deemed to be or to have become of the essence of the contract in a court of equity, receive in all courts the same construction as they would formerly have received in equity (*f*).

Part VI.—Equitable Relief in Cases of Fiduciary Relationship.

SECT. 1.—*The Fiduciary Character.*

SUB-SECT. 1.—*Express, Constructive, and Resulting Trusts.*

Express trusts.

183. A court of equity imposes special liabilities and duties upon persons who stand in a fiduciary relationship to others, and, in particular, it will not allow them to purchase the trust property, or to make a profit out of the trust, unless there are such circumstances of consent on the part of the *cestui que trust* as to warrant an exception from these rules. Trusts are either express or arising by operation of law. An express trust as regards land is a trust expressly declared by a deed, will, or other written instrument (*g*); as to personalty (other than leaseholds) the trust can be expressly created by parol (*h*). To constitute an express trust three matters

1881 (44 & 45 Vict. c. 41) and 1892 (55 & 56 Vict. c. 13); see title LANDLORD AND TENANT.

(*d*) "Where from the contract, or from the nature of the case, time is not shown to be of the essence of the contract, courts of equity have long been in the habit of relieving against mere lapse of time, where it has been consistent with the substance of justice to do so" (*Roberts* v. *Berry* (1853), 3 De G. M. & G. 284, C. A., *per* KNIGHT BRUCE, L.J., at p. 290; *Seton* v. *Slade*, *Hunter* v. *Seton* (1802), 7 Ves. 265; *Lennon* v. *Napper* (1802), 2 Sch. & Lef. 682, 685; *Levy* v. *Lindo* (1817), 3 Mer. 81, 84; *Parkin* v. *Thorold* (1852), 16 Beav. 59, 65; and compare *Honeyman* v. *Marryat* (1855), 21 Beav. 14, 24). On the sale of a public-house as a going concern time is of the essence of the contract (*Tadcaster Tower Brewery Co.* v. *Wilson*, [1897] 1 Ch. 705); and so, too, in a contract for a lease of mines which are being worked (*Macbryde* v. *Weekes* (1856), 22 Beav. 533); and generally where possession is immediately required (*Tilley* v. *Thomas* (1867), 3 Ch. App. 61; see *Walker* v. *Jeffreys* (1842), 1 Hare, 341, 348; *Crawford* v. *Toogood* (1879), 13 Ch. D. 153); and see title CONTRACT, Vol. VII., p. 413.

(*e*) *Green* v. *Sevin* (1879), 13 Ch. D. 589; *Compton* v. *Bagley*, [1892] 1 Ch. 313.

(*f*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (8); see *Noble* v. *Edwardes*, *Edwardes* v. *Noble* (1877), 5 Ch. D. 378, C. A., as to the law in a case not affected by this enactment; and title SALE OF LAND.

(*g*) *Petre* v. *Petre* (1852), 1 Drew. 371, 393; *Cunningham* v. *Foot* (1878), 3 App. Cas. 974, 984.

(*h*) *Harris* v. *Truman* (1881), 7 Q. B. D. 340, 356; *Sands* to *Thompson* (1883), 22 Ch. D. 614.

must be defined—the property subject to the trust, the persons to be benefited, and the interests which they are to take (*i*). But it is not necessary to use the word "trust" (*k*), and the trust is express although it has to be made out from all the terms of the instrument (*l*). All that is necessary to establish the relation of trustee and *cestui que trust* is to prove that the legal title is in one person and the equitable title in another (*m*).

Constructive and resulting trusts.

184. Trusts arising by operation of law are either constructive or resulting trusts. A constructive trust arises when, although there is no express trust affecting specific property, equity considers that the legal owner should be treated as a trustee for another (*n*). This happens, for instance, where one who is already trustee takes advantage of his position to obtain a new legal interest in the property (*o*), as where a trustee of leaseholds takes a new lease in his own name (*p*). And the rule applies where a person, although not an express trustee, is in a fiduciary position, *e.g.*, a tenant for life in regard to the remaindermen (*q*).

A resulting trust may arise solely by operation of law, as where, upon a purchase of land, one person provides the purchase-money and the conveyance is taken in the name of another. There is then a resulting trust in favour of the person providing the money, unless from the relation between the two, or from other circumstances, it appears that a gift was intended (*r*). But there is another class of resulting trusts, and here the creation of the trust is express, though, in the events which happen, the beneficial destination of the property is undetermined. This is the case when there is a failure—entire or partial—in the objects of the trust, and then, to the extent of the failure, the benefit of the trust results to the settlor or his representatives (*s*). In all these cases

(*i*) *Malim* v. *Keighley* (1794), 2 Ves. 333, 335; *Knight* v. *Knight* (1840), 3 Beav. 148, 173.

(*k*) *Donations Commissioners* v. *Wybrants* (1845), 2 Jo. & Lat. 182, 189.

(*l*) *Re Williams*, *Williams* v. *Williams*, [1897] 2 Ch. 12, 27, C. A.; but the courts are less ready now than formerly to construe words of recommendation as creating a precatory trust (*Lambe* v. *Eames* (1871), 6 Ch. App. 597, 599); compare *Re Hanbury*, *Hanbury* v. *Fisher*, [1904] 1 Ch. 415, C. A.; reversed *sub nom. Comiskey* v. *Bowring-Hanbury*, [1905] A. C. 84.

(*m*) *Hardoon* v. *Belilios*, [1901] A. C. 118, 123, P. C. The trustee may himself have only an equitable interest, where, *e.g.*, a trust fund is settled by the *cestui que trust* by way of derivative settlement; see *Stephens* v. *Green*, *Green* v. *Knight*, [1895] 2 Ch. 148; and title TRUSTS AND TRUSTEES.

(*n*) The rule has been said to be based on public policy (*Griffin* v. *Griffin* (1804), 1 Sch. & Lef. 352, 354; *Blewett* v. *Millett* (1774), 7 Bro. Parl. Cas. 367).

(*o*) See *Pickering* v. *Vowles* (1783), 1 Bro. C. C. 197, 198; *James* v. *Dean* (1805), 11 Ves. 383, 395.

(*p*) *Keech* v. *Sandford* (1726), Cas. *temp.* King, 61; *Rawe* v. *Chichester* (1773), Amb. 715, 719.

(*q*) See *Re Biss*, *Biss* v. *Biss*, [1903] 2 Ch. 40, C. A., and cases there cited; and see further, as to the relations between tenant for life and remainderman, *Dicconson* v. *Talbot* (1870), 6 Ch. App. 32; *Hickman* v. *Upsall* (1876), 4 Ch. D. 144, C. A.

(*r*) *Dyer* v. *Dyer* (1788), 2 Cox, Eq. Cas. 92, *per* EYRE, C.B., at p. 93; 2 White & Tud. L. C., 7th ed., p. 803.

(*s*) *Salter* v. *Cavanagh* (1838), 1 Dr. & Wal. 668; *Patrick* v. *Simpson* (1889), 24 Q. B. D. 128.

SECT. 1. **The Fiduciary Character.**

the legal owner of the property holds it in a fiduciary capacity, and is subject to the equitable rules affecting that character.

SUB-SECT. 2.—*Fiduciary Relationship.*

Fiduciary relations.

185. Apart from the creation of trusts of specific property, the position held by a person may itself involve confidence so as to impress him with a fiduciary character, and when he gets possession of money or other property in this character he holds it as a trustee. This is so in most cases of agency, since the agent has duties to perform which involve the placing of confidence in him by the principal (*t*). On the same footing are directors (*u*) and promoters (*a*) of companies; and a receiver and a trustee in bankruptcy hold property received by them in a fiduciary capacity (*b*). But a partner does not receive the assets of the partnership on account of himself and his partners in a fiduciary capacity (*c*).

SECT. 2.—*Disability of Trustee to Purchase.*

Purchase by trustee from himself.

186. It is a settled rule of equity that no one having duties of a fiduciary nature to discharge shall be allowed to enter into engagements in which he has or can have a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect (*d*). One consequence of the rule is that a

(*t*) *Burdick* v. *Garrick* (1870), 5 Ch. App. 233; *Lyell* v. *Kennedy*, *Kennedy* v. *Lyell* (1889), 14 App. Cas. 437, 463; see *Friend* v. *Young*, [1897] 2 Ch. 421, 432. And as to the fiduciary nature of an agent's employment, see *Padwick* v. *Stanley* (1852), 9 Hare, 627; *Crowther* v. *Elgood* (1887), 34 Ch. D. 691, C. A.; *Lamb* v. *Evans*, [1893] 1 Ch. 218, C. A.; *Robb* v. *Green*, [1895] 2 Q. B. 315, C. A. But an agency is not necessarily fiduciary. A solicitor or other agent who receives money merely for transmission to his principal is not trustee of it (*Re Hindmarsh* (1860), 1 Drew. & Sm. 129); to become such he must have duties to perform in the disposition of the property, as to invest or manage it (*Gray* v. *Bateman* (1872), 21 W. R. 137; *Power* v. *Power* (1884), 13 L. R. Ir. 281; *Dooby* v. *Watson* (1888), 39 Ch. D. 178). And a banker is not an agent of a customer so as to be in a fiduciary relation, but merely a debtor (*Foley* v. *Hill* (1848), 2 H. L. Cas. 28).

(*u*) *Flitcroft's Case* (1882), 21 Ch. D. 519, C. A.; see *Re Forest of Dean Coal Mining Co.* (1878), 10 Ch. D. 450, 453.

(*a*) *Erlanger* v. *New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218, 1236.

(*b*) *Seagram* v. *Tuck* (1881), 18 Ch. D. 296; *Re Gent*, *Gent-Davis* v. *Harris* (1888), 40 Ch. D. 190. In general, a person who receives money or property in a fiduciary capacity is treated as an express trustee for the purpose of depriving him of the benefit of the Statutes of Limitation, other than the Trustee Act 1888 (51 & 52 Vict. c. 59), s. 8 (see *Burdick* v. *Garrick*, *supra*; *Re Bell*, *Lake* v. *Bell* (1886), 34 Ch. D. 462; *Re Sharpe*, *Re Bennett*, *Masonic and General Life Assurance Co.* v. *Sharpe*, [1892] 1 Ch. 154, 166, C. A.); and persons who, though strangers to the trust, participate in a fraudulent breach of trust (*Barnes* v. *Addy* (1874), 9 Ch. App. 244), or receive trust moneys and deal with them in violation of the trust (*Lee* v. *Sankey* (1873), L. R. 15 Eq. 204), are treated as express trustees; see *Wilson* v. *Moore* (1834), 1 My. & K. 337, 350; *Bridgman* v. *Gill* (1857), 24 Beav. 302; *Foxton* v. *Manchester and Liverpool District Banking Co.* (1881), 44 L. T. 406; and as to "fiduciary capacity," see the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 4, exception (3); and title CONTEMPT OF COURT AND ATTACHMENT, Vol. VII., p. 299.

(*c*) *Piddocke* v. *Burt*, [1894] 1 Ch. 343 (on the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 4 (3)). As to stockbrokers, see note (*g*), p. 159, *post*.

(*d*) *Aberdeen Rail. Co.* v. *Blaikie Brothers* (1854), 1 Macq. 461, H. L., *per* LORD CRANWORTH, L.C., at p. 471.

SECT. 2. Disability of Trustee to Purchase.

trustee for sale may not purchase the trust property from himself (*e*). It makes no difference whether he in fact gains an advantage from the transaction or not. If the purchase is made while he is trustee, and without the consent of the *cestuis que trust*, it is necessarily invalid, and the *cestuis que trust* are entitled either to confirm the sale or to take back the property (*f*). It is the same though the trustee has purchased by himself or an agent at auction (*g*), or from his co-trustees (*h*).

Purchase from *cestui que trust*.

187. The rule, however, is not absolute with regard to a purchase by the trustee after he has ceased to be a trustee, or when he purchases with the consent of his *cestuis que trust*. He may retire from being a trustee, and divest himself of that character, in order to qualify himself to become a purchaser (*i*); and the sale will then be good if he has taken this step sufficiently long before the sale to avoid the possibility of his making use of special information acquired by him as trustee (*k*); or, without ceasing to be trustee, he may enter into a contract of sale with the *cestui que trust*. Such a contract will be looked at with jealousy, but it will be supported if it is distinct and clear, if it appears that the *cestui que trust* intended that the trustee should buy, and if there is neither fraud, nor concealment, nor advantage taken by the trustee of information acquired by him in his character of trustee (*l*).

Terms on which relief is granted.

188. A *cestui que trust* who wishes to set aside a purchase of the trust property by the trustee (*m*) must repay the purchase-money, with interest at £4 per cent., and sums expended in repairs and permanent improvements, the trustee making an allowance for depreciation caused by his acts, and accounting for rents and profits, and paying an occupation rent if he has been in occupation (*n*); but a trustee who has been guilty of fraud will not have an allowance for improvements (*o*).

(*e*) *Re Bloye's Trust* (1849), 1 Mac. & G. 488, 495.

(*f*) *Fox* v. *Mackreth*, *Pitt* v. *Mackreth* (1788), 2 Bro. C. C. 400; 2 White & Tud. L. C., 7th ed., p. 709; *Hardwicke* (*Lord*) v. *Vernon* (1799), 4 Ves. 411; *Ex parte Lacey* (1802), 6 Ves. 625; *Ex parte James* (1803), 8 Ves. 337, 348; *Ex parte Bennett* (1805), 10 Ves. 381, 388, 394; *Randall* v. *Errington* (1805), 10 Ves. 423; *Hamilton* v. *Wright* (1842), 9 Cl. & Fin. 111, H. L. As to sale by a mortgagee to a company of which he is a member, see *Farrar* v. *Farrars, Ltd.* (1888), 40 Ch. D. 395, C. A.

(*g*) *Ex parte Bennett* (1805), 10 Ves. 381, 393; *Ingle* v. *Richards* (No. 1) (1860), 28 Beav. 361. The presence of the trustees as buyers is a discouragement to others to bid (*Ex parte Lacey*, *supra*, at p. 629). As to purchase by agent, see *Downes* v. *Grazebrook* (1817), 3 Mer. 200; and compare *Delves* v. *Delves* (1875), L. R. 20 Eq. 77, 83.

(*h*) *Whichcote* v. *Lawrence* (1798), 3 Ves. 740; *Hall* v. *Noyes* (*circa* 1796), cited *ibid.* at p. 748.

(*i*) *Downes* v. *Grazebrook*, *supra*, at p. 208.

(*k*) *Ex parte James*, *supra*, at p. 352; see *Re Boles and British Land Co.'s Contract*, [1902] 1 Ch. 244.

(*l*) *Coles* v. *Trecothick* (1804), 9 Ves. 234, 247; see *Ex parte James*, *supra*; *Morse* v. *Royal* (1806), 12 Ves. 355, 372.

(*m*) See, as to his right to do this, *Thompson* v. *Eastwood* (1877), 2 App. Cas. 215, 236; *Silkstone and Haigh Moor Coal Co.* v. *Edey*, [1900] 1 Ch. 167.

(*n*) *York Buildings Co.* v. *Mackenzie* (1795), 8 Bro. Parl. Cas. 42; *Campbell* v. *Walker* (1800), 5 Ves. 678; *Ex parte Bennett*, *supra*, at pp. 400, 401.

(*o*) *Mill* v. *Hill* (1852), 3 H. L. Cas. 828, 869.

SECT. 2. **Disability of Trustee to Purchase**

Dealings by other persons in fiduciary relationship.

189. The principle applies also to other persons in a fiduciary position, and a director or promoter cannot deal on behalf of the company with himself or with a firm of which he is a member (*p*). And since the principle depends, not on the subject-matter of the agreement, but on the fiduciary character of the contracting party, it is equally applicable to real and personal estate, and to mercantile transactions (*q*). But the principle does not apply to a person who has only the power to become trustee, and has not in fact done so, such as, *e.g.*, an executor who has neither proved nor disclaimed (*r*).

SECT. 3.—*Disability of Trustee to make a Profit.*

Trustee not allowed to make a profit.

190. From the rule that a person shall not be allowed to put himself in a position where his interest and duty conflict, it follows that a person in a fiduciary position is not allowed, unless otherwise expressly provided, to make a profit out of his trust (*s*). This rule obliges him to account for any advantages which he has obtained by reason of his ownership of the trust property. Benefits acquired by him as the owner of the property cannot be retained, but must be surrendered for the advantage of those beneficially interested (*t*).

And so, if the trustee retains trust money in his own hands, he is charged with interest (*a*); and if he mixes it with his own money, and employs it in his business, the *cestui que trust* is entitled to take a proportionate share of the profits of the business instead of interest (*b*).

Trustee not entitled to remuneration.

191. The rule has also been inflexibly established that, in the absence of a remuneration clause, a trustee shall have no allowance for his time and care (*c*); though he is entitled to

(*p*) *Aberdeen Rail. Co.* v. *Blaikie Brothers* (1854), 1 Macq. 461, H. L.; *Erlanger* v. *New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218.

(*q*) *Aberdeen Rail. Co.* v. *Blaikie Brothers*, *supra*, at p. 472.

(*r*) *Clark* v. *Clark* (1884), 9 App. Cas. 733, P. C. And see as to purchases by agents, title AGENCY, Vol. I., p. 189; by solicitors, title SOLICITORS; and, generally, title TRUSTS AND TRUSTEES.

(*s*) *Bray* v. *Ford*, [1896] A. C. 44, *per* Lord HERSCHELL, at p. 51; see *Parker* v. *McKenna* (1874), 10 Ch. App. 96, 118; *Archer's Case*, *Re North Australian Territory Co.*, [1892] 1 Ch. 322, C. A.

(*t*) *Aberdeen Town Council* v. *Aberdeen University* (1877), 2 App. Cas. 544, *per* Lord CAIRNS, at p. 549. Upon this consideration is based the constructive trust raised where the trustee renews a lease in his own favour. And the trustee cannot enjoy the right of sporting over the trust estate (*Webb* v. *Shaftesbury* (*Earl*), *Shaftesbury* (*Earl*) v. *Arrowsmith* (1802), 7 Ves. 480, 488).

(*a*) *A.-G.* v. *Alford* (1855), 4 De G. M. & G. 843; *Blogg* v. *Johnson* (1867), 2 Ch. App. 225, 228; *Re Barclay*, *Barclay* v. *Andrew*, [1899] 1 Ch. 674.

(*b*) *Docker* v. *Somes* (1834), 2 My. & K. 655. The principle applies also where one who is not expressly a trustee has bought or trafficked with another's money. "The law raises a trust by implication, clothing him, though a stranger, with the fiduciary character, for the purpose of making him accountable" (*ibid.*, *per* Lord BROUGHAM, L.C., at p. 665). But in such a case the constructive trustee is entitled to an allowance for his time and care (*Brown* v. *Litton* (1711), 1 P. Wms. 140); see further on this subject titles EXECUTORS AND ADMINISTRATORS; TRUSTS AND TRUSTEES.

(*c*) *Robinson* v. *Pett* (1734), 3 P. Wms. 249 (2 White & Tud. L. C., 7th ed., p. 606), *per* TALBOT, L.C., at p. 251: "The reason seems to be that on these pretences, if allowed, the trust estate might be loaded and rendered of little value"; see *Moore* v. *Frowd* (1837), 3 My. & Cr. 45, *per* Lord COTTENHAM, L.C., at p. 50. As to a solicitor-trustee's remuneration clause, see *Re Fish*, *Bennett*

his expenses (*d*), and has a first charge for these on the trust estate (*e*).

SECT. 3. Disability of Trustee to make a Profit.

SECT. 4.—*Following Assets.*

Trust property may be followed.

192. As between *cestui que trust* and trustee, and persons claiming under the trustee otherwise than by purchase for valuable consideration without notice, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruits of such property, whether in its original or in its altered state, continue to be subject to or affected by the trust (*f*). Upon this rule is based the doctrine of following trust property. The doctrine is not confined to express trustees, but applies to all persons in a fiduciary relation (*g*). Hence, if property has been sold, whether rightfully or wrongfully, the *cestui que trust* can take the proceeds of sale if he can identify them. There is no distinction between a rightful and a wrongful disposition of the property as regards the right of the beneficial owner to follow the proceeds (*h*).

Investments of proceeds.

If the proceeds have been invested, without the addition of further money, in the purchase of other property, the beneficial owner has the right to elect either to take the property purchased, or to have a charge on it for the amount of the trust money (*h*). If the trustee has mixed the trust money with money of his own, and has applied the whole in the purchase of property, the beneficial owner is entitled to a charge on the property purchased for the amount of the trust money, and this ranks before any claim by the trustee (*h*).

Following money.

Since equity does not admit that money has no ear-mark, the money itself can be followed in equity; and whether the trustee mixes it with his own money, and retains the whole as money, or places the whole in a bank, or invests it in personal securities, effect is given to the beneficial owner's right by allowing him a first charge on the whole mass of money, or the securities which represent it (*i*).

v. *Bennett*, [1893] 2 Ch. 413, C. A.; *Re Chalinder and Herington*, [1907] 1 Ch. 58; and title SOLICITORS.

(*d*) *A.-G.* v. *Norwich Corporation* (1837), 2 My. & Cr. 406, 424; see *Hide* v. *Haywood* (1740), 2 Atk. 126; *Dawson* v. *Clarke* (1811), 18 Ves. 247, 254.

(*e*) *Re Exhall Coal Co., Ltd., Re Bleckley* (1866), 35 Beav. 449.

(*f*) *Pennell* v. *Deffell* (1853), 4 De G. M. & G. 372, C. A., *per* TURNER, L.J., at p. 388.

(*g*) *Re Hallett's Estate, Knatchbull* v. *Hallett* (1880), 13 Ch. D. 696, C. A., *per* JESSEL, M.R., at p. 709; overruling *Re West of England and South Wales District Bank, Ex parte Dale & Co.* (1879), 11 Ch. D. 772, and see *per* FRY, J., at p. 778. Thus, a client's money can be followed into the assets of a stockbroker, since he is an agent into whose hands the money is put to be applied in a particular way (*Taylor* v. *Plumer* (1815), 3 M. & S. 562; *Re Strachan, Ex parte Cooke* (1876), 4 Ch. D. 123, C. A.); and though the relation of banker and customer is in general that of debtor and creditor, yet where a cheque is handed to a banker to collect and hold the proceeds for the customer, this is a trust and the money can be followed (*Re Brown, Ex parte Plitt* (1889), 37 W. R. 463).

(*h*) *Re Hallett's Estate, Knatchbull* v. *Hallett, supra;* and, similarly, where a tenant for life receives the purchase-money of the property (*Price* v. *Blakemore* (1843), 6 Beav. 507).

(*i*) *Re Hallett's Estate, Knatchbull* v. *Hallett, supra*, at p. 711; *Pennell* v. *Deffell, supra*. But the principle does not apply where money has not been actually received, but only credited in account, so that it is incapable of identification (*Re Hallett & Co., Ex parte Blane*, [1894] 2 Q. B. 237, C. A.).

SECT. 4. Following Assets.

In such circumstances the rule as to appropriation of payments (*k*) does not apply, and if the trustee draws out any money, the drawing will be attributed to his own money, and not to trust money which may have been paid into the account earlier (*l*). But the right to follow trust money is no more than an equity, and it does not prevail against a purchaser for valuable consideration without notice (*m*). Where an agent has received money as a bribe, there is no trust of the money until it has been declared by a judgment to be the principal's property, and till then it cannot be followed as trust money (*n*).

Refunding by legatees.

193. A right to follow assets is allowed in equity in favour of creditors and legatees when an executor has paid away the estate of a deceased person to the prejudice of their claims (*o*).

At suit of creditor.

A creditor is entitled to follow the assets into whosesoever hands they come (*p*), and consequently he can require a legatee to refund (*q*); and a specific legatee is under this liability, but without prejudice to his rights against the executor or the residuary legatee (*r*).

Of another legatee.

And if the estate was originally insufficient to pay all legacies, a legatee who is unpaid can require a legatee who has been paid more than his due proportion to refund (*s*). This is upon the ground that

(*k*) See *Devaynes* v. *Noble, Clayton's Case* (1816), 1 Mer. 572, and title CONTRACT, Vol. VII., pp. 449, 452, as to appropriation.

(*l*) *Re Hallett's Estate, Knatchbull* v. *Hallett* (1880), 13 Ch. D. 696, C. A., at p. 724; see *per* JESSEL, M.R., at p. 730, overruling on this point *Pennell* v. *Deffell* (1853), 4 De G. M. & G. 372, C. A; see *Re Oatway, Hertslet* v. *Oatway*, [1903] 2 Ch. 356. But, as between two trust funds which the trustee has paid into his own account, the rule in *Clayton's Case, supra*, applies, so that the sum first paid in is held to have been first drawn out (*Re Hallett's Estate, Knatchbull* v. *Hallett, supra, per* FRY, J.; *Hancock* v. *Smith* (1889), 41 Ch. D. 456, C. A.; *Re Stenning, Wood* v. *Stenning*, [1895] 2 Ch. 433).

(*m*) *Pennell* v. *Deffell, supra, per* TURNER, L.J., at p. 388. Where an executor, who is also residuary legatee, charges assets of the testator in favour of a mortgagee who has no notice of unsatisfied debts, or that the dealing with the assets is improper, his title prevails over that of the testator's creditors, although he may not obtain the legal estate in or control over the assets (*Graham* v. *Drummond*, [1896] 1 Ch. 968).

(*n*) *Lister & Co.* v. *Stubbs* (1890), 45 Ch. D. 1, C. A.; *Archer's Case*, [1892] 1 Ch. 322, 338, C. A.

(*o*) The creditor's right to follow assets is expressly reserved in the statutory provisions relating to an executor (Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), ss. 27, 28, 29).

(*p*) *Newman* v. *Barton* (1690), 2 Vern. 205. It is a case of following trust funds, since it is a breach of trust for the executor to pay legacies while the debts remain unpaid (*Fordham* v. *Wallis* (1853), 10 Hare, 217, 226).

(*q*) *Noel* v. *Robinson* (1682), 1 Vern. 94; *March* v. *Russell* (1837), 3 My. & Cr. 31. Formerly the legatee was required to give security to refund in case further debts were discovered; but, though this was discontinued, his personal liability remained (*March* v. *Russell, supra*); see *Re King, Mellor* v. *South Australian Land Mortgage and Agency Co.*, [1907] 1 Ch. 72; *National Assurance Co.* v. *Scott*, [1909] 1 I. R. 325. The right can be exercised against volunteers under the legatee (*ibid.*); but not against purchasers (*Noble* v. *Brett* (1858), 24 Beav. 499; *Dilkes* v. *Broadmead* (1860), 2 De G. F. & J. 566).

(*r*) *Davies* v. *Nicolson* (1858), 2 De G. & J. 693, C. A.; *Noble* v. *Brett, supra*. Where some legatees have been paid out of a fund in court, see *Gillespie* v. *Alexander* (1827), 3 Russ. 130, 138.

(*s*) *Noel* v. *Robinson, supra; Anon.* (1718), 1 P. Wms. 495; *Edwards* v. *Freeman* (1727), 2 P. Wms. 435, 447; *Walcott* v. *Hall* (1788), 2 Bro. C. C. 305;

SECT. 4. Following Assets.

the payment to the first legatee was in fact improper whether this was known to the executor or not (*t*). Where, on the other hand, the estate was sufficient at the time of the payment to one legatee, but afterwards there is a deficiency, due either to the executor's insolvency or to accidental loss (*u*), the paid legatee, who has received no more than at the time he was entitled to, cannot be required to refund (*v*).

At suit of executor.

In general, the executor himself cannot call upon a legatee to refund, since, by voluntarily paying the legacy, he admits that the assets are sufficient (*x*); but if the executor has paid under an order of the Court he can require the legatee to refund (*a*); and so, too, if debts, of which he had no notice at the time of payment, are afterwards discovered (*b*). But in this respect a distinction exists between debts and contingent liabilities—such as a liability on unpaid shares—and an executor paying legacies with notice of the latter can require the legatee to refund (*c*), but without interest (*d*). Where an executor has by mistake made an overpayment, though he cannot call for repayment (*e*), he can reimburse himself out of funds in which the legatee is interested which remain in his hands (*f*).

Part VII.—Equitable Defences.

SECT. 1.—*Equitable Set-off* (*g*).

Set-off by statute.

194. Where the nature of dealings between two parties necessitates the keeping of an account, consisting of receipts and payments, debts and credits, on either side, no question of set-off arises. It is only by taking the account, and ascertaining the balance, that the amount due from one party to the other can be ascertained, and it is such balance only that can be recovered. Where there is no such current account, but there are simply mutual debts between two parties, then apart from statute and the modern rules of procedure,

see *contra Newman* v. *Barton* (1690), 2 Vern. 205; and compare *Orr* v. *Kaines* (1751), 2 Ves. Sen. 194.

(*t*) See 2 Bro. C. C. (Belt's ed.) 305, n. (2).

(*u*) *Fenwick* v. *Clarke* (1862), 4 De G. F. & J. 240, C. A.

(*v*) *Anon.* (1718), 1 P. Wms. 495; *Walcott* v. *Hall* (1788), 2 Bro. C. C. 305; *Fenwick* v. *Clarke*, *supra*; *Peterson* v. *Peterson* (1866), L. R. 3 Eq. 111; *Re Winslow*, *Frere* v. *Winslow* (1890), 45 Ch. D. 249.

(*x*) *Hodges* v. *Waddington* (1679), 2 Cas. in Ch. 9; *Orr* v. *Kaines*, *supra*; see title EXECUTORS AND ADMINISTRATORS.

(*a*) *Newman* v. *Barton*, *supra*.

(*b*) *Nelthrop* v. *Hill* (1669), 1 Cas. in Ch. 135; *Jewon* v. *Grant* (1677), 3 Swan. 659; see *German* v. *Colston* (1678), 2 Rep. Ch. 137.

(*c*) *Jervis* v. *Wolferstan* (1874), L. R. 18 Eq. 18; *Whittaker* v. *Kershaw* (1890), 45 Ch. D. 320, C. A.

(*d*) *Jervis* v. *Wolferstan*, *supra*; see *Gittins* v. *Steele* (1818), 1 Swan. 199.

(*e*) *Hilliard* v. *Fulford* (1876), 4 Ch. D. 389.

(*f*) *Livesey* v. *Livesey* (1827), 3 Russ. 287; *Cooper* v. *Pitcher* (1845), 4 Hare, 485.

(*g*) As to set-off in bankruptcy, see title BANKRUPTCY, Vol. II., p. 211; and, generally, see title SET-OFF AND COUNTERCLAIM.

SECT. 1. **Equitable Set-off.**

no right of set-off exists at law, and each party would be obliged to sue in a different action to recover his own debt (*h*). At law a right to set off mutual debts between the plaintiff and defendant, or between either party and a deceased person of whom the other party was executor or administrator, was given by the Statutes of Set-off (*i*); and a right of set-off where there have been mutual credits, mutual debts, or other mutual dealings has been, under successive bankruptcy statutes, allowed in bankruptcy (*k*).

Set-off in equity.

Before these statutes, the Court of Chancery recognised the right to set off (*l*). It was natural equity that cross-demands should compensate each other, by deducting the less sum from the greater, and the difference was the only sum which was justly due (*m*). But equity did not allow set-off as between mutual independent debts generally. In addition to the existence of cross-demands, it was necessary that there should be some special equity to call for a set-off (*n*). Such equity existed where, although the debts were distinct, one party had given credit to the other on the faith of the debt to himself being paid (*o*).

And where there are cross-demands between two parties of such a nature that, if both were recoverable at law, they would be the subject of legal set-off, then if either of the demands is matter of equitable jurisdiction, the set-off will be enforced in equity (*p*).

(*h*) *Green* v. *Farmer* (1768), 4 Burr. 2214, *per* Lord MANSFIELD, at p. 2221; compare *Dale* v. *Sollet* (1767), 4 Burr. 2133.

(*i*) Stat. (1728) 2 Geo. 2, c. 22, s. 13; stat. (1734) 8 Geo. 2, c. 24, s. 4; both now repealed, though only as regards the Supreme Court of Judicature by the Civil Procedure Acts Repeal Act, 1879 (42 & 43 Vict. c. 59); but the statutory right is preserved by R. S. C., Ord. 19, r. 3.

(*k*) Beginning with stat. (1704) 4 Ann. c. 17, s. 11; and stat. (1731) 5 Geo. 2, c. 30, s. 28; and now under the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 38.

(*l*) *Ex parte Stephens* (1805), 11 Ves. 24, *per* Lord ELDON, L.C., at p. 27; *Ex parte Blagden* (1815), 19 Ves. 465, 467; see *Freeman* v. *Lomas* (1851), 9 Hare, 109, *per* TURNER, V.-C., at pp. 112, 113.

(*m*) *Green* v. *Farmer*, *supra*, *per* Lord MANSFIELD, C.J., at p. 2220.

(*n*) *Rawson* v. *Samuel* (1841), Cr. & Ph. 161, *per* Lord COTTENHAM, L.C., at p. 178: "Equitable set-off exists in cases where the party seeking the benefit of it can show some equitable ground for being protected against his adversary's demand;" doubting *Williams* v. *Davies* (1829), 2 Sim. 461; see *Whyte* v. *O'Brien* (1824), 1 Sim. & St. 551. Otherwise equity follows the statutory right at law (*Ex parte Stephens*, *supra*; *James* v. *Kynnier* (1799), 5 Ves. 108). The set-off is restricted to liquidated demands (*Rawson* v. *Samuel*, *supra*; *Best* v. *Hill* (1872), L. R. 8 C. P. 10), unless the unliquidated claim directly impeaches the right to recover the cross-claim (*Piggott* v. *Williams* (1821), Madd. & G. 95).

(*o*) Thus, where A. is indebted to B. in £10,000 on bond, and B. borrows of A. £2,000 on his own bond, the bonds being payable at different times, the nature of the transaction leads to the presumption that there was a mutual credit between the parties as to the £2,000, as an ultimate set-off *pro tanto* from the debt of £10,000 (Story, s. 1435). In all cases of mutual credit it is natural justice and equity that only the balance should be paid (*Lanesborough (Lord)* v. *Jones* (1716), 1 P. Wms. 325, *per* Lord COWPER, L.C., at p. 326); this is based on the presumed intention or agreement of the parties; "the least evidence of an agreement for a stoppage [*i.e.* a set-off] will do; and in these cases equity will take hold of a very slight thing to do both parties right" (*Jeffs* v. *Wood* (1723), 2 P. Wms. 127, 130; see *Ex parte Prescot* (1753), 1 Atk. 230, 231).

(*p*) *Clark* v. *Cort* (1840), Cr. & Ph. 154; *Freeman* v. *Lomas*, *supra*; compare *Thornton* v. *Maynard* (1875), L. R. 10 C. P. 695, 699; *Taylor*

SECT. 1. Equitable Set-off.

But equity, following the law, usually requires that the debts which are to be set off against each other shall be due from and to the parties in the same right. It does not allow a set-off of debts accruing in different rights (*q*)—as of a joint debt against a separate debt (*r*)—unless there is a series of transactions clearly showing that joint credit was given on account of the separate debt (*s*); or of a debt due from an executrix and residuary legatee against a debt due to her testator (*t*).

In order that demands may be set off against each other, it is necessary that each should be recoverable by action (*a*), since set-off is in the nature of a cross-action (*b*), and set-off cannot be used so as indirectly to make a debt transferable which is by statute not transferable (*c*). Where, under an order of the court or an arbitrator's award, each party has to pay a sum to the other, the sums are set off (*d*); but there is no set off of costs in independent proceedings (*e*).

Retainer of debt out of legacy or share of residue.

195. Where a testator leaves a legacy or a share of residue to his debtor, the debtor is not entitled to receive anything out of the estate until he has paid his debt, and consequently the executor can retain the debt out of the legacy or share of residue, even though it is statute-barred (*f*). Where the debtor has become bankrupt

Taylor (1875), L. R. 20 Eq. 155, 160; see, generally, title SET-OFF AND COUNTERCLAIM.

(*q*) Story, s. 1437; *Freeman* v. *Lomas* (1851), 9 Hare, 109, 114; see *Cavendish* v. *Geaves* (1857), 24 Beav. 163; *Black & Co.'s Case* (1872), 8 Ch. App. 254, 261; *Phillips* v. *Howell*, [1901] 2 Ch. 773. For cases where set-off was allowed, or a debt extinguished, where the debt was the husband's, and a sum was due to the wife, see *Re Price, deceased, Price* v. *Price* (1879), 11 Ch. D. 163, C. A.; *Re Batchelor, Sloper* v. *Oliver* (1873), L. R. 16 Eq. 481; *Re Briant, Poulter* v. *Shackel* (1888), 39 Ch. D. 471. A debt may be set off though acquired by assignment (*Bennett* v. *White* (1910), 103 L. T. 52, C. A., reversing S. C. [1910] 2 K. B. 1).

(*r*) *Ex parte Twogood* (1805), 11 Ves. 517; *Addis* v. *Knight* (1817), 2 Mer. 117, 122; but this may be done in the interest of a joint debtor who is a surety (*Ex parte Hanson* (1811), 18 Ves. 232; (1806), 12 Ves. 346), or where there is fraud raising a special equity to a set-off (*Ex parte Stephens* (1805), 11 Ves. 24).

(*s*) *Vulliamy* v. *Noble* (1817), 3 Mer. 593, 618.

(*t*) *Bishop* v. *Church* (1748), 3 Atk. 691; see *Cherry* v. *Boultbee* (1839), 4 My. & Cr. 442; *Freeman* v. *Lomas, supra; Middleton* v. *Pollock, Ex parte Magee* (1875), L. R. 20 Eq. 29; *Re Willis, Percival & Co., Ex parte Morier* (1879), 12 Ch. D. 491, C. A. But set-off may be allowed as between a debtor to the estate and the administrator and sole next of kin after the estate has been cleared (*Jones* v. *Mossop* (1844), 3 Hare, 568).

(*a*) *Francis* v. *Dodsworth* (1847), 4 C. B. 202, 220; *Rawley* v. *Rawley* (1876), 1 Q. B. D. 460, C. A.; *Smith* v. *Betty*, [1903] 2 K. B. 317, C. A.

(*b*) *Walker* v. *Clements* (1850), 15 Q. B. 1046; see R. S. C., Ord. 19, r. 3. Hence a statute-barred debt cannot be set off against a debt not barred (*Walker* v. *Clements, supra*).

(*c*) *Gathercole* v. *Smith* (1881), 17 Ch. D. 1, C. A.

(*d*) *Pringle* v. *Gloag* (1879), 10 Ch. D. 676; R. S. C., Ord. 65, rr. 14, 27 (21); see *Goodfellow* v. *Gray*, [1899] 2 Q. B. 498, C. A.

(*e*) *David* v. *Rees*, [1904] 2 K. B. 435, C. A.; *Bake* v. *French*, [1907] 1 Ch. 428; and see title SET-OFF AND COUNTERCLAIM.

(*f*) *Courtenay* v. *Williams* (1844), 3 Hare, 539; *Coates* v. *Coates* (1864), 33 Beav. 249; and see title EXECUTORS AND ADMINISTRATORS. This is a right of the executor to pay himself out of the fund in hand, rather than set off (*Cherry* v. *Boultbee, supra*, at p. 447); and where the legatee is entitled to a share of residue, it may be referred to the principle that a debtor to an estate must contribute to the general mass of the estate what he owes to it before he

SECT. 1. Equitable Set-off.

in the lifetime of the testator, the executors are entitled to receive only dividends on the debt, and they are not entitled to retain the whole debt out of the legacy (*g*), notwithstanding that the testator did not prove in the bankruptcy (*h*). But if the bankruptcy occurs after the testator's death, the executors are entitled to retain the legacy to meet the debt (*i*), if the debt is ascertained (*k*) and they have not proved in the bankruptcy (*l*).

No set-off against calls in winding-up.

In the winding up of companies a creditor of the company who is also a shareholder is not allowed to set off the debt against calls on his shares; before participating as a creditor in the assets, he must make the contribution to the assets which is due from him (*m*).

Assignee of chose in action.

An assignee of a chose in action takes subject to rights of set-off between the debtor and creditor (*n*), unless expressly excluded by the contract creating the chose in action or otherwise (*o*).

SECT. 2.—*Release and Waiver.*

Release.

196. At law a right of action arising solely on an instrument under seal can only be released under seal; a right of action arising otherwise can be discharged either by release under seal or by accord and satisfaction (*p*); but in equity an agreement to release the right made for valuable consideration is in all cases effective as a release, and this rule now applies both to legal and equitable rights (*q*). Moreover, although there is no consideration,

can claim an aliquot share out of it (*Re Akerman, Akerman* v. *Akerman*, [1891] 3 Ch. 212, 219); but the share must be payable to the debtor as legatee, not to a legatee under whom the debtor claims (*Re Bruce, Lawford* v. *Bruce*, [1908] 2 Ch. 682, C. A.); and the debt must be immediately payable (*Re Abrahams, Abrahams* v. *Abrahams*, [1908] 2 Ch. 69). Executors cannot retain the debt after they have appropriated funds to meet the legacy and have become trustees of it (*Ballard* v. *Marsden* (1880), 14 Ch. D. 374). As to the application of the principle between a company and a debenture-holder, see *Re Goy & Co., Ltd., Farmer* v. *Goy & Co., Ltd.*, [1900] 2 Ch. 149.

(*g*) *Cherry* v. *Boultbee* (1839), 4 My. & Cr. 442; *Re Orpen, Beswick* v. *Orpen* (1880), 16 Ch. D. 202.

(*h*) *Re Hodgson, Hodgson* v. *Fox* (1878), 9 Ch. D. 673.

(*i*) *Re Watson, Turner* v. *Watson*, [1896] 1 Ch. 925.

(*k*) *Re Binns, Lee* v. *Binns*, [1896] 2 Ch. 584.

(*l*) *Armstrong* v. *Armstrong* (1871), L. R. 12 Eq. 614; *Stammers* v. *Elliott* (1868), 3 Ch. App. 195; compare as to claims in winding-up, *Re West Coast Gold Fields, Ltd., Rowe's Trustee's Claim*, [1906] 1 Ch. 1, C. A.

(*m*) *Grissell's Case* (1866), 1 Ch. App. 528; *Re West of England Bank, Ex parte Brown* (1879), 12 Ch. D. 823; *Re Auriferous Properties, Ltd.*, [1898] 1 Ch. 691; *Re Hiram Maxim Lamp Co.*, [1903] 1 Ch. 70.

(*n*) *Roxburghe* v. *Cox* (1881), 17 Ch. D. 520, 526, C. A.; *Newfoundland* (*Government*) v. *Newfoundland Rail. Co.* (1888), 13 App. Cas. 199; compare *Green* v. *Sevin* (1879), 13 Ch. D. 589, where in specific performance the defendant was allowed to deduct his costs from the purchase-money against a mortgagee whose mortgage was subsequent to the contract of sale.

(*o*) *E.g.*, under the common clause in debentures making them assignable free from equities. As to set-off between a company and a trade customer, notwithstanding a floating charge created by debentures, see *Biggerstaff* v. *Rowatt's Wharf, Ltd., Howard* v. *Rowatt's Wharf, Ltd.*, [1896] 2 Ch. 93, C. A.; *Nelson* (*Edward*) *& Co., Ltd.* v. *Faber & Co.*, [1903] 2 K. B. 367; and see p. 104 *ante*.

(*p*) See title CONTRACT, Vol. VII., pp. 441 *et seq.*, where these and other methods of discharging a right of action are discussed.

(*q*) *Steeds* v. *Steeds* (1889), 22 Q. B. D. 537; *Edwards* v. *Walters*, [1896] 2 Ch. 157, 168, C. A.

a release of an equitable right of action can, it would seem, be effected by instrument under hand, or even verbally, provided the intention is to grant an immediate release (*r*); and such a release, though not in itself effective as to a legal right of action, will become effective if the legal right of action is subsequently extinguished (*s*). But in practice a gratuitous release of a legal or equitable right of action should be under seal.

Waiver.

197. Waiver is the abandonment of a right, and is either express or implied from conduct. A person who is entitled to the benefit of a stipulation in a contract or of a statutory provision (*t*) may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist. Waiver of this kind depends upon consent (*a*), and the fact that the other party has acted upon it is sufficient consideration (*b*). Where the waiver is not express, it may be implied from conduct which is inconsistent with the continuance of the right (*c*).

Where the right is a right of action, or an interest in property, an express waiver depends upon the same considerations as a release. If it is a mere statement of an intention not to insist upon the right, it is not effectual unless made with consideration; but where there is consideration the statement amounts to a promise and operates as a release (*d*). And although there is no express

(*r*) The gratuitous release of an equitable demand appears to be subject to the same considerations as the gratuitous assignment or release of an equitable interest in property; see title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 376, 377, and the discussion there of *Re Hancock, Hancock* v. *Berrey* (1888), 57 L. J. (CH.) 793. And there seems to be no objection to its being verbal, provided the evidence of the release is clear; compare *Strong* v. *Bird* (1874), L. R. 18 Eq. 315; but the evidence must show an immediate release, not a mere expression of intention not to enforce the debt (*Byrn* v. *Godfrey* (1798), 4 Ves. 6).

(*s*) *Strong* v. *Bird, supra;* and see other cases cited note (*u*), p. 98, *ante.*

(*t*) But sometimes waiver of a statutory provision is forbidden, *e.g.*, the "waiver clause" in a prospectus (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 81 (4)).

(*a*) *E.g.*, waiver of notice prior to sale by a mortgagee (*Selwyn* v. *Garfit* (1888), 38 Ch. D. 273, C. A., *per* BOWEN, L.J., at p. 284: "waiver is consent to dispense with the notice"; *Re Thompson and Holt* (1890), 44 Ch. D. 492); and as to waiver of stipulations in a contract, see title CONTRACT, Vol. VII.; and as to parol waiver of the contract itself, see *Price* v. *Dyer* (1810), 17 Ves. 356. Delay is not necessarily waiver, though it may be evidence of waiver (*Selwyn* v. *Garfit, supra*); and see *Darnley* (*Earl*) v. *London, Chatham and Dover Rail. Co.* (1867), L. R. 2 H. L. 43.

(*b*) See *Re Stokoe, Ex parte Moore* (1876), 2 Ch. D. 802, C. A. (waiver of statutory requirement as to time for disclaimer by trustee in bankruptcy).

(*c*) *Keene* v. *Biscoe* (1878), 8 Ch. D. 201, 203 (acceptance of mortgage interest in arrear not inconsistent with, and therefore not a waiver of right to call in principal for non-punctual payment; but see *Norton* v. *Wood* (1830), 1 Russ. & M. 178). As to waiver of forfeiture or of notice to quit, see title LANDLORD AND TENANT.

(*d*) "A waiver is nothing unless it amounts to a release. It is by a release, or something equivalent only, that an equitable demand can be taken away. A mere waiver signifies nothing more than an intention not to insist upon the right, which in equity will not without consideration bar the right any more than at law accord and satisfaction would be a plea" (*Stackhouse* v. *Barnston* (1805), 10 Ves. 453, *per* GRANT, M.R., at p. 466). Similarly a promise not to enforce an accrued legal right, *e.g.*, a right to seize goods under a bill of sale, is not binding unless there is consideration for it, or the debtor has altered his position (*Williams* v. *Stern* (1879), 5 Q. B. D. 409, C. A.).

SECT. 2. Release and Waiver.

waiver, the person entitled to the right may so conduct himself that it becomes inequitable to enforce it, and this is sometimes called an implied waiver. But in such cases the right is lost either on the ground of estoppel, or of acquiescence, whether by itself or accompanied by delay (*e*).

Knowledge of rights essential.

198. For a release (*f*) or waiver (*g*) to be effectual it is essential that the person granting it should be fully informed as to his rights; and similarly, a confirmation of an invalid transaction is inoperative unless the person confirming knows of its invalidity (*h*).

SECT. 3.—*Acquiescence.*

Meanings of acquiescence.

199. The term "acquiescence" is used in two senses. In its proper legal sense it implies that a person abstains from interfering while a violation of his legal rights is in progress (*i*); in another sense it implies that he refrains from seeking redress when a violation of his rights, of which he did not know at the time, is brought to his notice. Here the term is used in the former sense; in the second sense acquiescence is an element in laches (*k*).

Estoppel by acquiescence.

200. Acquiescence operates by way of estoppel. It is quiescence in such circumstances that assent may reasonably be inferred, and is an instance of estoppel by words or conduct (*l*). Consequently, if the whole circumstances are proper for raising this estoppel, the party acquiescing cannot afterwards complain of the violation of his right. For this purpose the lapse of time is of no importance. He is estopped immediately by his conduct; and hence the effect of acquiescence is expressly preserved by the Real

(*e*) Thus, from the open use of premises for many years in violation of a restrictive covenant a waiver or release of the covenant will be presumed (*Hepworth* v. *Pickles*, [1900] 1 Ch. 108). A *cestui que trust* who obtains part satisfaction of a breach of trust does not thereby waive his right to further relief (*Re Cross, Harston* v. *Tenison* (1882), 20 Ch. D. 109, 122, C. A.).

(*f*) *Pusey* v. *Desbouverie* (1734), 3 P. Wms. 315; *Ramsden* v. *Hylton, Hylton* v. *Biscoe* (1751), 2 Ves. Sen. 304; see *M'Carthy* v. *Decaix* (1831), 2 Russ. & M. 614.

(*g*) *Vyvyan* v. *Vyvyan* (1861), 30 Beav. 65; see *Moxon* v. *Payne* (1873), 8 Ch. App. 881, 885; *Federal Supply Co.* v. *Angehrn* (1910), 26 T. L. R. 626, P. C.

(*h*) *Crowe* v. *Ballard* (1790), 3 Bro. C. C. 117; *Roche* v. *O'Brien* (1810), 1 Ball & B. 330; *Savery* v. *King* (1856), 5 H. L. Cas. 627.

(*i*) If a party having a right stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection while the act is in progress, he cannot afterwards complain. That is the proper sense of the word 'acquiescence' (*Leeds* (*Duke*) v. *Amherst* (*Earl*) (1846), 2 Ph. 117, *per* Lord COTTENHAM, L.C., at p. 124).

(*k*) See p. 169, *post*.

(*l*) *De Bussche* v. *Alt* (1878), 8 Ch. D. 286, C. A.; compare *Kent* v. *Jackson* (1851), 14 Beav. 367. The estoppel rests upon the circumstance that the party standing by in effect makes a misrepresentation as to a fact, namely, his own title. A mere statement that he intends to do something—as to abandon his right—is not enough (*Jorden* v. *Money* (1854), 5 H. L. Cas. 185, 214, 215; *Citizens' Bank of Louisiana* v. *First National Bank of New Orleans* (1873), L. R. 6 H. L. 352, 360). The principle of estoppel by representation applies both in law and in equity, though its application to acquiescence is equitable (see Ashb., p. 635; and see title ESTOPPEL, *post*; *R.* v. *Butterton* (*Inhabitants*) (1796), 6 Term Rep. 554, 556).

Property Limitation Act, 1833 (*m*), s. 25, as regards matters falling within that statute. But when once the violation has been completed without any knowledge or assent upon the part of the person whose right has been infringed, the legal result is quite different. A right of action has then vested in him which, as a general rule, cannot be divested without accord and satisfaction or release under seal (*n*).

Elements in the estoppel.

201. When A. stands by while his right is being infringed by B., the following circumstances must be present in order that the estoppel may be raised against A. (*a*): (1) B. must be mistaken as to his own legal rights; if he is aware that he is infringing the rights of another, he takes the risk of those rights being asserted (*b*); (2) B. must expend money, or do some act, on the faith of his mistaken belief (*c*); otherwise, he does not suffer by A.'s subsequent assertion of his rights; (3) acquiescence is founded on conduct with a knowledge of one's legal rights, and hence A. must know of his own rights (*d*); (4) A. must know of B.'s mistaken belief; with that knowledge it is inequitable for him to keep silence and allow B. to proceed on his mistake (*e*); (5) A. must encourage B. in his expenditure of money or other act, either directly or by abstaining from asserting his legal right (*f*).

Applications of the estoppel.

202. The doctrine of acquiescence operating as an estoppel has been applied where a person interested in property, whether as owner or incumbrancer, has stood by while another has purchased what he supposed to be a good title to the property; thus the person so standing by cannot afterwards set up his title against the innocent

(*m*) 3 & 4 Will. 4, c. 27, s. 25.

(*n*) *De Bussche* v. *Alt* (1878), 8 Ch. D. 286, C. A.; see p. 164, *ante*.

(*a*) *Willmott* v. *Barber* (1880), 15 Ch. D. 96, *per* FRY, J., at p. 105; *Civil Service Musical Instrument Association* v. *Whiteman* (1899), 68 L. J. (CH.) 484.

(*b*) If a person builds on land of another knowing him to be the owner thereof, there is no principle of equity which would prevent the owner from claiming the land with the benefit of all the expenditure on it (*Ramsden* v. *Dyson* (1866), L. R. 1 H. L. 129, *per* Lord CRANWORTH, L.C., at p. 141; compare *Rennie* v. *Young* (1858), 2 De G. & J. 136, C. A.; Story, s. 799 b).

(*c*) *Dann* v. *Spurrier* (1802), 7 Ves. 231, 235; *Rochdale Canal Co.* v. *King* (1851), 2 Sim. (N. S.) 78; *Archbold* v. *Scully* (1861), 9 H. L. Cas. 360, 383.

(*d*) *Neesom* v. *Clarkson* (1845), 4 Hare, 97.

(*e*) The knowledge by A. of B.'s mistake imposes on A. the duty to undeceive him. "The doctrine as to a person lying by so as to create an equity against him arises if he knows facts which are unknown to the other persons acting in violation of the right which those facts give, and does not inform them about it, but lies by and lets them run into a trap" (*Russell* v. *Watts* (1883), 25 Ch. D. 559, C. A., *per* COTTON, L.J., at p. 576), a principle not affected by the reversal of the decision on appeal (10 App. Cas. 590); it is his duty to be active and to state his adverse title (*Ramsden* v. *Dyson*, *supra*, at p. 141; Ashb., p. 636). The duty to give information is of course still greater when the person lying by, and permitting expenditure by another, is in a fiduciary relation to that other (see *Cawdor* (*Lord*) v. *Lewis* (1835), 1 Y. & C. (EX.) 427).

(*f*) The estoppel is founded on the consideration that it is fraudulent under the circumstances for A. not to give notice to B. (see *Savage* v. *Foster* (1723), 9 Mod. Rep. 35; 1 White & Tud. L. C., 7th ed., p. 455). But if he gives notice of a claim, this is sufficient to avoid the equity against him, although he does not repeat it while the expenditure is being incurred, and although the claim is excessive (*Clare Hall* (*Master etc.*) v. *Harding* (1848), 6 Hare, 273).

SECT. 3. Acquiescence.

purchaser (*g*), or a person deriving title under him (*h*). And it has been applied where the owner, knowing his own title to land, has suffered another who was ignorant of that title to expend money on the land in buildings or other improvements (*i*); and the person so expending money will be entitled to have his supposed title to the property confirmed (*k*), or, at any rate, to be compensated for his outlay (*l*).

SECT. 4.—*Laches.*

The defence of laches.

203. A plaintiff in equity is bound to prosecute his claim without undue delay. This is in pursuance of the principle which underlies the Statutes of Limitation, *vigilantibus et non dormientibus lex succurrit* (*m*). A court of equity refuses its aid to stale demands, where the plaintiff has slept upon his right and acquiesced for a great length of time (*n*). He is then said to be barred by his laches. The defence of laches, however, is only allowed where there is no statutory bar. If there is a statutory bar, operating either expressly or by way of analogy, the plaintiff is entitled to the full statutory period before his claim becomes unenforceable (*o*); and

(*g*) "For it was apparent fraud in him not to give notice of his title to the intended purchaser" (*Savage* v. *Foster* (1723), 9 Mod. Rep. 35; see *Hobbs* v. *Norton* (1682), 1 Vern. 136; *Clare* v. *Bedford* (*Earl*) (1690), 13 Vin. Abr. 536; 2 Vern. 151; cited in *Bath* (*Earl*) v. *Mountague* (*Earl*) (1693), 3 Cas. in Ch. 55, 85, 104; *Berrisford* v. *Milward* (1740), 2 Atk. 49; *Nicholson* v. *Hooper* (1838), 4 My. & Cr. 179, 185, 186; *Boyd* v. *Belton* (1844), 1 Jo. & Lat. 730; *Stronge* v. *Hawkes* (1853), 4 De G. M. & G. 186, 196, C. A.; *Olliver* v. *King* (1856), 8 De G. M. & G. 110, C. A.; compare *Vaughan* v. *Vanderstegen* (1854), 2 Drew. 363; *Sharpe* v. *Foy* (1868), 4 Ch. App. 35; *Re Lush's Trusts* (1869), 4 Ch. App. 591). Ordinarily, ignorance of his title on the part of the person standing by prevents the estoppel being raised against him (*Dyer* v. *Dyer* (1682), 2 Cas. in Ch. 108); but not in the case of a marriage settlement; at any rate where he is a near relation of one of the spouses (*Teasdale* v. *Teasdale* (1726), Cas. *temp.* King, 59; see *Olliver* v. *King*, *supra*, at p. 118). A married woman cannot be deprived of her separate property, as to which she is restrained from anticipation, by estoppel (*Bateman* (*Lady*) v. *Faber*, [1898] 1 Ch. 144, C. A.).

(*h*) *Nicholson* v. *Hooper*, *supra*.

(*i*) *Huning* v. *Ferrers* (1710), Gilb. (CH.) 85; *East India Co.* v. *Vincent* (1740), 2 Atk. 83; *Steed* v. *Whitaker* (1740), Barn. (CH.) 220; *Stiles* v. *Cowper* (1748), 3 Atk. 692; *Shannon* v. *Bradstreet* (1803), 1 Sch. & Lef. 52, 73, 74; see *Oxford's* (*Earl*) *Case* (1615), 1 Rep. Ch. 1; 1 White & Tud. L. C., 6th ed., p. 730.

(*k*) *Ramsden* v. *Dyson* (1866), L. R. 1 H. L. 129, *per* Lord CRANWORTH, L.C., at p. 140: "If a stranger begins to build on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a court of equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own"; *Proctor* v. *Bennis* (1887), 36 Ch. D. 740, 760, C. A.; see *Powell* v. *Thomas* (1848), 6 Hare, 300.

(*l*) *Neesom* v. *Clarkson* (1845), 4 Hare, 97; see *Plimmer* v. *Wellington Corporation* (1884), 9 App. Cas. 699, P. C.; and compare *Clavering's Case* (undated), cited in *Jackson* v. *Cator* (1800), 5 Ves. 688, 690.

(*m*) *Cholmondeley* (*Marquis*) v. *Clinton* (*Lord*) (1820), 2 Jac. & W. 1, 140.

(*n*) *Smith* v. *Clay* (1767), 3 Bro. C. C. 639, n., *per* Lord CAMDEN; see *Pickering* v. *Stamford* (*Lord*) (1793), 2 Ves. 272, 280.

(*o*) *Archbold* v. *Scully* (1861), 9 H. L. Cas. 360, *per* Lord WENSLEYDALE, at p. 383; *Rochdale Canal Co.* v. *King* (1851), 2 Sim. (N. S.) 78, 89; *Re Baker*, *Collins* v. *Rhodes*, *Re Seaman*, *Rhodes* v. *Wish* (1881), 20 Ch. D. 230, C. A.; *Re Maddever*, *Three Towns Banking Co.* v. *Maddever* (1884), 27 Ch. D. 523, C. A.; *Penny* v. *Allen* (1857), 7 De G. M. & G. 409, 426; see *Moors* v. *Marriott* (1878), 7 Ch. D. 543, 546; *Re Birch*, *Roe* v. *Birch* (1884), 27 Ch. D. 622; and compare *Eldridge* v. *Knott* (1744), 1 Cowp. 214.

an injunction in aid of a legal right is not barred till the legal right is barred (*p*), though laches may be a bar to an interlocutory injunction (*q*).

The nature of laches.

204. The legislature, in enacting a statute of limitation, specifies fixed periods after which claims are barred; equity does not fix a specific limit, but considers the circumstances of each case (*r*). In determining whether there has been such delay as to amount to laches the chief points to be considered are (1) acquiescence on the plaintiff's part, and (2) any change of position that has occurred on the defendant's part. Acquiescence in this sense does not mean standing by while the violation of a right is in progress, but assent after the plaintiff has become aware of the violation. It is unjust to give the plaintiff a remedy where he has by his conduct done that which might fairly be regarded as equivalent to a waiver of it; or where by his conduct and neglect he has, though not waiving the remedy, put the other party in a position in which it would not be reasonable to place him if the remedy were afterwards to be asserted. In such cases lapse of time and delay are most material. Upon these considerations rests the doctrine of laches (*s*).

Acquiescence as an element in laches.

205. The chief element in laches is acquiescence, and sometimes this has been described as the sole ground for creating a bar in equity by the lapse of time (*t*). Acquiescence implies that the person acquiescing is aware of his rights, and is in a position to complain of an infringement of them (*a*). Hence acquiescence depends on knowledge, capacity, and freedom. As regards knowledge, persons cannot be said to acquiesce in the claims of others unless they are fully cognisant of their right to dispute

(*p*) *Fullwood* v. *Fullwood* (1878), 9 Ch. D. 176; compare *Cooper* v. *Hubbuck* (1860), 30 Beav. 160, 167.

(*q*) *Johnson* v. *Wyatt* (1863), 2 De G. J. & S. 18; especially where expenditure has been incurred by the defendant (*Birmingham Canal Co.* v. *Lloyd* (1812), 18 Ves. 515; *Great Western Rail. Co.* v. *Oxford, Worcester and Wolverhampton Rail. Co.* (1853), 3 De G. M. & G. 341, 359, C. A.).

(*r*) *Smith* v. *Clay* (1767), 3 Bro. C. C. 639, n.

(*s*) *Lindsay Petroleum Co.* v. *Hurd* (1874), L. R. 5 P. C. 221, *per* Lord SELBORNE, at p. 239: "Two circumstances always important in such cases are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy"; see *Erlanger* v. *New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218, *per* Lord BLACKBURN, at p. 1279; *Re Sharpe, Re Bennett, Masonic and General Life Assurance Co.* v. *Sharpe*, [1892] 1 Ch. 154, 168, C. A.; *Rochefoucauld* v. *Boustead* [1897] 1 Ch. 196, 210, C. A.; *Re Gallard, Ex parte Gallard*, [1897] 2 Q. B. 815.

(*t*) "Length of time, where it does not operate as a statutory or positive bar, operates, as I apprehend, simply as evidence of assent or acquiescence," *per* TURNER, L.J., in *Life Association of Scotland* v. *Siddal, Cooper* v. *Greene* (1861), 3 De G. F. & J. 58, 72, C. A.; compare *Morse* v. *Royal* (1806), 12 Ves. 355, 374.

(*a*) From the difficulty of concerted action, laches is less readily imputed to a class than to an individual (*A.-G.* v. *Bradford Canal* (*Proprietors*) (1866), L. R. 2 Eq. 71, 82; *Evans* v. *Smallcombe* (1868), L. R. 3 H. L. 249, 259; *Boswell* v. *Coaks* (1884), 27 Ch. D. 424, 457, C. A.). As to acquiescence by shareholders in *ultra vires* acts of directors, see *London Financial Association* v. *Kelk* (1884), 26 Ch. D. 107, 152; *Re Sharpe, Re Bennett, Masonic and General Life Assurance Co.* v. *Sharpe, supra.*

SECT. 4. **Laches.**

them (*b*). But it is not necessary that the plaintiff should have known the exact relief to which he was entitled; it is enough that he knew the facts constituting his title to relief (*c*). As regards capacity, there is no acquiescence, and laches is not imputed, while the party is under the disability of infancy or lunacy (*d*); but it may be imputed to a married woman (*e*). As regards freedom, a person does not acquiesce while he is subject to such circumstances of undue influence or other pressure as to deprive him of the ability to give a true consent, and laches is not imputed until he is released from the position in which he is placed by these circumstances (*f*). Poverty, added to other circumstances, is a material ingredient in deciding whether laches is to be imputed to a vendor who seeks to avoid a sale; but by itself it does not prevent a waiver of a right (*g*). A remainderman may assent to a breach of trust while his interest is still future, and he will then be debarred from complaining of it; but ordinarily he is not bound to enforce his rights, and delay does not prejudice him till after his interest has fallen into possession (*h*). Moreover, there is no laches until the person entitled is ascertained (*i*).

(*b*) *Marker* v. *Marker* (1851), 9 Hare, 1, 16; see *Burrows* v. *Walls* (1855), 5 De G. M. & G. 233; *Beauchamp* (*Earl*) v. *Winn* (1873), L. R. 6 H. L. 223, 249; *La Banque Jacques-Cartier* v. *La Banque d'Epargne de la Cité et du District de Montreal* (1887), 13 App. Cas. 111, 118, P. C.; *Rees* v. *De Bernardy*, [1896] 2 Ch. 437, 445. Under the Statutes of Limitation ignorance does not prevent the running of the statute (*Rains* v. *Buxton* (1880), 14 Ch. D. 537, compare *Adnam* v. *Sandwich* (*Earl*) (1877), 2 Q. B. D. 485, 490; *Irish Land Commission* v. *White*, [1896] 2 I. R. 410); save in case of fraud (*Gibbs* v. *Guild* (1882), 9 Q. B. D. 59, C. A.).

(*c*) See *Lindsay Petroleum Co.* v. *Hurd* (1874), L. R. 5 P. C. 221, at p. 241; but ordinarily a man is not held to confirm a title unless he was fully aware at the time, not only of the fact upon which the defect of title depends, but of the consequence in point of law (*Cockerell* v. *Cholmeley* (1830), 1 Russ. & M. 418, 423); though, in general, when the facts are known from which a right arises, the right is presumed to be known (*Stafford* v. *Stafford* (1857), 1 De G. & J. 193, 202, C. A.). If he has been mistaken as to his rights, he is not guilty of laches until he has discovered the mistake, or has had reasonable means of doing so (*Brooksbank* v. *Smith* (1836), 2 Y. & C. (EX.) 58; *Baker* v. *Courage & Co.*, [1910] 1 K. B. 56; see *Stone* v. *Godfrey* (1854), 5 De G. M. & G. 76).

(*d*) *March* v. *Russell* (1837), 3 My. & Cr. 31; *Young* v. *Harris* (1891), 65 L. T. 45; see *Watson* v. *Toone* (1820), Madd. & G. 153.

(*e*) *Derbishire* v. *Home* (1853), 3 De G. M. & G. 80, 102, C. A.; compare *Sprange* v. *Lee*, [1908] 1 Ch. 424, 431; and see *Heath* v. *Wickham* (1880), 5 L. R. Ir. 285. And now under the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), a married woman is for this purpose in the position of a *feme sole*.

(*f*) *Aylward* v. *Kearney* (1814), 2 Ball & B. 463, 477; *Gregory* v. *Gregory* (1815), Coop. G. 201; *Roberts* v. *Tunstall* (1844), 4 Hare, 257; *Allcard* v. *Skinner* (1887), 36 Ch. D. 145, 163, C. A.; see *Purcell* v. *M'Namara* (1806), 14 Ves. 91; and compare *Dunbar* v. *Tredennick* (1813), 2 Ball & B. 304, 317; *Gowland* v. *De Faria* (1811), 17 Ves. 20.

(*g*) *Roberts* v. *Tunstall*, *supra*.

(*h*) *Life Association of Scotland* v. *Siddal*, *Cooper* v. *Greene* (1861), 3 De G. F. & J. 58, 73, C. A.; *Price* v. *Blakemore* (1843), 6 Beav. 507; *Kirwan* v. *Kennedy* (1869), 3 I. R. Eq. 472, 484; *Bennett* v. *Colley* (1833), 2 My. & K. 225; *Mehrtens* v. *Andrews* (1839), 3 Beav. 72; see *Butler* v. *Carter* (1868), L. R. 5 Eq. 276. But the omission of the remainderman to take steps to have the fund secured may bar him (*Re Taylor*, *Atkinson* v. *Lord* (1900), 81 L. T. 812)

(*i*) *Cator* v. *Croydon Canal Co.* (1841), 4 Y. & C. (EX.) 405.

SECT. 4. **Laches.**

In case of fraud.

When the remedy is in respect of fraud, there is no laches so long as the party defrauded remains, without any fault of his own, in ignorance of the fraud (*k*); and a person who is entitled to rely on the fidelity of another is not bound to inquire as to the conduct of the other until he has reason for suspicion (*l*). Fraud is not condoned unless the injured party has full knowledge of all the facts, and of the equitable rights arising out of those facts (*m*). But when the fraud has been discovered relief must be sought promptly (*n*); and even in cases of gross fraud it may not be granted after a great lapse of time against innocent persons claiming under the fraudulent person (*o*).

Change in defendant's position.

206. Regard must be had to any change in the position of the defendant which has resulted from the plaintiff's delay in bringing his action. This may be, for instance, because by the lapse of time he has lost the evidence necessary for meeting the claim. A court of equity will not allow a dormant claim to be set up when the means of resisting it, if unfounded, have perished (*p*). And where the claim is to set aside a conveyance of property, the defendant may have settled his mode of living upon the assumption that the conveyance was valid (*q*). The fact that property has passed through various hands, and that money has been expended on it, is a strong reason for not setting aside an improper sale by a trustee (*r*). Any change in the position of the defendant tells more strongly against the plaintiff, if the latter has been acquainted with the circumstances so as to make it inequitable for him to lie by (*s*). And laches will be imputed where the plaintiff, with knowledge of his rights, has allowed the defendant to expend money in the belief that no claim will be made (*t*).

Delay so great as to be in itself a bar.

207. Apart from considerations as to the acquiescence of the plaintiff or the change of position of the defendant, the delay may be so great as in itself to constitute laches and render the claim

(*k*) *Rolfe* v. *Gregory* (1864), 4 De G. J. & Sm. 576, 579; *Roche* v. *O'Brien* (1810), 1 Ball & B. 330; see *Clanricarde* (*Marquis*) v. *Henning* (1860), 30 Beav. 175, *per* ROMILLY, M.R., at p. 180: "The fraud is considered to be discovered at the time when such reasonable notice of what has happened has been given to the person injured as to make it his duty, if he intends to seek redress, to make inquiry and to ascertain the circumstances of the case"; *Browne* v. *McClintock* (1873), L. R. 6 H. L. 456. As to secret working of mines, see *Bulli Coal Mining Co.* v. *Osborne*, [1899] A. C. 351, P. C.; *Ecclesiastical Commissioners for England* v. *North Eastern Rail. Co.* (1877), 4 Ch. D. 845. As to reopening accounts on the ground of fraud recently discovered, see *Vernon* v. *Vawdrey* (1740), 2 Atk. 119; *Allfrey* v. *Allfrey* (1849), 1 Mac. & G. 87.

(*l*) *Rawlins* v. *Wickham* (1858), 3 De G. & J. 304, C. A.; *Betjemann* v. *Betjemann*, [1895] 2 Ch. 474, C. A.

(*m*) *Moxon* v. *Payne* (1873), 8 Ch. App. 881, 885.

(*n*) See *Byrne* v. *Frere* (1828), 2 Moll. 157.

(*o*) *Hercy* v. *Dinwoody* (1793), 2 Ves. 87, 92.

(*p*) *Bright* v. *Legerton* (1861), 2 De G. F. & J. 606, *per* Lord CAMPBELL, L.C., at p. 617; see *Mathew* v. *Brise* (1851), 14 Beav. 341, 346; *Watt* v. *Assets Co.*, [1905] A. C. 317, 329, 333; and as to cases of fraud, see *Charter* v. *Trevelyan* (1844), 11 Cl. & Fin. 714, 740, H. L.

(*q*) *Turner* v. *Collins* (1871), 7 Ch. App. 329; *Allcard* v. *Skinner* (1887), 36 Ch. D. 145, 192, C. A.

(*r*) *Bonney* v. *Ridgard* (1784), 1 Cox, Eq. Cas. 145.

(*s*) *Erlanger* v. *New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218, 1279.

(*t*) See *Evans* v. *Smallcombe* (1868), L. R. 3 H. L. 249, 255.

SECT. 4. Laches.

stale, so that a court of equity will decline to enforce it (*u*). Here the laches depends on the mere negligence of the plaintiff to enforce his rights (*v*). And, in the absence of infancy or some circumstance preventing an action, twenty years may be taken as the period which in practice will bar a claim on the ground of delay (*x*). But this is not so in the case of an express trust, and time alone—apart from the statute (*y*)—is no bar to an action for breach of trust (*a*), though, like any other equitable claim, it may be barred by acquiescence, whether this consists in assent to the breach of trust, or in subsequent condonation (*b*), or by other circumstances which, combined with delay, make it inequitable to allow the action (*c*).

Application of doctrine of laches.

208. The practical application of the doctrine of laches depends upon the nature of the claim which it is sought to enforce. In ordinary cases of claims to enforce equitable rights (*d*), where

(*u*) In the case of a claim by a company against a director in respect of a matter *ultra vires* the company, acquiescence must be by all the shareholders and may be practically impossible, so that, apart from the Trustee Act, 1888 (51 & 52 Vict. c. 59), no bar is available unless mere lapse of time constitutes laches (*Re Sharpe, Re Bennett, Masonic and General Life Assurance Co.* v. *Sharpe*, [1892] 1 Ch. 154, C. A.).

(*v*) *Harcourt* v. *White* (1860), 28 Beav. 303, *per* ROMILLY, M.R., at p. 310; *Williams* v. *Thomas*, [1909] 1 Ch. 713, 722 (equitable action for dower); *Brooks* v. *Muckleston*, [1909] 2 Ch. 519, 523 (equitable mortgage of advowson); compare *Blake* v. *Gale* (1885), 31 Ch. D. 196, 210.

(*x*) *Byrne* v. *Frere* (1828), 2 Mol. 157, *per* HART, L.C., at p. 176; see *Hercy* v. *Dinwoody* (1793), 2 Ves. 87, where a creditor's bill was dismissed after thirty-three years. But the view that time in itself is a bar has not always been accepted (see *Pickering* v. *Stamford* (*Lord*) (1795), 2 Ves. 581, where ARDEN, M.R., at p. 582, said there was no such thing as setting up length of time against an equitable demand as a complete bar, and, at the instance of a next of kin, declared a charitable bequest void after thirty-five years). In certain cases referred to later special promptitude is required, and a much shorter period than twenty years will be a bar. And in claims affecting land twelve years may be a bar (*Williams* v. *Thomas*, [1909] 1 Ch. 713, 722, though this seems a case of applying the analogy of the Statute of Limitations; see p. 175, *post*). As to a claim by a ward against his guardian, see *Sleeman* v. *Wilson* (1871), L. R. 13 Eq. 36.

(*y*) Trustee Act, 1888 (51 & 52 Vict. c. 59), s. 8; see title LIMITATION OF ACTIONS.

(*a*) *McDonnell* v. *White* (1865), 11 H. L. Cas. 570, *per* Lord WESTBURY, L.C., at p. 579; *Re Cross, Harston* v. *Tenison* (1882), 20 Ch. D. 109, C. A.; *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196, 212, C. A. Charities are subject to the Real Property Limitation Acts (*Magdalen College, Oxford* (*President etc.*) v. *A.-G.* (1857), 6 H. L. Cas. 189, 207).

(*b*) As to acquiescence being a bar to a *cestui que trust*, see *Brice* v. *Stokes* (1805), 11 Ves. 319; *Walker* v. *Symonds* (1818), 3 Swan. 1, 64; *Maitlands' Case* (1853), 4 De G. M. & G. 769, 779, C. A.; *Burrows* v. *Walls* (1855), 5 De G. M. & G. 233, 251; *Farrant* v. *Blanchford* (1863), 1 De G. J. & Sm. 107; *Fletcher* v. *Collis*, [1905] 2 Ch. 24.

(*c*) *Harcourt* v. *White* (1860), 28 Beav. 303, 310; *M'Donnel* v. *White*, *supra*; *Carey* v. *Cuthbert* (1873), 7 I. R. Eq. 542; (1875), 9 I. R. Eq. 330; *Re Cross, Harston* v. *Tenison*, *supra*; *Re Taylor* (1900), 81 L. T. 812.

(*d*) In connection with a claim to enforce an interest in a partnership Lord CHELMSFORD, L.C., in *Clarke and Chapman* v. *Hart* (1858), 6 H. L. Cas. 633, divided equitable interests into "executed" and "executory," and he treated the doctrine of laches as being confined to the latter class; executed interests, he said, could only be lost by conduct amounting to waiver. But it is well settled that the doctrine of laches applies to all equitable claims, including claims for breaches of trust, which are the most important class of claims in respect of executed interests, and Lord CHELMSFORD's restriction of the doctrine of laches has not been adopted. The distinction which he really intended, perhaps, was

the delay is not so excessive as to be a bar in itself, the court looks for evidence of the circumstances which constitute laches, namely, acquiescence by the plaintiff or change of position on the part of the defendant; and the plaintiff is not barred unless such evidence is given (*e*). This applies to claims against trustees and others in a fiduciary position to set aside sales (*f*), to claims to set aside a sale of a reversion (*g*), or a sale by a mortgagee (*h*); to claims by mortgagees (*i*), or a beneficiary (*k*), to follow assets; and to claims in respect of partnership interests (*l*). And it applies generally to claims in respect of breach of trust, subject, however, to the rule that time itself is no bar—that is, is not evidence of acquiescence (*m*).

Cases where special promptitude required.

209. In certain classes of claims a stricter rule prevails, and the claim to relief in equity must be made with special promptitude. These are claims to establish constructive trusts, to set aside gifts made under undue influence, and to obtain specific performance or rescission of contracts. In cases of constructive trust, relief which

between claims of the nature considered in this section, in which, in the absence of actual acquiescence, the plaintiff may not be barred for a considerable time, and claims of the nature considered in the following section, where the claim must be made promptly and even a slight delay may be treated as laches.

(*e*) See *Pomfret* v. *Windsor* (1752), 2 Ves. Sen. 472, 482; *Stone* v. *Godfrey* (1854), 5 De G. M. & G. 76.

(*f*) As to purchases by trustees, see *Hall* v. *Noyes* (1796), cited 3 Ves. 748; *Morse* v. *Royal* (1806), 12 Ves. 355; *Gregory* v. *Gregory* (1815), Coop. G. 201; *Watson* v. *Toone* (1820), Madd. & G. 153; *Roberts* v. *Tunstall* (1845), 4 Hare, 257; *Baker* v. *Read* (1854), 18 Beav. 398; *Beningfield* v. *Baxter* (1886), 12 App. Cas. 167, P. C.; as to purchase by a solicitor from his client, *Champion* v. *Rigby* (1830), 1 Russ. & M. 539; *Gresley* v. *Mousley* (1858), 1 Giff. 450.

(*g*) *Moth* v. *Atwood* (1801), 5 Ves. 845; *Sibbering* v. *Balcarras* (*Earl*) (1850), 3 De G. & Sm. 735. Where, upon a sale of a reversion, the circumstances are such as to entitle the vendor to set it aside, it has been held that there is no laches until the reversion falls into possession (*Salter* v. *Bradshaw*, *Bradshaw* v. *Salter* (1858), 26 Beav. 161; *Beynon* v. *Cook* (1875), 10 Ch. App. 389, 393, n.). But it is apprehended that if this were many years after the sale, the vendor could not rely on further time, but would then have to apply for relief promptly (see *Salter* v. *Bradshaw*, *Bradshaw* v. *Salter*, *supra*).

(*h*) *Robertson* v. *Norris* (1858), 1 Giff. 421; *Pooley's Trustee* v. *Whetham* (1886), 33 Ch. D. 111, 123, C. A.; *Nutt* v. *Easton*, [1899] 1 Ch. 873; [1900] 1 Ch. 29, C. A.; see *Martinson* v. *Clowes* (1882), 21 Ch. D. 857.

(*i*) *Ridgway* v. *Newstead* (1861), 3 De G. F. & J. 474; *Blake* v. *Gale* (1886), 32 Ch. D. 571, 580, C. A.; compare *Leahy* v. *De Moleyns*, [1896] 1 I. R. 206, C. A.; *Re Lacey*, *Howard* v. *Lightfoot*, [1907] 1 Ch. 330, C. A.

(*k*) *Harris* v. *Harris* (No. 2) (1861), 29 Beav. 110; see *Bate* v. *Hooper* (1855), 5 De G. M. & G. 338.

(*l*) Claims in respect of partnership interests are subject to the consideration that the plaintiff must not wait to see whether the partnership business will result in a profit or a loss. Hence if a partner has received notice of forfeiture of his interest and does not object, he will be held to have acquiesced after the lapse of a short time (*Prendergast* v. *Turton* (1841), 1 Y. & C. Ch. Cas. 98, on appeal (1843), 13 L. J. (CH.) 268; *Rule* v. *Jewell* (1881), 18 Ch. D. 660; *Palmer* v. *Moore*, [1900] A. C. 293, P. C.); but otherwise, where he objects and the delay is not excessive (*Clarke and Chapman* v. *Hart* (1858), 6 H. L. Cas. 633; *Garden Gully United Quartz Mining Co.* v. *McLister* (1875), 1 App. Cas. 39, P. C.)

(*m*) *Life Association of Scotland* v. *Siddal*, *Cooper* v. *Greene* (1861), 3 De G. F. & J. 58, 72, C. A.; *Harcourt* v. *White* (1860), 28 Beav. 303, 310; *McDonnell* v. *White* (1865), 11 H. L. Cas. 570, 579; *Jones* v. *Higgins* (1866), L. R. 2 Eq. 538; *Re Taylor*, *Atkinson* v. *Lord* (1900), 81 L. T. 812. A tenant for life is not necessarily prejudiced by delay in asserting her right to recoupment of deficiency of income out of an existing fund (*Mills* v. *Drewitt* (1855), 20 Beav. 632).

SECT. 4. Laches.

would have been given originally will be refused after long acquiescence (*n*); the equity must be pursued within some reasonable time (*o*). Especially is this the case where the claim is to establish a trust in respect of property of a speculative nature (*p*). In the case of gifts made under undue influence, there is no laches in the donor until he is acquainted with his rights and the influence is at an end (*q*); but, so soon as he is in this position, he must assert his equitable claim to have the gift set aside promptly, in order that the persons affected may know what line of conduct they are to adopt with regard to the transaction (*r*). In claims, too, for specific performance and for rescission of contracts, the special relief in equity is only given on condition of the plaintiff coming with great promptitude. Specific performance is relief which the court will not give, unless in cases where the parties seeking it come promptly, and as soon as the nature of the case will admit (*s*). Any substantial delay after the negotiations have terminated—such as a year or probably less—will be a bar (*t*). And in cases of rescission the defendant may be altering his position on the faith of the contract standing, and the claim to rescind must be made promptly (*a*); especially in the case of a contract to take shares (*b*).

(*n*) *Beckford* v. *Wade* (1805), 17 Ves. 87, 97, P. C.

(*o*) *Townshend* v. *Townshend* (1783), 1 Bro. C. C. 550, 554.

(*p*) *Clegg* v. *Edmondson* (1857), 8 De G. M. & G. 787, C. A.; *Clements* v. *Hall* (1858), 2 De G. & J. 173, C. A.; *Senhouse* v. *Christian* (undated), cited 19 Ves. at p. 159; *Norway* v. *Rowe* (1812), 19 Ves. 144; see, however, *Turner* v. *Trelawney* (1841), 12 Sim. 49, where a trust of mining property was established notwithstanding the lapse of fifteen years and large expenditure on the mines.

(*q*) *Allcard* v. *Skinner* (1887), 36 Ch. D. 145, *per* KEKEWICH, J., at p. 163.

(*r*) *Turner* v. *Collins* (1871), 7 Ch. App. 329. For instances, see *Wright* v. *Vanderplank* (1856), 8 De G. M. & G. 133, C. A.; *Mitchell* v. *Homfray* (1881), 8 Q. B. D. 587, C. A.; *Allcard* v. *Skinner* (1887), 36 Ch. D. 145, C. A. In *Hatch* v. *Hatch* (1804), 9 Ves. 292, a gift was set aside after twenty years, but the circumstances were special, and the decision was an extreme one; see *Turner* v. *Collins, supra; Byrne* v. *Frere* (1828), 2 Mol. 157.

(*s*) *Eads* v. *Williams* (1854), 4 De G. M. & G. 674; *Re Oriental Steam Navigation Co., Ex parte Briggs* (1861), 4 De G. F. & J. 191; *Barclay* v. *Messenger* (1874), 43 L. J. (CH.) 449, 456; see *Moore* v. *Marrable* (1866), 1 Ch. App. 217; but the rule was not applied in a case where the plaintiff had been in possession under an agreement for a lease, and then called for a lease (*Shepheard* v. *Walker* (1875), L. R. 20 Eq. 659; *Clarke* v. *Moore* (1844), 1 Jo. & Lat. 723, 727); *contra*, if the possession is not claimed under the agreement with the vendor's knowledge (*Mills* v. *Haywood* (1877), 6 Ch. D. 196, C. A.); see also title SPECIFIC PERFORMANCE.

(*t*) *Watson* v. *Reid* (1830), 1 Russ. & M. 236; *Southcomb* v. *Exeter* (*Bishop*) (1847), 6 Hare, 213; and see *Hertford* (*Marquis*) v. *Boore* (1801), 5 Ves. 719 (fourteen months not a bar); *Harrington* v. *Wheeler* (1789), 4 Ves. 686 (six years a bar); *Milward* v. *Thanet* (*Earl*) (1801), 5 Ves. 720, n. (seven years a bar). The purchaser of a reversion cannot wait till the reversion falls in before enforcing his contract (*Levy* v. *Stogdon*, [1899] 1 Ch. 5, C. A.).

(*a*) See *Lindsay Petroleum Co.* v. *Hurd* (1874), L. R. 5 P. C. 221, 239; *Seddon and London Salt Co., Ltd.* v. *North-Eastern Salt Co.* (1905), 53 W. R. 232; compare *Mutual Reserve Life Insurance Co.* v. *Foster* (1902), 20 T. L. R. 715, H. L. (two years allowed); *Molloy* v. *Mutual Reserve Life Insurance Co.* (1906), 94 L. T. 756, C. A. (six years' limit suggested in case of misrepresentation).

(*b*) Such a claim must be made immediately on the facts being known (*Sharpley* v. *Louth and East Coast Rail. Co.* (1876), 2 Ch. D. 663, 685, C. A.); compare *Venezuela Central Rail. Co.* (*Directors etc.*) v. *Kisch* (1867), L. R. 2 H. L. 99; and see *Taite's Case* (1867), L. R. 3 Eq. 795; *Re Scottish Petroleum Co.* (1883),

SECT. 5.—*Analogy of the Statutes of Limitation.*

SECT. 5. Analogy of the Statutes of Limitation.

Equity acts on the analogy of the Statutes of Limitation.

210. In certain cases the Statutes of Limitation apply expressly to equitable claims, as in the case of equitable claims to land or rentcharges (*c*); and a court of equity, of course, acts in obedience to the statutes, and applies, in regard to such claims, the express bar of the statute. Moreover, when claims are made in equity which are not, as regards equitable proceedings, the subject of any express statutory bar, but the equitable proceedings correspond to a remedy at law in respect of the same matter which is subject to a statutory bar, a court of equity, in the absence of fraud or other special circumstances, adopts, by way of analogy, the same limitation for the equitable claim (*d*). Thus proceedings in equity to recover a simple contract debt are subject to the six-years' limit imposed by the Limitation Act, 1623 (*e*); and the same limit applies, perhaps, to equitable remedies which assume the existence of a contract, such as specific performance (*f*). But where a claim in respect of personal estate is not subject to any limitation, equity does not impose a limitation in analogy to the limitation on claims to real estate (*g*).

23 Ch. D. 413, 434, C. A.; *Re Snyder Dynamite Projectile Co., Ltd., Skelton's Case* (1893), 68 L. T. 210.

(*c*) Real Property Limitation Act, 1833 (3 & 4 Will. 4. c. 27), s. 24; see title LIMITATION OF ACTIONS.

(*d*) *Hovenden* v. *Annesley* (*Lord*) (1806), 2 Sch. & Lef. 607, *per* Lord REDESDALE, at p. 632; see *Smith* v. *Clay* (1767), 3 Bro. C. C. 639, n.; *Bond* v. *Hopkins* (1802), 1 Sch. & Lef. 413, 429; *Beckford* v. *Wade* (1805), 17 Ves. 87, P. C.; *Cholmondeley* (*Marquis*) v. *Clinton* (*Lord*) (1820), 2 Jac. & W. 1, 121. It has been suggested that in such cases courts of equity act in obedience to, and not merely in analogy to the statute (*Cholmondeley* (*Marquis*) v. *Clinton* (*Lord*) (1821), 4 Bli. 1, 119, H. L.). But the true principle is that "where the remedy in equity is correspondent to the remedy at law, and the latter is subject to a limit in point of time by the Statute of Limitations, a court of equity acts by analogy to the statute, and imposes on the remedy it affords the same limitation. But if any proceeding in equity be included in the words of the statute, there a court of equity, like a court of law, acts in obedience to the statute" (*Knox* v. *Gye* (1872), L. R. 5 H. L. 656, *per* Lord WESTBURY, at p. 674). In cases of fraud, such as fraud committed by the secret working of underground coal, the period of limitation is not reckoned in equity till the fraud is, or could with reasonable dilligence be, discovered (*Ecclesiastical Commissioners for England* v. *North-Eastern Rail. Co.* (1877), 4 Ch. D. 845, 860; *Gibbs* v. *Guild* (1882), 9 Q. B. D. 59, C. A.; and similarly in cases of mistake (*Brooksbank* v. *Smith* (1836), 2 Y. & C. (EX.) 58; *Baker* v. *Courage & Co.*, [1910] 1 K. B. 56, 63).

(*e*) 21 Jac. 1, c. 16; *Re Greaves, Bray* v. *Tofield* (1881), 18 Ch. D. 551, 554; *Re Hollingshead, Hollingshead* v. *Webster* (1888), 37 Ch. D. 651; *Re Chant, Bird* v. *Godfrey*, [1905] 2 Ch. 225. As to claims for misrepresentation, see *Peek* v. *Gurney* (1873), L. R. 6 H. L. 377, 384, 402. The analogy extends to debts of a married woman in respect of her separate estate (*Re Hastings* (*Lady*), *Hallett* v. *Hastings* (1887), 35 Ch. D. 94, 105, C. A.). Secret profit made by an agent or other person in a fiduciary position is recoverable as an equitable debt, and the period, in analogy to the statute, is six years; but it does not run till the facts are discovered (*Metropoliton Bank* v. *Heiron* (1880), 5 Ex. D. 319, C. A.; compare *Lister & Co.* v. *Stubbs* (1890), 45 Ch. D. 1, C. A.); and as to secret profit by a director or promoter, see *Re Fitzroy Bessemer Steel etc. Co.* (1884), 50 L. T. 144.

(*f*) See *Firth* v. *Slingsby* (1888), 58 L. T. 481, 483; though in *Talmash* v. *Mugleston* (1826), 4 L. J. (o. s.) (CH.) 200, it was held that specific performance was not subject to the six years' limitation. In practice, as stated at p. 174, *ante*, it is subject to a shorter limitation.

(*g*) *Mellersh* v. *Brown* (1890), 45 Ch. D. 225.

EQUITY OF REDEMPTION.

See EQUITY; MORTGAGE.

EQUITY TO A SETTLEMENT.

See EQUITY; HUSBAND AND WIFE.

ESCAPE.

See CRIMINAL LAW AND PROCEDURE.

ESCHEAT.

See CONSTITUTIONAL LAW; COPYHOLDS; CROWN PRACTICE; DESCENT AND DISTRIBUTION; REAL PROPERTY AND CHATTELS REAL.

ESCROW.

See DEEDS AND OTHER INSTRUMENTS.

ESTATE.

See REAL PROPERTY AND CHATTELS REAL.

ESTATE AGENT.

See AGENCY.

ESTATE AND OTHER DEATH DUTIES.

PAGE

PART I. INTRODUCTION - - - - - - - - - - 180

SECT. 1. INCIDENCE OF THE VARIOUS DEATH DUTIES - - - 180

SECT. 2. MANAGEMENT OF THE DUTIES - - - - - 181

SECT. 3. COMPOSITION OF CLAIMS - - - - - - 181

SECT. 4. REMISSION OF DUTY AND INTEREST - - - - 182

PART II. ESTATE DUTY - - - - - - - - - - 183

SECT. 1. THE IMPOSITION OF THE DUTY - - - - - 183

SECT. 2. PROPERTY WHICH PASSES - - - - - - 183

Sub-sect. 1. Property - - - - - - - - 183
Sub-sect. 2. Settled Property - - - - - - 184

SECT. 3. PROPERTY WHICH IS DEEMED TO PASS - - - 185

Sub-sect. 1. Meaning of "deemed to pass" - - - 185
Sub-sect. 2. Property of which the Deceased was competent to dispose at his Death - - - - 185
Sub-sect. 3. Property in which an Interest was limited to cease on the Deceased's Death - - - 186
Sub-sect. 4. Gifts *Mortis causâ* and *Inter vivos* - - - 187
Sub-sect. 5. Settlements with Reservation - - - - 190
Sub-sect. 6. Joint Investments - - - - - - 191
Sub-sect. 7. Interests arising on Death - - - - 192

SECT. 4. EXCEPTIONS FROM THE CHARGE OF DUTY - - - 192

Sub-sect. 1. Foreign Property - - - - - - 192
Sub-sect. 2. Trust Property - - - - - - 193
Sub-sect. 3. Settled Property in which the Interest failed before Possession - - - - - - 193
Sub-sect. 4. Property reverting to Disponer - - - 194
Sub-sect. 5. Where Money Consideration given - - - 195
Sub-sect. 6. Where Death Duty already Paid - - - 196
Sub-sect. 7. Other Exceptions - - - - - - 201

SECT. 5. AGGREGATION OF PROPERTY, AND RATES OF DUTY - 202

Sub-sect. 1. Aggregation of Property - - - - - 202
Sub-sect. 2. Rates of Duty - - - - - - 204

SECT. 6. VALUE CHARGEABLE - - - - - - - 207

Sub-sect. 1. Gross Value - - - - - - - 207
Sub-sect. 2. Deductions - - - - - - - 210

SECT. 7. COLLECTION OF THE DUTY - - - - - - 212

Sub-sect. 1. The Duty - - - - - - - 212
Sub-sect. 2. When the Duty is payable - - - - 213

PAGE

PART II. ESTATE DUTY—*continued.*

SECT. 7. COLLECTION OF THE DUTY—*continued.*

Sub-sect. 3. By whom the Duty is payable - - - 214
(1) Personal Property of which the Deceased was competent to dispose at his Death - - - 214
(2) Other Property - - - - - - - 216
(3) Limitation of Personal Liability - - - - 218

Sub-sect. 4. Out of what Property the Duty is payable - 219
(1) Property which passes to the Executor as such - 219
(2) Other Property - - - - - - - 220
(3) Apportionment of Duty - - - - - 221
(4) Powers to raise the Duty - - - - - 223
(5) Limitation of the Charge of Duty - - - 223

Sub-sect. 5. Remission of Duty and Interest - - - 224
Sub-sect. 6. Commutation of Duty and Composition of Claims - - - - - - - - 224

SECT. 8. INTEREST, PENALTIES, AND PROCEEDINGS - - - 225

Sub-sect. 1. Interest - - - - - - - - 225
Sub-sect. 2. Penalties - - - - - - - 225
Sub-sect. 3. Proceedings - - - - - - - 226

SECT. 9. REPAYMENT OF OVERPAID DUTY - - - - - 228

PART III. SETTLEMENT ESTATE DUTY - - - - - - 228

SECT. 1. THE IMPOSITION OF THE DUTY - - - - - 228

SECT. 2. SETTLED PROPERTY - - - - - - - - 229

SECT. 3. EXCEPTIONS FROM THE CHARGE OF DUTY - - - 230

SECT. 4. THE RATE OF DUTY - - - - - - - - 230

SECT. 5. COLLECTION OF THE DUTY - - - - - - 230

SECT. 6. APPLICATION OF GENERAL ESTATE DUTY ENACTMENTS - 231

PART IV. LEGACY DUTY - - - - - - - - - 232

SECT. 1. THE IMPOSITION OF THE DUTY - - - - - 232

SECT. 2. LEGACIES, AND SUCCESSIONS UPON INTESTACY - - 233

Sub-sect. 1. The "Legacy" - - - - - - - 233
Sub-sect. 2. Successions upon Intestacy - - - - 235
Sub-sect. 3. Personal Estate - - - - - - 235
Sub-sect. 4. The Will or Intestacy - - - - - 236
Sub-sect. 5. The Legatee or Successor - - - - 236
Sub-sect. 6. The Testator or Intestate - - - - 238
Sub-sect. 7. Domicil and *Situs* - - - - - - 238

SECT. 3. EXCEPTIONS FROM THE CHARGE OF DUTY - - - 239

SECT. 4. RATES OF DUTY - - - - - - - - - 242

SECT. 5. VALUE CHARGEABLE - - - - - - - - 245

Sub-sect. 1. Gross Value - - - - - - - - 245
Sub-sect. 2. Deductions - - - - - - - - 249

SECT. 6. COLLECTION OF THE DUTY - - - - - - 249

Sub-sect. 1. The Duty - - - - - - - - 249
Sub-sect. 2. When the Duty is payable - - - - 249
Sub-sect. 3. By whom the Duty is payable - - - 252
(1) The Accountable Persons - - - - - 252
(2) Limitation of Personal Liability - - - - 256

Sub-sect. 4. Out of what Property the Duty is payable - 256
Sub-sect. 5. Remission of Duty and Interest - - - 258
Sub-sect. 6. Commutation of Duty and Composition of Claims - - - - - - - - 259

PAGE

PART IV. LEGACY DUTY—*continued.*

SECT. 7. INTEREST, PENALTIES, AND PROCEEDINGS - - - 259
Sub-sect. 1. Interest - - - - - - - - - 259
Sub-sect. 2. Penalties - - - - - - - - 259
Sub-sect. 3. Proceedings - - - - - - - - 260
SECT. 8. REPAYMENT OF OVERPAID DUTY - - - - - 261

PART V. SUCCESSION DUTY - - - - - - - - 262
SECT. 1. THE IMPOSITION OF THE DUTY - - - - - 262
SECT. 2. THE SUCCESSION - - - - - - - - 263
Sub-sect. 1. Property - - - - - - - - 263
Sub-sect. 2. Successions under Dispositions - - - 265
Sub-sect. 3. Successions through Devolution by Law - - 267
Sub-sect. 4. The Successor - - - - - - - 267
Sub-sect. 5. The Predecessor - - - - - - 268
Sub-sect. 6. Special Modes of conferring Successions - - 271
Sub-sect. 7. Domicil and *Situs* - - - - - - 273
SECT. 3. EXCEPTIONS FROM THE CHARGE OF DUTY - - - 276
Sub-sect. 1. Interests surrendered, destroyed, or transmitted - - - - - - - - 276
Sub-sect. 2. Where the Successor is also the Predecessor - 277
Sub-sect. 3. Where Money Consideration given - - - 277
Sub-sect. 4. Where other Death Duty chargeable and exempted - - - - - - - - 278
Sub-sect. 5. Small Successions - - - - - - 280
Sub-sect. 6. Property not yielding Income - - - 280
Sub-sect. 7. Money applied to Payment of Duty - - 281
Sub-sect. 8. Early Cesser of Limited Interest - - - 281
SECT. 4. RATES OF DUTY - - - - - - - - 282
SECT. 5. VALUE CHARGEABLE - - - - - - - 286
Sub-sect. 1. Gross Value - - - - - - - - 286
Sub-sect. 2. Deductions - - - - - - - - 289
SECT. 6. COLLECTION OF THE DUTY - - - - - - 292
Sub-sect. 1. The Duty - - - - - - - - 292
Sub-sect. 2. When the Duty is payable - - - - 292
Sub-sect. 3. By whom the Duty is payable - - - 295
(1) The Accountable Persons - - - - - 295
(2) Limitation of Personal Liability - - - - 297
Sub-sect. 4. Out of what Property the Duty is payable - 298
(1) The Property - - - - - - - - 298
(2) Powers to raise the Duty - - - - - 300
(3) Limitation of the Charge of Duty - - - 301
Sub-sect. 5. Remission of Duty and Interest - - - 302
Sub-sect. 6. Commutation of Duty and Composition of Claims 302
SECT. 7. INTEREST, PENALTIES, AND PROCEEDINGS - - - 303
Sub-sect. 1. Interest - - - - - - - - - 303
Sub-sect. 2. Penalties - - - - - - - - 303
Sub-sect. 3. Proceedings - - - - - - - - 303
SECT. 8. REPAYMENT OF OVERPAID DUTY - - - - - 304

PART VI. PROBATE DUTY - - - - - - - - 305
SECT. 1. THE IMPOSITION OF THE DUTY - - - - - 305
SECT. 2. THE SUBJECT-MATTER OF THE CHARGE - - - 306
Sub-sect. 1. "Estate and Effects" - - - - - 306
Sub-sect. 2. Cumulative Duties - - - - - - 308
Sub-sect. 3. Domicil and *Situs* - - - - - - 309

PAGE

PART VI. PROBATE DUTY—*continued.*

SECT. 3. EXCEPTIONS FROM THE CHARGE OF DUTY - - - 311
SECT. 4. RATES OF DUTY - - - - - - - - - 312
SECT. 5. VALUE CHARGEABLE - - - - - - - - 312
Sub-sect. 1. Gross Value - - - - - - - - 312
Sub-sect. 2. Deductions - - - - - - - - 313
SECT. 6. COLLECTION OF THE DUTY - - - - - - 314
Sub-sect. 1. The Duty - - - - - - - - 314
Sub-sect. 2. When the Duty is payable - - - - 315
Sub-sect. 3. By whom the Duty is payable - - - 315
Sub-sect. 4. Out of what Property the Duty is payable - 316
SECT. 7. INTEREST, PENALTIES, AND PROCEEDINGS - - - 317
Sub-sect. 1. Interest - - - - - - - - - 317
Sub-sect. 2. Penalties - - - - - - - - - 317
Sub-sect. 3. Proceedings - - - - - - - - 317
SECT. 8. REPAYMENT OF OVERPAID DUTY - - - - - 318

For Administrators - - - *See title* EXECUTORS AND ADMINISTRATORS.
Corporation Duty - - - ,, CORPORATIONS; REVENUE.
Executors - - - - ,, EXECUTORS AND ADMINISTRATORS.
Legacies - - - - ,, WILLS.
Personal Representatives - ,, EXECUTORS AND ADMINISTRATORS.
Probate Practice - - - ,, EXECUTORS AND ADMINISTRATORS.
Settlements - - - - ,, SETTLEMENTS.

Part I.—Introduction.

SECT. 1.—*Incidence of the various Death Duties.*

Names of the death duties.

211. The Death Duties (*a*) are seven in number, namely, the Estate Duty, the Settlement Estate Duty, the Legacy Duty, the Succession Duty, the Probate Duty (*b*), the Account Duty, and the Temporary Estate Duty.

Incidence of the duties.

The incidence of the various duties is shortly as follows:—

The estate duty (*c*) is leviable in respect of property passing on death. The settlement estate duty (*d*) is a further estate duty leviable where property is settled. The legacy duty (*e*) and the

(*a*) Compare Finance Act, 1894 (57 & 58 Vict. c. 30), s. 13 (3). It has been said that, in dealing with questions under the Finance Act, 1894 (57 & 58 Vict. c. 30), and the Succession Duty Acts, regard should be had to the substance of the transactions on which these questions turn, rather than to the forms of conveyancing which the parties to them may have adopted to carry out their objects (*Lethbridge* v. *A.-G.*, [1907] A. C. 19, *per* Lord ATKINSON, at pp. 26, 27). See title DESCENT AND DISTRIBUTION, Vol. XI., pp. 1—31.
(*b*) In Scotland, called Inventory Duty.
(*c*) See p. 183, *post*.
(*d*) See p. 228, *post*.
(*e*) See p. 232, *post*.

SECT. 1. Incidence of the various Death Duties.

succession duty (*f*) are additional duties, alternatively leviable, in respect of beneficial interests acquired on death.

The remaining three duties are leviable in connection with deaths which occurred before the 2nd August, 1894 (*g*), before which date estate duty and settlement estate duty were not leviable. The probate duty (*h*) is leviable in respect of personal property passing under will or intestacy. The account duty (*i*) is leviable in connection with deaths which occurred after the 31st May, 1881, in respect of certain dispositions of personal property which may be regarded as substitutes for wills (*k*). The temporary estate duty (*l*) is leviable in connection with deaths which occurred within seven years after the 31st May, 1889, as an addition to the probate duty or account duty, and, in certain cases, to the succession duty, where the property exceeds £10,000 in value.

SECT. 2.—*Management of the Duties.*

Managed by the Commissioners of Inland Revenue.

212. The death duties are under the management of the Commissioners of Inland Revenue (*m*), who have all necessary powers for carrying into execution the various Acts of Parliament by which they are imposed (*n*).

SECT. 3.—*Composition of Claims.*

Power to compound.

213. Where, by reason of the number of deaths on which property has passed, or of the complicated nature of the interests of different persons, or from any other cause, it is difficult, without undue expense, to ascertain exactly the amount of the death duties payable in respect of any property or any interest therein, the Commissioners may, on the application of any person accountable for the duty, accept an appropriate sum by way of composition for all the death duties payable in respect of such property or interest (*o*).

(*f*) See p. 262, *post*.

(*g*) Finance Act, 1894 (57 & 58 Vict. c. 30), ss. 21 (2), 24.

(*h*) See p. 305, *post*.

(*i*) See note (*a*), p. 185, note (*h*), p. 187, notes (*k*), (*s*), p. 188, note (*c*), p. 189, note (*n*), p. 190, notes (*r*), (*t*), p. 191, note (*e*), p. 192, note (*i*), p. 199, note (*l*), p. 206, note (*q*), p. 220, and note (*i*), p. 222, *post*.

(*k*) *A.-G.* v. *Gosling*, [1892] 1 Q. B. 545, *per cur.*, at p. 550.

(*l*) See note (*l*), p. 206, note (*t*), p. 283, and note (*b*), p. 312, *post*.

(*m*) See pp. 212, 231, 249, 292, 314, *post*. All communications in regard to death duties should be addressed to the Secretary, Estate Duty Office, Somerset House, London, W.C. A list of the forms of affidavit and account used in accounting for death duties will be found in the official form No. 18.

(*n*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 9; Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 26 (1); Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 9 (1); Inland Revenue Regulation Act, 1890 (53 & 54 Vict. c. 21), s. 1 (2). See Agreement with France, dated 15th November, 1907, for the prevention of frauds in connection with death duties (Treaty Series, No. 10, 1908, Cd. 3965). See also Declaration, dated 27th August, 1872, as to succession or legacy duties on property of British subjects dying in the Canton of Vaud, or of citizens of that Canton dying in the British dominions (1873, C. 685); compare Domicile Act, 1861 (24 & 25 Vict. c. 121), and Naturalization Act, 1870 (33 & 34 Vict. c. 14), s. 6.

(*o*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 13 (1).

SECT 3. **Composition of Claims.**

In order to arrive at the amount to be accepted, the accountable person is to furnish the Commissioners with all the information in his power respecting the property and the several interests therein, and other circumstances of the case (*p*).

Particulars to be furnished.

When the duty agreed to be accepted by the Commissioners has been paid, they are to give a certificate (*q*) in full discharge of all claims for death duties in respect of such property or interest (*r*).

Certificate of discharge.

The certificate does not discharge any person from any duty in case of fraud or failure to disclose material facts (*s*).

SECT. 4.—*Remission of Duty and Interest.*

After lapse of twenty years.

214. If, after the expiration of twenty years from a death upon which any death duty became leviable, any such duty remains unpaid, the Commissioners may, if they think fit, on the application of any person accountable or liable for such duty, or interested in the property, remit the payment of the duty, or any part of it, or any interest upon it (*t*).

Where amount of interest small.

The Commissioners may also remit interest where the amount appears to them to be so small as not to repay the expense and trouble of calculation and account (*a*).

Objects of national etc. interest given etc. for public purposes.

The Treasury may remit any duty leviable in respect of any such pictures, prints, books, manuscripts, works of art or scientific collections as appear to the Treasury to be of national, scientific, or historic interest, and to be given or bequeathed for national purposes, or to any university, county council, or municipal corporation (*b*).

Persons killed in war.

Where any person dies from wounds inflicted, accident occurring, or disease contracted, within twelve months before death, while on active service against an enemy, whether on sea or land, and was at the time either subject to the Naval Discipline Act (*c*), or to military law, whether as an officer, non-commissioned officer, or soldier, under Part V. of the Army Act (*d*), the Treasury may, on the recommendation of the Secretary of State or of the Admiralty, as the case requires, remit or repay up to £150 in any one case, the whole or any part of the death duties leviable in respect of property passing upon the death of the deceased to his widow or lineal descendants, if the total value for the purpose of estate duty of the property so passing does not exceed £5,000 (*e*).

(*p*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 13 (1).
(*q*) See note (*b*), p. 218, *post*.
(*r*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 13 (1).
(*s*) *Ibid.*, s. 13 (2).
(*t*) *Ibid.*, s. 8 (11); Finance Act, 1907 (7 Edw. 7, c. 13), s. 13.
(*a*) Finance Act, 1896 (59 & 60 Vict. c. 28), s. 18 (3).
(*b*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 15 (2). See also p. 202, *post*; Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 63. See title CORPORATIONS, Vol. VIII., p. 378.
(*c*) 29 & 30 Vict. c. 109, printed as amended, in accordance with the Naval Discipline Act, 1884 (47 & 48 Vict. c. 39), s. 7 (2).
(*d*) Army Act, 1881 (44 & 45 Vict. c. 58), printed as amended, in accordance with the Army (Annual) Act, 1885 (48 & 49 Vict. c. 8), s. 8 (2); see title ROYAL FORCES.
(*e*) Finance Act, 1900 (63 & 64 Vict. c. 7), s. 14 (1). The death must be after the 11th October, 1899 (*ibid.*, s. 14 (2)).

Part II.—Estate Duty.

SECT. 1.—*The Imposition of the Duty.*

SECT. 1. The Imposition of the Duty.

215. Estate duty (*f*) is leviable, save as expressly provided (*g*), upon the principal value of all property, settled or not, which passes, or is deemed to pass, on death (*h*), but only once on the same death (*i*).

The extent of the charge.

The death must be after the 1st August, 1894 (*k*).

SECT. 2.—*Property which passes.*

SUB-SECT. 1.—*Property.*

Meaning of "property."

216. "Property" includes real and personal property, and the proceeds of sale thereof, respectively, and any money or investment for the time being representing such proceeds (*l*).

"Property passing on the death."

"Property passing on the death" includes property passing either immediately on the death or after any interval, either

(*f*) Finance Act, 1894 (57 & 58 Vict. c. 30), ss. 1—4, 5 (2), (3), (5), 6—15, 16 (1), (3), (5), 17, 20—22, 24, 42, Scheds. I., II.; Finance Act, 1896 (59 & 60 Vict. c. 28), ss. 14—17, 18 (1), (3), 20—22, 24, 39—40, Sched., Part III.; Finance Act, 1898 (61 & 62 Vict. c. 10), s. 13; Finance Act, 1900 (63 & 64 Vict. c. 7), ss. 11 (1), 12—14, 18, Sched. II.; Revenue Act, 1903 (3 Edw. 7, c. 46), ss. 14, 17 (2); Finance Act, 1907 (7 Edw. 7, c. 13), ss. 12, 14—16, 30, Scheds. I., III.; Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), ss. 54—56 (1), 57, 59—61 (1), (2), (5), 62—64, 95, 96 (1), (3), Scheds. II., VI. The Finance Act, 1894 (57 & 58 Vict. c. 30), s. 23, and the Finance Act, 1900 (63 & 64 Vict. c. 7), s. 11 (2), contain provisions affecting Scotland exclusively. The Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 61 (1), (3), (4), contains provisions affecting Ireland exclusively. The Finance Act, 1894 (57 & 58 Vict. c. 30), ss. 1—24, is referred to as the "Principal Act" (Finance Act, 1896 (59 & 60 Vict. c. 28), s. 24 (2); Finance Act, 1907 (7 Edw. 7, c. 13), s. 12; Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 54); and the Finance Act, 1896 (59 & 60 Vict. c. 28), ss. 14—24, the Finance Act, 1907 (7 Edw. 7, c. 13), ss. 12—16, and the Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), ss. 54—64, are to be construed with it (Finance Act, 1896 (59 & 60 Vict. c. 28), s. 39; Finance Act, 1907 (7 Edw. 7, c. 13), s. 30 (2); Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 96 (3)). "Estate duty" means estate duty under the Principal Act (Finance Act, 1894 (57 & 58 Vict. c. 30), s. 22 (1) (e)), as distinguished from the temporary estate duty under the Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), ss. 5, 6.

(*g*) See pp. 192 *et seq.*, *post*.

(*h*) Finance Act, 1894 (57 & 58 Vict. c. 30), ss. 1, 2. It has been said that property only passes on death when it then changes hands (*Cowley* (*Earl*) v. *Inland Revenue Commissioners*, [1899] A. C. 198, *per* Lord MACNAGHTEN, at pp. 210, 211; *Inland Revenue Commissioners* v. *Priestley*, [1901] A. C. 208, *per* Lord MACNAGHTEN, at p. 213).

(*i*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 7 (10).

(*k*) *Ibid.*, s. 24. In the Finance Act, 1894 (57 & 58 Vict. c. 30), unless the context otherwise requires, the expressions "deceased" and "deceased person" mean a person dying after the 1st August, 1894 (*ibid.*, s. 22 (1) (a)). In the Finance Act, 1896 (59 & 60 Vict. c. 28), unless the context otherwise requires, those expressions mean a person dying after the 30th June, 1896 (*ibid.*, s. 24 (1) (b); *Re Gibbs*, *Thorne* v. *Gibbs*, [1898] 1 Ch. 625).

(*l*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 22 (1) (f).

SECT. 2. Property which passes.

certainly or contingently, and either originally or by way of substitutive limitation, and "on the death" includes "at a period ascertainable only by reference to the death" (*m*).

Every estate includes all income accrued upon the property comprised therein down to and outstanding at the date of the death (*n*).

SUB-SECT. 2.—*Settled Property.*

Meaning of "settlement" and "settled property."

217. "Settled property" means property comprised in a settlement (*o*), and "settlement" means any "instrument," whether relating to real or personal property, which is a settlement within the meaning of s. 2 of the Settled Land Act, 1882 (*p*), or if it related to real property would be a settlement within the meaning of that section, and includes a settlement effected by a parol trust (*q*).

Estates in dower or by curtesy.

Property in which the wife or husband of a person, dying after the 1st August, 1894, takes an estate in dower or by the curtesy, or any other like estate, is regarded, for the purpose of estate duty, as if it were settled by the will of the deceased (*r*).

Lands or chattels inalienably settled by Act of Parliament or royal grant.

Lands or chattels which are so settled, whether by Act of Parliament or royal grant, that no one of the persons successively in possession is capable of alienating them (otherwise than under the powers of sale or exchange in the Settled Land Act, 1882 (*s*)) are not, for the purpose of estate duty, regarded as settled property, even where the possessor's interest is, in law, a tenancy for life (*t*).

(*m*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 22 (1) (l); compare *A.-G.* v. *Gell* (1865), 3 H. & C. 615, and *Ring* v. *Jarman* (1872), L. R. 14 Eq. 357.

(*n*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 6 (5).

(*o*) *Ibid.*, s. 22 (1) (h).

(*p*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 2. A settlement within the meaning of this section is any "instrument or instruments," under or by virtue of which any land, or any estate or interest therein, stands for the time being limited to or in trust for any persons by way of succession—*i.e.*, successively upon death (*A.-G.* v. *Owen*, *A.-G.* v. *Coulson*, [1899] 2 Q. B. 253, *per* KENNEDY, J., at pp. 265, 266)—and, it has been said, includes every device known to conveyancers by which the enjoyment of estate "under the same deed or will" may be had by different persons succeeding to the estate in their order (*Lord Advocate* v. *Stewart's Trustees* (1899), 36 Sc. L. R. 297, *per* Lord M'LAREN, at p. 300). In ascertaining the meaning of the expression "settlement" for the purpose of the estate duty, regard, it has been said, is to be had to the decisions under the Settled Land Act, 1882 (45 & 46 Vict. c. 38) (*Re Campbell*, [1902] 1 K. B. 113, C. A., *per* STIRLING, L.J., at p. 121); see title SETTLEMENTS. An estate or interest in remainder or reversion not disposed of by a settlement, and reverting to the settlor or descending to the testator's heir, is, for purposes of the Settled Land Act, 1882 (45 & 46 Vict. c. 38), an estate or interest coming to the settlor or heir under or by virtue of the settlement, and comprised in the subject of the settlement (Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 2 (2)). But, for certain purposes of the Finance Act, 1894 (57 & 58 Vict. c. 30), compare *Re Cochrane*, [1906] 2 I. R. 200, C. A., *per* HOLMES, L.J., at p. 204.

(*q*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 22 (1) (i).

(*r*) *Ibid.*, ss. 22 (1) (a), 22 (3), 24.

(*s*) Settled Land Act, 1882 (45 & 46 Vict. c. 38).

(*t*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 5 (5).

SECT. 3. Property which is deemed to pass.

SECT. 3.—*Property which is deemed to pass.*

SUB-SECT. 1.—*Meaning of "deemed to pass."*

Property "deemed to pass."

218. Certain specific descriptions of property are deemed to pass (*a*) on death (*b*). It has been said that property passing on death, and property deemed to pass, are mutually exclusive classes (*c*), but that property deemed to pass is to be regarded as if it in fact passed (*d*).

SUB-SECT. 2.—*Property of which the Deceased was competent to dispose at his Death.*

Meaning of "competent to dispose."

219. Property of which the deceased was, at the time of his death, competent to dispose is deemed to pass on his death (*e*).

A person is deemed competent to dispose of property if he has such an estate or interest in it, or such a power or authority, as would, if he were *sui juris*, enable him to appoint or dispose of it as he thinks fit, including a tenant in tail, whether in possession or not (*f*). The power may be exercisable by instrument *inter vivos* or testamentary (*g*), or both (*h*).

(*a*) Property deemed to be included as property passing (the language of the Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2 (1)), and property deemed to pass, are synonymous terms (*Inland Revenue* v. *Heywood-Lonsdale's Trustees* (1906), 43 Sc. L. R. 589, *per* the Lord Ordinary (JOHNSTON), at p. 591); and compare Finance Act, 1896 (59 & 60 Vict. c. 28), ss. 14, 15 (1), (4), and Finance Act, 1900 (63 & 64 Vict. c. 7), ss. 11 (1), 12 (2), where the term "deemed to pass" is used.

Property passing on death is to be deemed to include, *inter alia*, property which, in effect, would, under the law in force prior to the imposition of the estate duty, have been liable to account duty on the deceased's death, if the charge to that duty had extended to real as well as personal property, and the words "voluntary" and "voluntarily," and a reference to a "volunteer," were omitted from the charging sections (Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2 (1) (c); Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 38 (1), (2); Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 11 (1)); see pp. 187—191, *post*.

The word "voluntarily" in this connection means "without consideration" (*A.-G.* v. *Smyth*, [1905] 2 I. R. 553, *per* PALLES, C.B., at p. 564). Dispositions of property made in consideration of marriage were, therefore, brought within the charge of estate duty, although they were not within the charge of account duty (*ibid.*, at p. 569). *Secus*, where the consideration was in money or money's worth paid to the disponer for his own use or benefit (see p. 195, *post*). By the Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 59 (2), however, gifts *inter vivos* made in consideration of marriage are not property which is deemed to pass on the donor's death, at any rate where the donor died after the 29th April, 1909.

(*b*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2 (1).

(*c*) *Cowley (Earl)* v. *Inland Revenue Commissioners*, [1899] A. C. 198, *per* Lord MACNAGHTEN, at p. 212.

(*d*) *A.-G.* v. *Jameson*, [1904] 2 I. R. 644, *per* PALLES, C.B., at p. 688; compare also, *A.-G.* v. *Robinson*, [1901] 2 I. R. 67, *per* PALLES, C.B., at p. 88.

(*e*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2 (1) (a).

(*f*) *Ibid.*, s. 22 (2) (a); and compare *A.-G.* v. *Hallett* (1857), 2 H. & N. 368. It has been doubted whether a person, not a tenant in tail, can be considered as competent to dispose of property where, by going through certain forms, he might come into the position of being able to dispose of it (*Lord Advocate* v. *Moray's (Earl) Trustees* (1904), 41 Sc. L. R. 267, *per* Lord M'LAREN, at p. 273; see also *Inland Revenue* v. *Gunning's Trustees* (1907), 44 Sc. L. R. 514).

(*g*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 22 (1) (b).

(*h*) *Ibid.*, s. 22 (2) (a).

SECT. 3. Property which is deemed to pass.

Money which a person, under such a power or authority, can charge on property of another person (*i*), is deemed to be property of which he has power to dispose (*k*).

A power exercisable in a fiduciary capacity under a disposition not made by the deceased himself, or exercisable by him as tenant for life under the Settled Land Act, 1882 (*l*), or as mortgagee, does not confer competency to dispose (*m*).

A disposition taking effect out of the interest of a deceased person is deemed to have been made by him, whether the concurrence of any other person was or was not required (*n*).

An interest in expectancy of which the deceased was competent to dispose is deemed to pass on his death (*o*).

The expression "interest in expectancy" includes an estate in remainder or reversion, and every other future interest, whether vested or contingent (*p*). It does not, however, include reversions expectant upon the determination of leases (*p*).

Property which accrues to a deceased person's estate under a gift in the will of an ancestor who survived him, but which gift, by reason of such person having left issue, one at least of whom survives such ancestor, does not fail (*q*), is property of which the deceased was, at the time of his death, competent to dispose (*r*).

SUB-SECT. 3.—*Property in which an Interest was limited to cease on the Deceased's Death.*

Release of life interest to remainderman.

220. Property in which the deceased or any other person had an interest (*s*), of definite amount (*t*), ceasing on the deceased's death, is deemed to pass on the death to the extent to which the interest extended to the income of the property (*a*).

Property in which the deceased person or any other person had an estate or interest limited to cease on the death of the deceased is also deemed to pass on that death, notwithstanding that the estate etc. has been surrendered, assured, divested, or

(*i*) *Lord Advocate* v. *Moray's (Earl) Trustees* (1904), 41 Sc. L. R. 267, *per* the Lord Ordinary (STORMONTH DARLING), at p. 271.

(*k*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 22 (2) (c).

(*l*) 45 & 46 Vict. c. 38.

(*m*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 22 (2) (a).

(*n*) *Ibid.*, s. 22 (2) (b).

(*o*) Compare *ibid.*, ss. 5 (3), 7 (6); *Inland Revenue Commissioners* v. *Priestley*, [1901] A. C. 208, *per* Lord MACNAGHTEN, at p. 213.

(*p*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 22 (1) (j).

(*q*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 33.

(*r*) *Re Scott*, [1901] 1 K. B. 228, C. A. Seemingly such property, although in truth a mere *spes successionis*, is to be regarded as an interest in expectancy (S. C., [1900] 1 Q. B. 372, *per* CHANNELL, J., at p. 388).

(*s*) It has been said that the interest may be that of a trustee (*H. M. Advocate* v. *M'Taggart Stewart* (1906), 43 Sc. L. R. 465, *per* the Lord President (Lord DUNEDIN), at p. 473 (an accumulated fund under the will of a testator dying before the Finance Act, 1894 (57 & 58 Vict. c. 30))).

(*t*) *A.-G.* v. *Power*, [1906] 2 I. R. 272, 280 (a discretionary trust).

(*a*) Finance Act, 1894 (57 & 58 Vict. c. 30), ss. 2 (1) (b), 7 (7); *Inland Revenue* v. *Maclachlan* (1899), 36 Sc. L. R. 727; *Lord Advocate* v. *Henderson's Trustees* (1905), 42 Sc. L. R. 720.

SECT. 3. Property which is deemed to pass.

otherwise disposed of, whether for value or not, to or for the benefit of any person entitled to an estate or interest in remainder or reversion in the property, unless the surrender etc. was *bonâ fide* (*b*) made or effected three years before the death of the deceased, and *bonâ fide* possession and enjoyment of the property was assumed thereunder immediately upon the surrender etc., and thenceforward retained to the entire exclusion of the person who had the estate etc. so limited to cease, and of any benefit to him by contract or otherwise (*c*).

In the case of surrenders etc. effected for public or charitable purposes, the period, however, is twelve calendar (*d*) months, and not three years (*e*).

In order that the property may be deemed to pass on the deceased's death, it seems that there must be an enforceable right in the surrenderor etc. to non-exclusion or to a benefit (*f*), and that where the property surrendered etc. can properly be regarded as indivisible, any retainer, or enjoyment, or any benefit, provided that, in either case, it is enforceable, will avoid the whole claim for exception (*g*).

SUB-SECT. 4.—*Gifts Mortis causâ and Inter vivos.*

Donationes mortis causâ.

221. Property taken as a donation *mortis causâ* is deemed to pass on the donor's death (*h*).

(*b*) See p. 188, and note (*f*), p. 210, *post*, as to the meaning of *bonâ fide*.

(*c*) Finance Act, 1900 (63 & 64 Vict. c. 7), s. 11 (1); Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 59 (1). The death must be after the 31st March, 1900 (Finance Act, 1900 (63 & 64 Vict. c. 7), s. 11 (1)). If the death is before the 30th April, 1909, the period is twelve months, and not three years (*ibid*); and it is so also where the surrender etc. was effected before the 30th April, 1908 (Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 59 (1)). Prior to the Finance Act, 1900 (63 & 64 Vict. c. 7), s. 11 (1), where a life interest was surrendered, to the entire exclusion of the surrenderor, the duty was not chargeable (*A.-G.* v. *Beech*, [1899] A. C. 53), even where the surrender was effected within a year of the surrenderor's death (*A.-G.* v. *De Préville*, [1900] 1 Q. B. 223, C. A.).

(*d*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 3.

(*e*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 59 (1), even where the death is after the 29th April, 1909 (*ibid.*).

(*f*) *H. M. Advocate* v. *M'Taggart Stewart* (1906), 43 Sc. L. R. 465. The question is, was the deceased the old proprietor retaining a benefit of his old estate, or was he a guest getting as a guest what the new proprietor chose to give him (*per* the Lord President (Lord DUNEDIN), at p. 474). This case, however, was argued and decided upon certain admissions, and was prior to the Revenue Act, 1906 (6 Edw. 7, c. 20), s. 12, which repealed the Exchequer Court (Scotland) Act, 1856 (19 & 20 Vict. c. 56), s. 43, by which the defendant in a Scottish case of Inland Revenue was precluded from giving evidence, and could not, therefore, be interrogated. The question whether, to involve the payment of duty, the non-exclusion or benefit is of necessity enforceable is perhaps, therefore, still in doubt.

(*g*) *H. M. Advocate* v. *M'Taggart Stewart* (1906), 43 Sc. L. R. 465, *per* the Lord Ordinary (PEARSON), at p. 471. See also p. 189, *post*, and the cases there cited, as to *inter vivos* gifts not to the entire exclusion of the donor.

(*h*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2 (1) (c); Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 38 (2) (a). There can be no such gift of real or leasehold property (compare *Richards* v. *Syms* (1740), Barn. (CH.) 90, *per* Lord HARDWICKE, L.C., at p. 93; discussed in *Duffield* v. *Elwes* (1827), 1 Bli. (N. S.) 497, *per* Lord ELDON, L.C., at p. 539). Where the donor died after the

SECT. 3.
Property which is deemed to pass.

Immediate gifts *inter vivos.*

222. Property taken under a disposition purporting to operate as an immediate gift *inter vivos*, if it was not *bonâ fide* made, that is, as a real transaction intended to have operative effect (*i*), three years before the donor's death, is also deemed to pass on the death (*k*).

In the case of gifts made for public or charitable purposes, the period, however, is twelve months, and not three years (*l*).

A gift may be *bonâ fide* although it is made to avoid death duties (*m*). It need not be made in contemplation of death at all (*n*), but it must, seemingly, be of property which, if it had not been given, would have been chargeable with estate duty as part of the donor's estate (*o*).

The disposition may be by way of transfer, delivery, declaration of trust, settlement upon persons in succession (*p*), or otherwise (*q*).

A gift may be liable to duty although made in pursuance of an antecedent moral (*r*) or enforceable voluntary (*s*) obligation, and, in

31st May, 1881, but before the 2nd August, 1894, account duty is chargeable (Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 38 (2) (a)).

(*i*) See note (*f*), p. 210, *post.*

(*k*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2 (1) (c); Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 38 (2) (a); Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 11 (1) (first branch); Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 59 (1). If the donor's death was before the 30th April, 1909, the period is twelve months, and not three years (Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2 (1) (c)); and it is so also where the gift was effected before the 30th April, 1908 (Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 59 (1)). It has been said that "gift" is to be construed in the broad sense of *res data*, and not in the narrower and stricter sense of *res donata* (*H. M. Advocate* v. *Heywood-Lonsdale's Trustees* (1906), 43 Sc. L. R. 529, *per* the Lord President (Lord DUNEDIN), at p. 533; see also *A.-G.* v. *Smyth*, [1905] 2 I. R. 553, *per* PALLES, C.B., at p. 571). Personal property taken as an immediate gift *inter vivos*, within three months of the death (extended to twelve months by the Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 11 (1)), where the donor died after the 31st May, 1881, but before the 2nd August, 1894, is chargeable with account duty (Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 38 (2) (a)).

(*l*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 59 (1), even where the death is after the 29th April, 1909 (*ibid.*).

(*m*) *A.-G.* v. *Richmond and Gordon* (*Duke*), [1909] A. C. 466.

(*n*) *A.-G.* v. *Booth* (1894), 63 L. J. (Q. B.) 356; *A.-G.* v. *Richmond and Gordon* (*Duke*), [1909] A. C. 466, *per* Lord ATKINSON, at p. 475.

(*o*) *A.-G.* v. *De Préville*, [1900] 1 Q. B. 223, C. A. (release of a life interest).

(*p*) *Miles* v. *R.* (1897), 41st Report of the Commissioners of Inland Revenue, 167, following *A.-G.* v. *Jacobs Smith*, [1895] 2 Q. B. 341, 353, C. A.; *A.-G.* v. *Smyth*, [1905] 2 I. R. 553; *H. M. Advocate* v. *Heywood-Lonsdale's Trustees*, *supra*; *Inland Revenue* v. *Heywood-Lonsdale's Trustees* (1906), 43 Sc. L. R. 589. See also *Wheeler* v. *Humphreys*, [1898] A. C. 506, *per* Lord MACNAGHTEN, at p. 509.

(*q*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2 (1) (c); Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 38 (2) (a); Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 11 (1) (first branch).

(*r*) *A.-G.* v. *Chamberlain* (1904), 90 L. T. 581.

(*s*) *A.-G.* v. *Cobham* (*Viscount*) (1904), 90 L. T. 816; *H. M. Advocate* v. *Heywood-Lonsdale's Trustees* (1906), 43 Sc. L. R. 529. Gifts in consideration of marriage were made chargeable with estate duty by the Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2 (1) (c); see *A.-G.* v. *Holden*, [1903] 1 K. B. 832; *A.-G.* v. *Smyth*, [1905] 2 I. R. 553. It was otherwise in the case of account duty,

the latter case, not the less so by reason of its purporting to be made in consideration of the release of the prior obligation (*t*).

The donee may be a member of a restricted class in whose favour the donor has acquired the right to make gifts out of another's property (*u*), and, seemingly, whether such right was acquired by purchase or gratuitously (*a*).

Gifts, whenever made, where donor not entirely excluded.

223. Property taken under any gift, whenever made, is deemed to pass on the donor's death, if *bonâ fide* (*b*) possession and enjoyment of it was not immediately assumed by the donee, and thenceforward retained to the entire exclusion of the donor, or of any benefit to him by contract or otherwise (*c*).

The right to possess under the terms of a gift is not possession (*d*); and it is payment, and not the obligation to pay, which confers enjoyment (*e*).

The possession and enjoyment, seemingly, may be assumed by the donee in the ordinary course of business, provided that the donor does not by any collusion, trick, or undue delay continue to enjoy the use of or take any benefit from the property (*f*).

If the non-exclusion of, or benefit to, the donor extends to, or overrides, the whole subject-matter of the gift, the whole is chargeable with estate duty (*g*). But where the reservation can be

where the donor died after the 31st May, 1881, but before the 2nd August, 1894; and by the Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 59 (2), such gifts are not deemed to pass on the donor's death, at any rate where the death was after the 29th April, 1909.

(*t*) *A.-G.* v. *Cobham* (*Viscount*) (1904), 90 L. T. 816.

(*u*) *Inland Revenue* v. *Heywood-Lonsdale's Trustees* (1906), 43 Sc. L. R. 589.

(*a*) *Ibid.*, *per* the Lord Ordinary (JOHNSTON), at p. 591.

(*b*) See note (*f*), p. 210, *post*.

(*c*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2 (1) (c); Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 38 (2) (a); Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 11 (1) (first branch). To escape the duty, the deceased must be excluded both from the possession and enjoyment of the property and from any benefit (*A.-G.* v. *Grey* (*Earl*), [1898] 2 Q. B. 534, C. A., *per* A. L. SMITH, L.J., at p. 541). As to what is not possession and enjoyment, see *A.-G.* v. *Waghorn* (1909), *Times*, 6th February. Where the donor died after the 31st May, 1889, but before the 2nd August, 1894, and the gift was of personal property, account duty is chargeable (Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 11 (1)).

(*d*) *H. M. Advocate* v. *M'Taggart Stewart* (1906), 43 Sc. L. R. 465, *per* the Lord President (Lord DUNEDIN), at p. 474.

(*e*) *H. M. Advocate* v. *Heywood-Lonsdale's Trustees* (1906), 43 Sc. L. R. 529, *per* the Lord Ordinary (PEARSON), at p. 532.

(*f*) *Matheson* v. *Inland Revenue Commissioners* (1898), 14 Sheriff Court Reports, 156 (payment made when donor called on her agent to settle money matters with him, three months after the date when the gift purported to be made).

(*g*) *Grey* (*Earl*) v. *A.-G.*, [1900] A. C. 124 (reservation to the donor of an annuity less than the income of the property given, and a power of revocation of the gift in certain events, namely, the donee's death in the donor's lifetime, or failure by the donee to perform certain covenants, including a covenant to pay the donor's debts out of the property; the power of revocation was released within a year of the donor's death). Where what was reserved is released outside the period preceding the donor's death within which enjoyment by the donor involves payment of duty, the gift is not deemed to pass on the donor's death (Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 59 (3)), at any rate where he died after the 29th April, 1909.

SECT. 3. Property which is deemed to pass.

considered as extending to a part only of the subject-matter, then, seemingly, only that part is chargeable with the duty (*h*).

The benefit need not be reserved out of the subject-matter of the gift, but may be secured only by the donee's personal covenant (*i*).

A transaction does not cease to be a gift merely because the annual benefit secured to the donor is greater than the interest on the property comprised in the gift at the rate obtainable on trust investments, or because the annual payment to the donor is to be continued by the donee to a third person after the donor's death (*k*).

A contingent reversion, reserved to the donor, in the *corpus* of property given upon trusts is not reserved out of the gift, but is something not comprised in the gift (*l*).

Policy moneys.

224. Money received under a policy of assurance effected by any person on his life, where the policy is wholly kept up by him for the benefit of a designated (*m*) donee, whether nominee or assignee, or a part of such money in proportion to the premiums paid by him, where the policy is partially kept up by him for such benefit, is deemed to pass on the assured's death (*n*).

The liability to duty is independent of the existence of any obligation upon the assured to keep up the policy, or of any arrangement between him and any other person in relation thereto (*o*).

SUB-SECT. 5.—*Settlements with Reservation.*

Reservations to settlor.

225. Property passing under (*p*) any settlement effected by any instrument not taking effect as a will, whereby an interest in the property, or the proceeds of the sale of it, for life or any other period determinable by reference to death (*q*), is reserved either expressly or by implication to the settlor, or whereby the settlor may have reserved to himself the right, by the exercise of any power, to restore to himself, or to reclaim the absolute interest in

(*h*) *A.-G.* v. *Grey* (*Earl*), [1898] 1 Q. B. 318, *per* CHANNELL, J., at p. 325; see also *Re Cochrane*, [1905] 2 I. R. 626, *per* KENNY, J., at p. 643.

(*i*) *A.-G.* v. *Worrall*, [1895] 1 Q. B. 99, C. A.

(*k*) *A.-G.* v. *Johnson*, [1903] 1 K. B. 617, C. A.; and compare *Lord Advocate* v. *M'Kersies* (1881), 19 Sc. L. R. 438; *Crossman* v. *R.* (1886), 18 Q. B. D. 256; *Lord Advocate* v. *Wilsons* (1894), 31 Sc. L. R. 819.

(*l*) *Re Cochrane*, [1906] 2 I. R. 200, C. A.

(*m*) *Lord Advocate* v. *Fleming*, [1897] A. C. 145.

(*n*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2 (1) (c); Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 11 (1) (fourth branch); see also p. 192, *post*. Where the assured died after the 31st May, 1889, but before the 2nd August, 1894, account duty is chargeable (Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 11 (1)).

(*o*) *A.-G.* v. *Robinson*, [1901] 2 I. R. 67, *per* PALLES, C.B., at p. 90.

(*p*) It has been said that the expression "passing under," in this connection, is not a phrase of art, but is of a comprehensive nature (*A.-G.* v. *Chapman*, [1891] 2 Q. B. 526, *per cur.*, at p. 532; approved *A.-G.* v. *Wendt* (1895), 43 W. R. 701, *per cur.*, at p. 703); and that the word "passing" is at least equivalent to and co-extensive with "disposition" (*A.-G.* v. *Riall*, [1906] 2 I. R. 122, *per* PALLES, C.B., at p. 133).

(*q*) *I.e.*, the "life" and "death" of the settlor (*Re Cochrane*, [1905] 2 I. R. 626, *per* PALLES, C.B., at p. 634).

the property, or the proceeds of the sale of it, is deemed to pass on the settlor's death (*r*).

The expression "settlement," in this connection, includes any trust, whether expressed in writing or otherwise, in favour of any person, and, if contained in an instrument effecting the settlement, whether the instrument was made for valuable consideration (*s*) or not as between the settlor and any other person (*t*).

Where a person has reserved a general power of appointment, as well as a life interest, and the power is exercised, the appointment is, by the general rule of law, to be read into the settlement creating the power, with the result that the appointed property "passes under" the settlement (*a*).

It is enough for an interest of some sort to be reserved (*b*), and it may be kept, provided for, or secured to the settlor in any way (*c*).

SUB-SECT. 6.—*Joint Investments.*

Investments in joint names.

226. Property which a person, having been absolutely entitled thereto, has caused to be transferred to or vested in himself and any other person jointly, whether by disposition or otherwise, including any purchase or investment effected by the person who was absolutely entitled to the property, either by himself alone, or in concert, or by arrangement (*d*), with any other person, so that the beneficial interest in the property, or in some part of it, passes

(*r*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2 (1) (c); Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 38 (2) (c); *Grey* (*Earl*) v. *A.-G.*, [1900] A. C. 124. Where the settlor died after the 31st May, 1881, but before the 2nd August, 1894, and the settlement was voluntary, and of personal property, account duty is chargeable (Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 38 (2) (c)). As to what constitutes a voluntary settlement in this connection, see *Crossman* v. *R.* (1886), 18 Q. B. D. 256.

(*s*) Compare *A.-G.* v. *Jacobs Smith*, [1895] 2 Q. B. 341, C. A.; and *A.-G.* v. *Rathdonnell* (*Lord*) (1893), 32 L. R. Ir. 574.

(*t*) Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 11 (1) (third branch). A similar extension of the meaning of "voluntary settlement" to trusts, in general, in favour of volunteers was enacted, in the case of account duty, by the Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 11 (1); see *A.-G.* v. *Jacobs Smith*, *supra*; *A.-G.* v. *Chapman*, [1891] 2 Q. B. 526; *De Mestre* v. *West*, [1891] A. C. 264, P. C.; *A.-G.* v. *Rathdonnell* (*Lord*), *supra*.

(*a*) *A.-G.* v. *Chapman*, *supra*.

(*b*) *Crossman* v. *R.*, *supra* (transfer of shares in partnership in consideration of an annuity equal to 4 per cent. upon the value of the shares to transferor for his life, and secured by the personal covenant of transferee); *Lord Advocate* v. *Wilsons* (1894), 31 Sc. L. R. 819 (ditto 5 per cent.); *A.-G.* v. *Gosling*, [1892] 1 Q. B. 545 (appointment, to one of a limited class, of share in partnership, at appointor's death); *A.-G.* v. *Wendt* (1895), 43 W. R. 701 (annuity, out of gross profits, to be paid to widow of deceased partner, by surviving partner, who acquired the deceased's share on his death, under the partnership deed); *A.-G.* v. *Heywood* (1887), 19 Q. B. D. 326, 332 (discretionary trust of income in favour of settlor and others during his life).

(*c*) *A.-G.* v. *Gosling*, *supra*, *per cur.*, at p. 549.

(*d*) The words "in concert" etc. would appear to point to the existence of some contractual obligation (*A.-G.* v. *Ellis*, [1895] 2 Q. B. 466, *per cur.*, at p. 470). It has, however, been said that *Savoy Overseers* v. *Art Union of London*, [1896] A. C. 296 (a case on the Scientific Societies Act, 1843 (6 & 7 Vict. c. 36), s. 1) has deprived *A.-G.* v. *Ellis*, *supra*, of all authority (*A.-G.* v. *Smyth*, [1905] 2 I. R. 553, *per* PALLES, C.B., at p. 564).

SECT. 3. **Property which is deemed to pass.**

or accrues by survivorship on his death to the other person, is deemed to pass on the death (*e*).

SUB-SECT. 7.—*Interests arising on Death.*

Annuity or other interest purchased or provided by the deceased.

227. Any annuity or other interest in property (*f*), including moneys payable under a policy of life insurance (*g*), purchased or provided by the deceased (*h*), either by himself alone (*i*), or in concert or by arrangement (*k*) with any other person (*l*), to the extent of the beneficial interest accruing or arising (*m*), by survivorship or otherwise, on the deceased's death, is deemed to pass on his death (*n*).

SECT. 4.—*Exceptions from the Charge of Duty.*

SUB-SECT. 1.—*Foreign Property.*

Test of liability.

228. Property passing on the death of the deceased, when situate out of the United Kingdom, is included within the charge of duty only if, under the law in force before the imposition of the estate

(*e*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2 (1) (c); Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 38 (2) (b); Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 11 (1) (second branch). Where the deceased person, who made such an investment of personal property, died after the 31st May, 1881, but before the 2nd August, 1894, account duty is chargeable (Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 38 (2) (b); extended to such investments made in concert or by arrangement with any other person by the Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 11 (1)).

(*f*) *A.-G.* v. *Robinson*, [1901] 2 I. R. 67, *per* PALLES, C.B., at p. 89.

(*g*) *Ibid.*, at p. 90; *A.-G.* v. *Hawkins*, [1901] 1 K. B. 285, *per* KENNEDY, J., at p. 292; *A.-G.* v. *Murray*, [1904] 1 K. B. 165, C. A., *per cur.*, at p. 172; *A.-G.* v. *Lethbridge*, [1905] 2 K. B. 323, C. A., *per cur.*, at p. 332. Compensation for death payable either under the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), or under the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), would not appear to involve the payment of estate duty in connection with the death.

(*h*) It has been said that the provision must be the deceased's gift, or at his cost (*Lethbridge* v. *A.-G.*, [1907] A. C. 19, *per* Lord MACNAGHTEN, at p. 25), by a subtraction from his means during life (*ibid.*, *per* Lord LOREBURN, L.C., at p. 23). An interest provided at the cost of a third person is, therefore, outside the enactment (*A.-G.* v. *Murray*, *supra*), although, in the case of policy moneys, the fact that the insurer had no insurable interest in the assured's life (compare Life Assurance Act, 1774 (14 Geo. 3, c. 48)), would not, of itself, if the insurance company in fact paid the moneys, be an objection to the claim (*A.-G.* v. *Murray*, *supra*, *per cur.*, at p. 172).

(*i*) *A.-G.* v. *Dobree*, [1900] 1 Q. B. 442 (deceased settled a policy and paid the premiums).

(*k*) See note (*d*), p. 191, *ante*.

(*l*) *A.-G.* v. *Robinson*, [1901] 2 I. R. 67; explained, *Richardson* v. *Inland Revenue Commissioners*, [1909] 2 I. R. 597, *per* PALLES, C.B., at p. 624 (deceased, on his marriage, settled a policy, and the premiums, by arrangement with his wife, were paid out of the income of property settled by her on him for life, and to which, apart from the settlement, he would have been entitled in his marital right). See also *A.-G.* v. *Murray*, *supra*, as to distinction between "provided by the deceased in concert with any other person" and "provided by any other person in concert with the deceased."

(*m*) It has been said that this enactment aims at property which springs up upon the death, and then vests in another, although previously it had not been existing in anyone (*A.-G.* v. *Robinson*, *supra*, *per* PALLES, C.B., at p. 90).

(*n*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2 (1) (d).

duty, legacy duty (*o*) or succession duty (*p*) is payable in respect of it, or would be so payable but for the relationship of the person to whom it passes (*q*).

SECT. 4. **Exceptions from the Charge of Duty.**

Foreign bonds to bearer, locally situate in England, are personal property in England, notwithstanding that they contain a charge upon foreign real property (*r*).

SUB-SECT. 2.—*Trust Property.*

Property held by the deceased as trustee.

229. Property passing on the death of the deceased is not deemed to include property held by him as trustee for another person, under a disposition not made by the deceased, or under a disposition made by him more than three years before his death, where possession and enjoyment of the property was *bonâ fide* (*s*) assumed by the beneficiary immediately upon the creation of the trust, and thenceforward retained to the entire exclusion of the deceased, or of any benefit to him by contract or otherwise (*a*).

SUB-SECT. 3.—*Settled Property in which the Interest failed before Possession.*

Failure of interest where subsequent limitations under the settlement continue to subsist.

230. In the case of settled property, where the interest of any person under the settlement fails or determines by reason of his death before it becomes an interest in possession, as distinguished from remainder or reversion (*b*), and one or more (*c*) subsequent limitations under the settlement continue to subsist (*d*), the property is not deemed to pass on his death (*e*).

(*o*) See p. 238, *post*.

(*p*) See p. 273, *post*.

(*q*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2 (2); see also *Winans* v. *A.-G.*, [1910] A. C. 27, 45.

(*r*) *A.-G.* v. *Glendining* (1904), 92 L. T. 87; *Winans* v. *A.-G.*, *supra*. As to a mortgage debt on immovable property out of the United Kingdom, see *Lawson* v. *Inland Revenue Commissioners*, [1896] 2 I. R. 418; compare also *Payne* v. *R.*, [1902] A. C. 552, P. C.

(*s*) See note (*f*), p. 210, *post*.

(*a*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2 (3); Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 59 (1). In the case of deaths before the 30th April, 1909, the period is twelve months (*ibid.*). See also *H. M. Advocate* v. *Gunning's Trustees* (1902), 39 Sc. L. R. 534 (a donor granted interest-bearing bonds by way of gift, and the bonds remained unpaid at the donor's death; they were held not to be property held by the debtor as trustee for his creditor).

(*b*) *A.-G.* v. *Power*, [1906] 2 I. R. 272 (a vested interest in the deceased in fee, divested by his death under a specified age, where he was not entitled to the income, the trustees having a discretionary power as to its application, was not a beneficial interest in possession: *sed qu.*, *per* PALLES, C.B., at p. 280, whether estate duty is not payable on the cesser of the actual income applied).

(*c*) *A.-G.* v. *Wood*, [1897] 2 Q. B. 102.

(*d*) *I.e.*, at the time of the death of the person whose interest fails (*A.-G.* v. *Glossop*, [1907] 1 K. B. 163, C. A., *per* COZENS-HARDY, L.J., at p. 177, and *per* FARWELL, L.J., at p. 180). A limitation to a person absolutely is a limitation which continues to subsist (*A.-G.* v. *Wood*, *supra*, *per* VAUGHAN WILLIAMS, J., at p. 109; *A.-G.* v. *Glossop*, *supra*, *per* FARWELL, L.J., at p. 180; see also *Re Finance Act*, 1894, *and Studdert*, [1900] 2 I. R. 281, *per* GIBSON, J., at p. 296). It has, however, been said, although not on the construction of this sub-section, that a settlement is at an end when the settled property is absolutely vested in possession (*Re Mundy and Roper's Contract*, [1899] 1 Ch. 275, C. A., *per* LINDLEY, M.R., and CHITTY, L.J., at p. 297; *A.-G.* v. *Beech*, [1899] A. C. 53, *per* Lord DAVEY, at p. 60).

(*e*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 5 (3).

SECT. 4. **Exceptions from the Charge of Duty.**

Enlargement of life interest into an absolute interest.

231. Where property is settled by a person on himself for life (*f*), and after his death on any other persons, with an ultimate reversion of an absolute interest or absolute power of disposition to the settlor, the property is not deemed to pass to the settlor on the death of any such other person, by reason only that the settlor, being then in possession of the property, as tenant for life, becomes, in consequence of such death, entitled to the immediate reversion, or acquires an absolute power to dispose of the whole property (*g*). It is so, also, where the enlargement of interest etc. is acquired by any person other than the settlor (*h*).

SUB-SECT. 4.—*Property reverting to Disponer.*

Reverter to disponer.

232. Where by a disposition of any property an interest is conferred on any person, other than the disponer, for the life of such person or determinable on his death, and such person enters into possession of the interest, and thenceforward retains possession of it to the entire exclusion of the disponer, or of any benefit to him by contract or otherwise, and the only benefit (*i*) which the disponer retains in the property is subject to such life or determinable interest, and no other interest, even contingent (*k*), is created by the disposition, then, on the death of such person, the property is not deemed to pass by reason only of its reverter to the disponer in his lifetime (*l*).

It is so, also, where any such interest is conferred on two or more persons, either severally or jointly, or in succession (*m*).

But it is not so where the person or persons taking the life etc. interest had at any time prior to the disposition been competent to dispose of the property (*n*).

Income of settled property acquired on death of spouse.

233. Where a husband or wife is entitled, either solely or jointly with the other, to the income of any property settled by the other, under a disposition which took effect before the 2nd August, 1894, and on his or her death the survivor becomes entitled to the

(*f*) Joint lives, *semble*, otherwise (*A.-G.* v. *Glossop*, [1907] 1 K. B. 163, C. A., *per* COZENS-HARDY, L.J., at p. 177).

(*g*) Finance Act, 1896 (59 & 60 Vict. c. 28), s. 14. The death, in terms of the Act, must be after the 30th June, 1896 (*ibid.*, s. 24 (1)); but see next note.

(*h*) *A.-G.* v. *Wood*, [1897] 2 Q. B. 102. It seems that the exception in the Finance Act, 1896 (59 & 60 Vict. c. 28), s. 14, is included in the wider exception in the Finance Act, 1894 (57 & 58 Vict. c. 30), s. 5 (3).

(*i*) *A.-G.* v. *Penrhyn* (1900), 83 L. T. 103; *A.-G.* v. *Glossop*, [1907] 1 K. B. 163, C. A.; compare also *Re Cochrane*, [1906] 2 I. R. 200, C. A.

(*k*) *A.-G.* v. *Penrhyn*, *supra*; *A.-G.* v. *Glossop*, *supra*.

(*l*) Finance Act, 1896 (59 & 60 Vict. c. 28), s. 15 (1). The death must be after the 30th June, 1896 (*ibid.*, s. 24 (1)). Where executors to meet an annuity set aside a capital sum, as an administrative act, without direction in the will, it seems that, on the annuitant's death, no estate duty is chargeable in respect of the acquisition of the capital sum, in point of beneficial enjoyment, by the persons entitled under the will (*A.-G.* v. *Hannen* (1904), 48th Report of the Commissioners of Inland Revenue, 121, *per* CHANNELL, J.).

(*m*) Finance Act, 1896 (59 & 60 Vict. c. 28), s. 15 (2). The exemption has been held to apply on the first death (*Watson* v. *Inland Revenue Commissioners* (1900), 16 Sheriff Court Reports, 235).

(*n*) Finance Act, 1896 (59 & 60 Vict. c. 28), s. 15 (3).

income of the property, as distinguished from the property itself (*o*), settled by the survivor, estate duty is not payable in respect of that property until the death of the survivor (*p*).

Where the deceased was entitled by law to the rents and profits of any real or leasehold property (*q*) of his wife, and has died in her lifetime, the property is not deemed to pass on his death by reason of her then becoming entitled to the property in virtue of her former interest (*r*).

Wife's real or leasehold property.

SUB-SECT. 5.—*Where Money Consideration given.*

234. Estate duty is not payable in respect of property passing on the death of the deceased by reason only of a *bonâ fide* purchase (*s*) from the person under whose disposition the property passes, nor in respect of the falling into possession of the reversion on any lease for lives, nor in respect of the determination of any annuity for lives, where the purchase was made or the lease etc. granted for full consideration (*t*) in money or money's worth paid to the vendor or grantor for his own use or benefit, or, in the case of a lease, for the use or benefit of any person for whom the grantor was a trustee (*a*).

Bonâ fide purchase for full consideration in money.

Where any such purchase was made, or lease etc. granted, for partial consideration in money or money's worth, paid as above, the value of the consideration is allowed as a deduction from the value of the property (*b*).

Bonâ fide purchase for partial consideration.

A *bonâ fide* purchase is one which is not fraudulent or unreal, and the consideration, which was in fact the whole consideration, is the full consideration, even if on the face inadequate (*c*).

If the consideration comprises something in addition to

(*o*) *A.-G.* v. *Strange*, [1898] 2 Q. B. 39, C. A.

(*p*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 21 (5).

(*q*) *I.e.*, real property as defined by the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 1; see p. 263, *post*.

(*r*) Finance Act, 1896 (59 & 60 Vict. c. 28), s. 15 (4). The death must be after the 30th June, 1896 (*ibid.*, s. 24 (1)).

(*s*) A change of security is not a purchase (*A.-G.* v. *Smith-Marriott*, [1899] 2 Q. B. 595).

(*t*) Compare *Lethbridge* v. *A.-G.*, [1907] A. C. 19.

(*a*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 3 (1). As to what is not consideration in money etc., see *A.-G.* v. *Cobham* (*Viscount*) (1904), 90 L. T. 816 (payment within twelve months of death of sum covenanted to be paid by way of gift at death); *H. M. Advocate* v. *Heywood-Lonsdale's Trustees* (1906), 43 Sc. L. R. 529 (ditto); *Re Clark* (1906), 40 I. L. T. 117 (gift of partnership business).

It has been said that the principle of this provision is that property purchased for a price in money etc. is not to be taxed merely because it is acquired in possession on death (*A.-G.* v. *Dobree*, [1900] 1 Q. B. 442, *per* DARLING, J., at p. 450; see also *A.-G.* v. *Smyth*, [1905] 2 I. R. 553, *per* PALLES, C.B., at p. 567).

(*b*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 3 (2). Compare *Brown* v. *A.-G.* (1898), 79 L. T. 572, H. L. (partnership deed operating also as a settlement). As to what is not partial consideration in money etc., see *A.-G.* v. *Johnson*, [1903] 1 K. B. 617, C. A. (transfer of capital sum in consideration of annuity for lives greater than the income obtainable on a trust investment of the same capital sum); *H. M. Advocate* v. *Heywood-Lonsdale's Trustees* (1906), 43 Sc. L. R. 529 (renunciation of, *inter alia*, claim under marriage settlement by default of exercise of limited power of appointment).

(*c*) *Re Lombard*, [1904] 2 I. R. 621, *per* PALLES, C.B., at p. 630

SECT. 4. Exceptions from the Charge of Duty.

money or money's worth, then the money etc. is partial consideration (*d*).

There may be consideration in money etc. paid to persons other than the vendor or grantor (*e*).

A transaction which, as between strangers, would be regarded as a purchase, is not the less so because the parties are members of the same family, and were impelled to the arrangement for the sake of their interests, or the honour of the family (*f*).

Interest in expectancy sold or mortgaged prior to 2nd August, 1894.

235. Where an interest in expectancy in any property has, before the 2nd August, 1894 (*g*), been *bonâ fide* sold or mortgaged for full consideration in money or money's worth, then no other duty on such property is payable by the purchaser or mortgagee when the interest falls into possession than would have been payable if the Finance Act, 1894 (*h*), by which the estate duty was imposed, had not passed; and, in the case of a mortgage, any higher duty payable by the mortgagor ranks as a charge subsequent to that of the mortgagee (*i*).

Liability of mortgagor.

In the case of a mortgage, the exception is personal to the mortgagee, and the mortgagor, if the equity of redemption proves sufficient, must pay the whole estate duty out of it (*k*).

Mode of treatment where exception not immediately operative.

In the case of the sale of an interest expectant on the death of the survivor of more than one person, where estate duty is payable and paid on the first death, it seems that a repayment of the duty, but without interest, is to be made on the last death, when the exception becomes operative (*l*).

Interest as holder of an office, corporation sole, or beneficiary under a charity.

236. Property in which the deceased or any other person had an interest ceasing on the death of the deceased is not deemed to pass on the death where the interest was only an interest as holder of an office (*m*), or recipient of the benefits of a charity, or as a corporation sole (*n*).

SUB-SECT. 6.—*Where Death Duty already paid.*

Settled property on which, since the date of

237. If estate duty has already been paid in respect of any settled property since the date of the settlement, the estate duty is not payable in respect thereof until the death of a person who wa

(*d*) *Lethbridge* v. *A.-G.*, [1907] A. C. 19, *per* Lord ATKINSON, at p. 28; *Lombard*, [1904] 2 I. R. 621, *per* PALLES, C.B., at p. 631.

(*e*) *Re Lombard*, *supra*, *per* PALLES, C.B., at p. 632.

(*f*) *Lethbridge* v. *A.-G.*, *supra*; see title FAMILY ARRANGEMENTS.

(*g*) Where the sale was after the 1st August, 1894, and before the 9th April 1900, see p. 204, *post*; where it was after the 1st August, 1894, and before th 19th April, 1907, see p. 206, *post*; where it was after the 18th April, 1907, an before the 30th April, 1909, see p. 205, *post*.

(*h*) Finance Act, 1894 (57 & 58 Vict. c. 30).

(*i*) *Ibid.*, s. 21 (3).

(*k*) *Re Vernon*, [1901] 1 K. B. 297. If the equity should prove insufficient, way, it has been said, would probably be found of protecting the mortgag from liability to duty in excess of it (*ibid.*, *per* PHILLIMORE, J., at p. 307).

(*l*) *Re Reversionary Interest Society*, *A.-G.* v. *Walker* (1896), *Times*, 14th Ma

(*m*) *A.-G.* v. *Eyres*, [1909] 1 K. B. 723 (trustee under a settlement).

(*n*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2 (1) (b); see titles CHARITI Vol. IV., p. 205; CORPORATIONS, Vol. VIII., p. 378.

SECT. 4.
Exceptions from the Charge of Duty.

at the time of his death, or had been at any time during the continuance of the settlement, competent to dispose of such property (*o*), and who, if on his death subsequent limitations under the settlement take effect in respect of such property, was *sui juris* at the time of his death, or had been *sui juris* at any time while so competent to dispose of the property (*p*).

the settlement, estate duty has been paid.

The principle of this exception seemingly applies to property deemed to pass on death by reason of the cesser of an interest, where a further interest arises on the death, and ceases on a later death (*q*).

Payment of estate duty in respect of an interest in expectancy in settled property of which, subject to an existing life interest, the deceased was competent to dispose, is, where the deceased was the settlor, a payment in respect of settled property (*r*), whether he had only a general power of appointment, exercised by his will (*s*), or a vested reversionary interest (*a*). But the exception does not apply where by deduction of debts etc. estate duty in respect of the interest in expectancy is not in fact paid (*b*).

Where after-acquired property is covenanted to be settled, the payment of estate duty in respect of property which passes absolutely to the covenantor, or to trustees in his right, and becomes subject to the covenant, is not a payment in respect of settled property (*c*).

The payment of estate duty in respect of a covenantor's estate, without allowance for (*d*) a covenant debt, due by him or his executors etc. to the trustees of a settlement, is, seemingly, a payment in respect of settled property (*e*), although the estate duty,

(*o*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 5 (2).

(*p*) Finance Act, 1898 (61 & 62 Vict. c. 10), s. 13. As to the retrospective operation of this last provision, compare *A.-G.* v. *Theobald* (1890), 24 Q. B. D. 557.

(*q*) Compare *Inland Revenue* v. *Maclachlan* (1899), 36 Sc. L. R. 727.

(*r*) *Inland Revenue Commissioners* v. *Priestley*, [1901] A. C. 208.

(*s*) *Ibid.*

(*a*) Compare *Lord Advocate* v. *Mackenzie's Trustees* (1905), 42 Sc. L. R. 584. Where the deceased was not the settlor, the position was the same (*Lord Advocate* v. *Mackenzie's Trustees, supra*); but by the Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 55, for the purpose of any claim to relief from estate duty under the Finance Act, 1894 (57 & 58 Vict c. 30), s. 5 (2), in the case of persons dying after the 29th April, 1909, payment of duty, whether made before, on, or after that date, is not to be deemed to be a payment in respect of settled property if the payment was made in respect of an interest in expectancy in any property on the death of a person other than the settlor. Where, however, the interest in expectancy was, before the 30th April, 1909, *bonâ fide* sold or mortgaged for full consideration in money or money's worth, then no other duty on the property is payable by the purchaser or mortgagee when the interest falls into possession than would have been payable if the Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 55, had not passed, and in the case of a mortgage any higher duty payable by the mortgagor ranks as a charge subsequent to that of the mortgagee (*ibid.*, s. 64); and this rule applies generally to all the death duty provisions of that Act (*ibid.*).

(*b*) *Lord Advocate* v. *Mackenzie's Trustees, supra.*

(*c*) *Lord Advocate* v. *Harvey's Trustees* (1901), 39 Sc. L. R. 71.

(*d*) Compare Finance Act, 1894 (57 & 58 Vict. c. 30), s. 7 (1) (a).

(*e*) *Re Maryon-Wilson, Wilson* v. *Maryon-Wilson* (1899), 47 W. R. 635, *per* KEKEWICH, J., at p. 636.

SECT. 4.
Exceptions from the Charge of Duty.

except by deficiency of assets, is not, apart from express direction, payable out of the covenanted sum (*f*).

Settlement under which property passes, where fund settled and re-settled.

Where a person expectantly entitled to settled property re-settles it, and estate duty is subsequently paid in respect of the property as passing on the original life tenant's death, the "settlement," since the date of which the estate duty has been paid, and during the continuance of which the re-settlor was competent to dispose of the "settled property," is the original settlement under which he derived his benefit, and not the re-settlement by which he parted with his interest (*g*).

(*f*) *Re Gray, Gray* v. *Gray*, [1896] 1 Ch. 620; *Re Chisholm, Goddard* v. *Brodie*, [1902] 1 Ch. 457.

(*g*) *A.-G.* v. *Hay*, [1899] 2 Q. B. 245, 251 (a settlement of a money fund, and a re-settlement of it, whilst still in expectancy, by the expectant beneficiary).

A settlement for the purpose of the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 2, may consist of a series of deeds (*Re Ailesbury (Marquis) and Iveagh (Lord)*, [1893] 2 Ch. 345; *Re Du Cane and Nettlefold's Contract*, [1898] 2 Ch. 96, 105), and there may be at the same time a more comprehensive settlement consisting of several deeds, and a less comprehensive settlement constituted by one of the deeds (*Re Mundy and Roper's Contract*, [1899] 1 Ch. 275, 295, C. A.).

In the case of a settlement and re-settlement of a money fund, where, after the date of the re-settlement, the life tenant continued to enjoy his interest under the original settlement, the original settlement is, for the purpose of estate duty, the governing document, and the re-settlement is an appendage (*A.-G.* v. *Hay, supra, per* KENNEDY, J., at p. 252); and the original settlement may consist of a series of deeds ending with that under which the re-settlor took his benefit (*ibid.*, at p. 251).

The decisions under the Settled Land Act, 1882 (45 & 46 Vict. c. 38), it has been said, may be regarded to ascertain the meaning of the word "settlement" for the purpose of estate duty (see note (*p*), p. 184, *ante*); but contrast the language of s. 22 (1) (i) of the Finance Act, 1894 (57 & 58 Vict. c. 30), which enacts that the expression settlement is to mean any "instrument" which is, or would be etc., a settlement within the meaning of s. 2 of the Settled Land Act, 1882 (45 & 46 Vict. c. 38), with the language of that section, which enacts that any "instrument or instruments," under or by virtue of which etc., is or are to be a settlement.

In the case of a disentail of settled land by the remainderman in tail, with the life tenant's consent, and a re-settlement of the remainder in fee, subject to a life estate to the original life tenant, whether expressed to be in restoration of his old life estate (*Re Ailesbury (Marquis) and Iveagh (Lord)*, *supra*) or not (*Re Mundy and Roper's Contract*, *supra*), the series of deeds, including the re-settlement, form a settlement for the purpose of the Settled Land Act, 1882 (45 & 46 Vict. c. 38).

But, at any rate where the new life estate is expressed to be in restoration of the old life estate, the effect of the re-settlement is to leave the original settlement where it was, affected only by such matters as might be introduced, not for the purpose of destroying the life estate, but for the purpose of giving effect to the new arrangements (*Harrison* v. *Round* (1852), 2 De G. M. & G. 190; *Re Wright's Trustees and Marshall* (1884), 28 Ch. D. 93). *Quære*, in such circumstances, whether or not the doctrine of *A.-G.* v. *Hay*, *supra*, applies to a re-settlement of land, notwithstanding that the operative instrument under which the life tenant enjoyed his interest after the date of the re-settlement was, in form at least, the re-settlement, and not the original settlement; see also, *A.-G.* v. *Londesborough (Earl)*, [1904] 1 K. B. 749.

For succession duty purposes, the disposition which, in such circumstances, is deemed to confer the succession on the life tenant's death is made by the disentailing assurance and re-settlement (*Braybrooke (Lord)* v. *A.-G.* (1861), 9 H. L. Cas. 150, *per* Lord CAMPBELL, L.C., at p. 168); and it has been said that this is the rule also for estate duty (Parliamentary Debates, 4th Series, Vol. 50 (1897), col. 785, *per* FINLAY, S.-G. (with the concurrence of WEBSTER, A.-G.) in the House of Commons).

SECT. 4.
Exceptions from the Charge of Duty.

Settled property on which probate or account duty has been paid or is payable.

238. Estate duty is not payable on the death of a deceased person in respect of personal property settled by a will or disposition made by a person dying before the 2nd August, 1894, in respect of which property probate duty or account duty has been paid or is payable, unless in either case the deceased was at the time of his death, or at any time since the will or disposition took effect had been, competent to dispose of the property (*h*).

Payment of probate duty in respect of an interest in expectancy in personal property settled by deed, and which, subject to an existing life interest, the settlor appoints by will under a general power reserved to himself, is a payment in respect of personal property settled by a disposition made by him (*i*).

Where the settled personal property is directed to be invested in land, the exception equally applies (*k*), and not the less so where, in the lifetime of the life tenant under the will, the land is disentailed and re-settled (*l*).

Property must be settled.

239. Where, however, the property is not "settled," the exception does not apply (*m*).

Allowance in respect of certain duties already paid.

240. Where on the death of a deceased person estate duty becomes payable by a person in respect of any property passing under a settlement made by a will or disposition which took effect before the 2nd August, 1894, and before that date the additional succession duty (*n*), the temporary estate duty (*o*), or the 1 per cent.

(*h*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 21 (1). The paramount object of this provision is that settled property shall not pay two duties, first probate duty and then estate duty (*A.-G.* v. *Dodington*, [1897] 2 Q. B. 373, C. A., *per* A. L. SMITH, L.J., at p. 380). Where a mortgage on real property settled by a will is, under a direction for that purpose, paid off out of the testator's personal estate which has borne probate duty, the amount of such mortgage can seemingly be deducted in arriving at the principal value of the real property for estate duty purposes (*H. M. Advocate* v. *M'Taggart Stewart* (1906), 43 Sc. L. R. 465, *per* the Lord Ordinary (PEARSON), at p. 470).

(*i*) *A.-G.* v. *Dodington*, *supra*; approved by the House of Lords in *Inland Revenue Commissioners* v. *Priestley*, [1901] A. C. 208, 211, 214, 216. Where probate duty has once been paid, or become payable, in respect of the interest of the settlor in the settled property, that is effectual to exempt the property from estate duty (*A.-G.* v. *Dodington*, *supra*, *per* RIGBY, L.J., at p. 383). The instrument exercising the power is to be read into the instrument creating it (compare *A.-G.* v. *Chapman*, [1891] 2 Q. B. 526, and see *A.-G.* v. *Dodington*, [1897] 1 Q. B. 722, *per* VAUGHAN WILLIAMS, J., at p. 732). The provision in the Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 55, referred to in note (*a*), p. 197, *ante*, applies equally to the payment of or liability to probate duty in respect of an interest in expectancy in any property on the death of a person other than the settlor. Payment of or liability to account duty confers a like exception from estate duty in similar circumstances.

(*k*) *A.-G.* v. *Londesborough* (*Earl*), [1905] 1 K. B. 98, C. A.; Finance Act, 1894 (57 & 58 Vict. c. 30), s. 22 (1) (f). The fact that since the payment of the probate duty the property has changed its form from that of personalty into that of realty cannot affect the application of the principle, for the intention of the legislature to remedy an injustice must be to remedy it fully, and in every case in which it might arise (*A.-G.* v. *Londesborough* (*Earl*), *supra*, *per* COLLINS, M.R., at p. 106).

(*l*) *A.-G.* v. *Londesborough* (*Earl*), *supra*.

(*m*) *H. M. Advocate* v. *M'Taggart Stewart*, *supra*, at pp. 470, 473; see also *Lord Advocate* v. *Stewart*, [1902] A. C. 344.

(*n*) See p. 283, *post*.

(*o*) See note (*c*), p. 283, *post*.

SECT. 4.
Exceptions from the Charge of Duty.

legacy or succession duty (*p*), has been paid or is payable under the same will or disposition on the capital value of the property, the Commissioners are to allow the amount which would have been payable on account of the duty if the duty were calculated on the value of the property on which estate duty is payable (*q*).

Provided that, if the person by whom the duty is payable so requires on the first delivery of his account, the deduction to be allowed (*r*) is to be the amount of the duty so paid (*s*), or payable, in respect of the property on which estate duty is payable (*t*).

Allowance of death duty paid in British Possessions.

241. Where the Commissioners are satisfied that, in a British Possession to which this provision applies, duty is payable by reason of a death in respect of any property situate in such Possession and passing on such death, they are to allow a sum equal to the amount of that duty to be deducted from the estate duty payable in respect of that property on the same death (*a*).

Condition under which provision applied.

The Sovereign (*b*) may by Order in Council apply this provision to any British Possession where he is satisfied that, by the law of such Possession, either no duty is leviable in respect of property situate in the United Kingdom when passing on death, or the law of such Possession as respects any duty so leviable is to the like effect as the foregoing provision (*c*).

Order may be revoked if law altered.

The Sovereign in Council may revoke any such order where it appears that the law of the Possession has been so altered that it would not authorise the making of an order (*d*).

(*p*) See pp. 243, 282, *post*.

(*q*) Finance Act, 1896 (59 & 60 Vict. c. 28), s. 21; Finance Act, 1907 (7 Edw. 7, c. 13), s. 15. The deduction is only allowable in connection with deaths after the 30th June, 1896 (Finance Act, 1896 (59 & 60 Vict. c. 28), ss. 21, 24 (1)).

(*r*) Finance Act, 1907 (7 Edw. 7, c. 13), s. 15.

(*s*) An allowance cannot be made for duty paid upon a life interest (*Re Foley (Lady)* (1898), *Times*, 18th May).

(*t*) The amount of the allowance is not affected by a loss of capital value due merely to a change of investment (*Re Sykes* (1899), County Court of Redhill, 12th April, cited Soward's Estate Duty, 4th ed., p. 23).

(*a*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 20 (1).

(*b*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 30.

(*c*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 20 (3). Orders in Council have been made as follows:—Bahama Islands, 11th May, 1895; Barbados, 29th June, 1896; Bermudas, 11th May, 1895; British Columbia, 26th October, 1896; British Guiana, 22nd February, 1896; Ceylon, 11th May, 1895; Falkland Islands, 3rd October, 1895; Fiji, 24th August, 1895; Gambia, 11th May, 1895; Gibraltar, 16th July, 1895; Gold Coast Colony, 16th July, 1895; Grenada, 18th October, 1909; Hong Kong, 11th May, 1895; India (British, not including the Feudatory Native States), 2nd February, 1895; Jamaica, 3rd August, 1897; Labuan, 18th May, 1897; Lagos, 16th July, 1895; Leeward Islands, 16th July, 1895; Manitoba, 26th October, 1896; Natal, 16th July, 1895; New Brunswick, 26th February, 1897; Newfoundland, 8th March, 1895; New South Wales, 29th May, 1905; New Zealand, 2nd February, 1895; Nova Scotia, 20th October, 1898; Ontario, 26th October, 1896; Quebec, 15th January, 1897; Sierra Leone, 8th February, 1896; South Australia, 11th May, 1895; Straits Settlements, 11th May, 1895; Tasmania, 13th October, 1897; Trinidad and Tobago, 13th August, 1895; Victoria, 8th February, 1896; Western Australia, 1st August, 1896; Yukon Territory, 10th January, 1910.

(*d*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 20 (4). The Order in Council dated 13th August, 1895, applying s. 20 to the colony of the Cape of Good Hope has been revoked by Order in Council dated 21st November, 1908.

SUB-SECT. 7.—*Other Exceptions.* SECT. 4.

Exceptions from the Charge of Duty.

242. The law and practice existing at the time of the imposition of the estate duty relating to any of the death duties are, subject to the provisions of the Finance Act, 1894 (*e*), and so far as they are applicable, to apply, as if in terms made applicable, for the exemption of the property of common seamen, marines, or soldiers, who are slain or die in the service of the Sovereign (*f*).

Property of common seamen etc. and sums under £100.

The like law and practice, subject as above, similarly apply for the purpose of the payment of sums under £100 without requiring probate or letters of administration (*g*).

243. Estate duty is not payable in respect of a single annuity not exceeding £25 purchased or provided by the deceased, either by himself alone or in concert or arrangement with any other person (*h*), for the life of himself and of some other person and the survivor of them, or to arise on his own death in favour of some other person; and if in any case there is more than one such annuity, the annuity first granted is alone entitled to the exemption (*i*).

Annuity of £25 purchased or provided by the deceased.

244. Estate duty is not payable in respect of gifts made in consideration of marriage, or which are proved to the satisfaction of the Commissioners to have been part of the normal expenditure of the deceased, and to have been reasonable, having regard to the amount of his income, or to the circumstances, or which, in the case of any donee, do not exceed in the aggregate £100 in value or amount (*j*).

Gifts in consideration of marriage, or as forming part of normal expenditure, or not above £100 in value.

245. Estate duty is not payable in respect of any pension or annuity payable by the Government of British India to the widow

Indian pensions.

(*e*) Finance Act, 1894 (57 & 58 Vict. c. 30).

(*f*) *Ibid.*, s. 8 (1); Stamp Act, 1815 (55 Geo. 3, c. 184), Sched., Part III., Exemptions, branch 1 (representation to common seamen etc. slain or dying etc. not chargeable with probate duty). As to meaning of "common" seamen etc., compare the contemporary statute (now repealed) (1815) 55 Geo. 3, c. 60, Sched. B, where a warrant or petty officer in the navy, or non-commissioned officer of marines, is contrasted with a common seaman or marine. But see Navy and Marines (Property of Deceased) Act, 1865 (28 & 29 Vict. c. 111), s. 2.

(*g*) Finance Act, 1894 (57 & 58 Vict. c. 30), ss. 8 (1), 22 (1) (c). Compare, *e.g.*, Regimental Debts Act, 1893 (56 & 57 Vict. c. 5), s. 16; Navy and Marines (Property of Deceased) Act, 1865 (28 & 29 Vict. c. 111), s. 6; Superannuation Act, 1887 (50 & 51 Vict. c. 67), s. 8. In the case of a person entitled to make a nomination under the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), whose estate in respect of which estate duty is payable exceeds £100, any sum paid under the Act without representation is liable to estate duty (*ibid.*, s. 59). In the case of a deceased depositor in the Post Office or a Trustee Savings Bank, if his total property, after deduction of debts and funeral expenses, exceeds £100, any sum payable under the Statutory Regulations, otherwise than to his legal personal representative, is, nevertheless, for the purposes of estate duty, treated as passing under his will or intestacy (see Post Office Savings Bank Act, 1861 (24 & 25 Vict. c. 14), s. 11, and Post Office Savings Bank Regulations, 1910, cl. 88; Savings Banks Act, 1887 (50 & 51 Vict. c. 40), ss. 2, 3; Savings Banks Act, 1891 (54 & 55 Vict. c. 21), s. 12 (2); and Trustee Savings Bank Regulations, 1900, cl. 26 (1). See also the Supreme Court Funds Rules, r. 62).

(*h*) See note (*d*), p. 191, *ante*.

(*i*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 15 (1).

(*j*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 59 (2). The death, *semble*, must be after the 29th April, 1909.

SECT. 4. Exceptions from the Charge of Duty.

or child of any deceased officer of such Government, notwithstanding that the deceased contributed during his lifetime to any fund out of which the pension or annuity is paid (*k*).

Advowson.

246. Estate duty is not payable in respect of any advowson or church patronage which would have been free from succession duty under the exemption stated later (*l*).

Pictures etc. of national etc. interest.

247. Where any property passing on the death of a deceased person consists of pictures, prints, books, manuscripts, works of art, scientific collections, or other things not yielding income, which appear to the Treasury to be of national, scientific, historic, or artistic interest, such property only becomes chargeable with estate duty when it is sold, and then only in respect of the last death on which it passed (*m*).

The Treasury finding has relation back to the time of the death, and it seems that the estate duty when ultimately payable does not become so "upon or by reason of" the death (*n*).

SECT. 5.—*Aggregation of Property, and Rates of Duty.*

SUB-SECT. 1.—*Aggregation of Property.*

General rule.

248. For determining the rate of estate duty to be paid on any property passing on the deceased's death, all property so passing in

(*k*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 15 (3).

(*l*) *Ibid.*, s. 15 (4); Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 24. See p. 281, *post*.

(*m*) Finance Act, 1896 (59 & 60 Vict. c. 28), s. 20 (1); Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 63. The death must be after the 29th April, 1909. Where the death was after the 30th June, 1896, and before the 30th April, 1909, the exception does not extend to pictures etc. of merely artistic interest, and is restricted to property which is settled so as to be enjoyed in kind in succession by different persons, and while enjoyed in kind by a person not competent to dispose of it (Finance Act, 1896 (59 & 60 Vict. c. 28), ss. 20 (1), 24 (1)). In such a case, if the property is sold, or is in the possession of some person who is then competent to dispose of it, it becomes liable to estate duty (*ibid.*). As to legacy duty, see p. 240, *post*; and as to succession duty, see p. 281, *post*. See *per* the Lord Privy Seal (Viscount CROSS) in the House of Lords (1897), Parliamentary Debates, 4th series, Vol. 49, col. 1500, as to the Treasury interpretation of this provision, and the procedure to be adopted.

Where it is considered that any particular works of art are of national etc. interest, within this provision, and it is desired to obtain exemption from estate duty accordingly in respect thereof, application must be made to the Treasury. The application should state the short particulars of the "settlement" (if there is one), and the grounds upon which the articles are considered to be of national etc. interest. An inventory of the articles, showing the separate value attributed to each, should accompany the application. If there is a "settlement," and it is by a will which, at the date of the application, has not been proved, an extract from the will, so far as material, should accompany such application. But if the "settlement" is by deed which has not hitherto been noted in the Estate Duty Office, it, or a copy of it, should be sent there for that purpose. The application is forwarded by the Treasury to the Commissioners of Inland Revenue, and if their expert adviser on art etc. matters, after examination of the articles, if considered necessary, is of opinion that they come within the meaning of the provision, the Commissioners report to the Treasury accordingly.

As to the power of the Treasury to remit death duties in respect of any such pictures etc. given or bequeathed for national etc. purposes, see p. 182, *ante*.

(*n*) *Re Leconfield*, *Wyndham* v. *Leconfield* (1904), 90 L. T. 399, C. A. (direction to pay out of residuary estate the estate duty "payable upon or by reason of" the testator's death in respect of such settled property).

respect of which estate duty is leviable is, subject to the exceptions stated below, aggregated so as to form one "estate," and the duty is levied at the proper graduated rate on the principal value thereof (*o*).

Property passing on any death is not aggregated more than once (*p*).

Property in which the deceased never had an interest.

249. Property in which the deceased never had an interest is not aggregated with any other property, but is an estate by itself (*q*).

Settled property under disposition by person dying prior to 2nd August, 1894.

250. Settled property which passes, or is deemed to pass, on the deceased's death under a disposition made by a person dying before the 2nd August, 1894, and which would, if the disponer had died on or after that date, have been liable to estate duty on his death, is treated as an estate by itself (*r*).

Small estates.

251. Where the net value of the property in respect of which estate duty is payable on the deceased's death, exclusive of property settled otherwise than by his will, does not exceed £1,000, such property forms an estate by itself (*s*).

Pictures etc. of national etc. interest.

252. Where the Treasury, under the power conferred upon them (*t*), remit the estate duty in respect of pictures etc. which appear to them to be of national etc. interest, such property is not aggregated with any other property (*u*).

Property consisting of pictures etc., which pass on the deceased's death, and appear to the Treasury (*a*) to be of national etc. interest, is not aggregated with other property on the death, but forms an estate by itself (*b*).

Interests in expectancy.

253. Where an estate includes an interest in expectancy, and the payment of the estate duty in respect of that interest is deferred,

(*o*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 4; Finance Act, 1900 (63 & 64 Vict. c. 7), s. 12 (1).

(*p*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 7 (10).

(*q*) *Ibid.*, s. 4; Finance Act, 1900 (63 & 64 Vict. c. 7), s. 12 (1).

(*r*) Finance Act, 1900 (63 & 64 Vict. c. 7), s. 12 (2); Finance Act, 1907 (7 Edw. 7, c. 13), s. 16.

Where, however, the deceased died before the 19th April, 1907, but after the 8th April, 1900, such settled property is aggregated, but the aggregation does not operate to enhance the rate of duty payable either upon the settled property or upon any other property by more than one half per cent. in excess of the rate at which duty would have been payable if such settled property had been treated as an estate by itself (Finance Act, 1900 (63 & 64 Vict. c. 7), s. 12 (2)).

Property is not "settled," within the meaning of this enactment, where it is given to a person for life, with remainder to her children, and, in default, for such persons as she appoints, and she dies without issue, having exercised the power of appointment (*Re Magan* (1908), *Irish Times*, 19th May).

Where the deceased died before the 9th April, 1900, such settled property follows the rule of aggregation stated at the end of para. 253, p. 204, *post*.

(*s*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 16 (3).

(*t*) See p. 182, *ante*.

(*u*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 15 (2).

(*a*) See p. 202, *ante*.

(*b*) Finance Act, 1896 (59 & 60 Vict. c. 28), s. 20 (1); Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 63. The death must be after the 30th June, 1896

SECT. 5. **Aggregation of Property, and Rates of Duty.**

as it may be (*c*), until the interest falls into possession, then, for the purpose of determining the rate of estate duty in respect of the rest of the estate, the value of the interest is its value at the date of the deceased's death, and the rate in respect of the interest when it falls into possession is calculated according to its then value, together with the value of the rest of the estate as previously ascertained (*d*).

Accretions under the Wills Act, 1837, s. 33.

Property accruing to a deceased person's estate after his death, under the will of an ancestor who survived him, in the circumstances stated earlier (*e*), is aggregated with the other aggregable property passing on the death of such person to find the rate appropriate for the accruing property, but it seems that no higher duty is chargeable on such other property (*f*).

Sale or mortgage of interest in expectancy after 1st August, 1894, and before 9th April, 1900.

Where an interest in expectancy in any property has, after the 1st August, 1894, but before the 9th April, 1900 (*g*), been *bonâ fide* sold or mortgaged for full consideration in money or money's worth, then no other duty on such property is payable by the purchaser or mortgagee when the interest falls into possession than would have been payable if the law as to aggregation had contained the following provision:—

The provision is, that any property which, under a disposition not made by the deceased, passes immediately on his death to some person other than the wife or husband, or a lineal ancestor or lineal descendant of the deceased, is an estate by itself, except that any benefit which, under such a disposition, is reserved or given to the wife etc., is aggregated with property of the deceased (*h*).

SUB-SECT. 2.—*Rates of Duty.*

Rates of estate duty.

254. The rates of estate duty are as follows (*i*):—

Where the principal value of the estate exceeds £100 and does not exceed £500, the rate is 1 per cent. Where the value exceeds £500 and does not exceed £1,000, the rate is 2 per cent. Where the value exceeds £1,000 and does not exceed £5,000, the rate is 3 per cent. Where the value exceeds £5,000 and does not exceed £10,000, the rate is 4 per cent. Where the value exceeds £10,000 and does not exceed £20,000, the rate is 5 per cent. Where the value exceeds £20,000 and does not exceed £40,000, the rate is 6 per cent. Where the value exceeds £40,000 and does not exceed

(Finance Act, 1896 (59 & 60 Vict. c. 28), s. 24 (1)). In the case of deaths before the 30th April, 1909, the provision only applies to settled objects; see note (*m*), p. 202, *ante*.

(*c*) See p. 213, *post*.

(*d*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 7 (6).

(*e*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 33; see p. 186, *ante*

(*f*) *Re Scott*, [1900] 1 Q. B. 372, 388; affirmed, [1901] 1 K. B. 228, C. A.

(*g*) Where the interest has been sold or mortgaged etc. before the 2nd August, 1894, see p. 196, *ante*.

(*h*) Finance Act, 1900 (63 & 64 Vict. c. 7), s. 12 (1) (proviso); Finance Act, 1894 (57 & 58 Vict. c. 30), s. 4 (proviso); and this provision applies generally where the deceased died before the 9th April, 1900 (*ibid.*). In the case of a mortgage, any higher duty, payable by the mortgagor, ranks as a charge subsequent to that of the mortgagee (Finance Act, 1900 (63 & 64 Vict. c. 7), s. 12 (1) (proviso)).

(*i*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 54, Sched. II. The death must be after the 29th April, 1909 (*ibid.*, s. 54).

£70,000, the rate is 7 per cent. Where the value exceeds £70,000 and does not exceed £100,000, the rate is 8 per cent. Where the value exceeds £100,000 and does not exceed £150,000, the rate is 9 per cent. Where the value exceeds £150,000 and does not exceed £200,000, the rate is 10 per cent. Where the value exceeds £200,000 and does not exceed £400,000, the rate is 11 per cent. Where the value exceeds £400,000 and does not exceed £600,000, the rate is 12 per cent. Where the value exceeds £600,000 and does not exceed £800,000, the rate is 13 per cent. Where the value exceeds £800,000 and does not exceed £1,000,000, the rate is 14 per cent. Where the value exceeds £1,000,000, the rate is 15 per cent.

Sale or mortgage of interest in expectancy after 18th April, 1907, and before 30th April, 1909.

255. Where an interest in expectancy has, after the 18th April, 1907, and before the 30th April, 1909, been *bonâ fide* sold or mortgaged for full consideration in money or money's worth, then no other duty is payable by the purchaser etc. than would have been payable if the scale of rates had been as follows (*k*) :—

Where the principal value of the estate exceeds £100 and does not exceed £500, as if the rate had been 1 per cent. Where the value exceeds £500 and does not exceed £1,000, as if the rate had been 2 per cent. Where the value exceeds £1,000 and does not exceed £10,000, as if the rate had been 3 per cent. Where the value exceeds £10,000 and does not exceed £25,000, as if the rate had been 4 per cent. Where the value exceeds £25,000 and does not exceed £50,000, as if the rate had been 4½ per cent. Where the value exceeds £50,000 and does not exceed £75,000, as if the rate had been 5 per cent. Where the value exceeds £75,000 and does not exceed £100,000, as if the rate had been 5½ per cent. Where the value exceeds £100,000 and does not exceed £150,000, as if the rate had been 6 per cent. Where the value exceeds £150,000 and does not exceed £250,000, as if the rate had been 7 per cent. Where the value exceeds £250,000 and does not exceed £500,000, as if the rate had been 8 per cent. Where the value exceeds £500,000 and does not exceed £750,000, as if the rate had been 9 per cent. Where the value exceeds £750,000 and does not exceed £1,000,000, as if the rate had been 10 per cent. Where the value exceeds £1,000,000 and does not exceed £1,500,000, as if the rate had been 10 per cent. on £1,000,000 and 11 per cent. on the remainder. Where the value exceeds £1,500,000 and does not exceed £2,000,000, as if the rate had been 10 per cent. on £1,000,000 and 12 per cent. on the remainder. Where the value exceeds £2,000,000 and does not exceed £2,500,000, as if the rate had been 10 per cent. on £1,000,000 and 13 per cent. on the remainder. Where the value exceeds £2,500,000 and does not exceed £3,000,000, as if the rate had been 10 per cent. on £1,000,000 and 14 per cent. on the remainder. Where the value

(*k*) Finance Act, 1907 (7 Edw. 7, c. 13), s. 12, Sched. I.; Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 64. And this scale applies generally where the deceased died after the 18th April, 1907, and before the 30th April, 1909 (Finance Act, 1907 (7 Edw. 7, c. 13), s. 12; Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 54). In the case of a mortgage, any higher duty payable by the mortgagor ranks as a charge subsequent to that of the mortgagee (Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 64).

SECT. 5. Aggregation of Property, and Rates of Duty.

exceeds £3,000,000, as if the rate had been 10 per cent. on £1,000,000 and 15 per cent. on the remainder.

Sale or mortgage of interest in expectancy after 1st August, 1894, and before 19th April, 1907.

256. Where an interest in expectancy has, after the 1st August, 1894, and before the 19th April, 1907, been *bonâ fide* sold or mortgaged for full consideration in money or money's worth, then no other duty is payable by the purchaser etc. than would have been payable if the scale of rates in the last paragraph, in the case of estates exceeding £150,000 in value, had been as follows (*l*):—

Where the principal value of the estate exceeds £150,000 and does not exceed £250,000, as if the rate had been 6½ per cent. Where the value exceeds £250,000 and does not exceed £500,000, as if the rate had been 7 per cent. Where the value exceeds £500,000 and does not exceed £1,000,000, as if the rate had been 7½ per cent. Where the value exceeds £1,000,000, as if the rate had been 8 per cent.

Fixed duty of 30*s.* or 50*s.* where gross value not over £300 or £500.

257. Where the gross value of the property in respect of which estate duty is payable on the death of the deceased, exclusive of property settled otherwise than by his will, does not exceed £500, the person intending to apply for representation (*m*) to the deceased may pay a fixed duty in place of the duty according to the scale. Where the gross value of the property does not exceed £300, the fixed duty is 30*s.*, and where it exceeds £300 and does not exceed £500, the fixed duty is 50*s.* (*n*).

Where such property includes property which is proved to the satisfaction of the Commissioners to be subject to a charge created for securing unpaid purchase-money, or money borrowed to pay

(*l*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 17; Finance Act, 1907 (7 Edw. 7, c. 13), s. 12 (proviso). And this scale applies generally where the deceased died after the 1st August, 1894, and before the 19th April, 1907 (Finance Act, 1894 (57 & 58 Vict. c. 30), s. 17; Finance Act, 1907 (7 Edw. 7, c. 13), s. 12). In the case of a mortgage, any higher duty payable by the mortgagor ranks as a charge subsequent to that of the mortgagee (Finance Act, 1907 (7 Edw. 7, c. 13), s. 12 (proviso)).

Where the deceased died after the 1st August, 1894, and before the 1st July, 1896, and the principal value of the estate contains a fractional part of £10 over £10, or any multiple of £10, the duty is payable for the full sum of £10. Where the deceased died after the 30th June, 1896, and before the 9th April, 1900, and the principal value comprises a fraction of £100 in excess of £100 or any multiple thereof, such fraction is excluded, except that where the principal value exceeds £100, and does not exceed £200, the duty is £1 (Finance Act, 1894 (57 & 58 Vict. c. 30), s. 17 (proviso); Finance Act, 1896 (59 & 60 Vict. c. 28), s. 17; Finance Act, 1900 (63 & 64 Vict. c. 7), s. 13 (1)). Where the deceased died on or after the 1st June, 1881, and before the 2nd August, 1894, and account duty is payable, the rate of duty is in accordance with the scale of rates of probate duty as set out at p. 312, *post* (Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 38 (1)). Where in the case of an account for account duty delivered on or after the 1st June, 1889, the value of the property exceeds £10,000, temporary estate duty is also payable. The rate is as set out in note (*b*), p. 312, *post*, in the case of the like duty when payable as an addition to probate duty (Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 5 (2)).

(*m*) *I.e.*, probate of a will or letters of administration (Finance Act, 1894 (57 & 58 Vict. c. 30), s. 22 (1) (c)).

(*n*) *Ibid.*, s. 16 (1), (2); Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 33 (1).

SECT. 5. Aggregation of Property, and Rates of Duty.

purchase-money, or to be subject to, or liable to be made subject to, a charge for securing an advance made, or to be made, for the purpose of the purchase thereof, the gross value of the property is to be taken to be its value subject to such charge or liability (*o*).

Where it is afterwards discovered that such gross value exceeds £300 or £500, as the case may be, estate duty according to the scale is payable (*p*).

If, however, the Commissioners are satisfied that there were reasonable grounds for the original estimate of the value of the property, they may allow to be deducted from such duty an amount equal to the fixed duty paid (*q*).

Rate, as first determined, may require to be subsequently rectified.

258. Estate duty is, in the first instance, to be calculated at the appropriate rate according to the value of the estate as set forth in the Inland Revenue affidavit or account delivered, but if afterwards it appears that for any reason too little duty has been paid additional duty is payable (*r*), unless a certificate of discharge has been delivered, and is to be treated as duty in arrear (*s*).

The issue of such certificate of discharge, under the provisions for that purpose, does not affect the rate of duty payable in respect of any property afterwards shown to have passed on the death, and the duty in respect of such property is at such rate as would be payable if its value were added to the value of the property in respect of which duty has already been accounted for (*t*).

SECT. 6.—*Value Chargeable.*

SUB-SECT. 1.—*Gross Value.*

Meaning of "principal value."

259. The principal value of any property is estimated to be the price which, in the opinion of the Commissioners (*u*), it would fetch if sold in the open market (*x*) at the time (*a*) of the deceased's death (*b*).

In estimating such principal value under this provision, the Commissioners are to fix the price of the property according to the market price at the time of the deceased's death, and are not to

(*o*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 61 (2).

(*p*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 16 (1), (2); Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 35.

(*q*) Revenue Act, 1903 (3 Edw. 7, c. 46), s. 14. The death must be after the 31st August, 1903 (*ibid.*).

(*r*) With interest (Finance Act, 1896 (59 & 60 Vict. c. 28), s. 18 (1)).

(*s*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 8 (7).

(*t*) *Ibid.*, s. 11 (3).

(*u*) The Commissioners have exclusive jurisdiction to estimate the price in the first instance (*A.-G.* v. *Jameson*, [1905] 2 I. R. 218, C. A., *per* FITZGIBBON, L.J., at p. 228). All the court can do is to decide the legal points that lie at the threshold of any inquiry as to value (*A.-G.* v. *Jameson*, [1904] 2 I. R. 644, *per* KENNY, J., at p. 664).

(*x*) Price in the open market is what would be obtainable upon a sale where it was open to every one who had the will, and the money, to offer the price which the deceased's property was worth as he held it (*A.-G.* v. *Jameson*, *supra*, *per* FITZGIBBON, L.J., at p. 230).

(*a*) The value at the time of the death is not ascertainable by the larger value at a sale at a later date, less the intermediate cost (*Inland Revenue* v. *Marr's Trustees* (1906), 44 Sc. L. R. 647).

(*b*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 7 (5).

SECT. 6. Value Chargeable.

make any reduction in the estimate on account of the estimate being made on the assumption that the whole property is to be placed on the market at one and the same time. Where, however, it is proved to the Commissioners that the value of the property has been depreciated by reason of the death of the deceased, the depreciation is to be taken into account in fixing the price (*c*).

Exception as regards agricultural property.

260. In the case of any agricultural property, where no part of the principal value is due to the expectation of an increased income (*d*) from such property, there is a special rule of valuation for determining the value of such property in connection with the provisions affecting small estates not exceeding £1,000 in net value (*e*). The rule is that the principal value is not to exceed twenty-five times the annual value as assessed under Schedule A of the Income Tax Acts (*f*), after making such deductions as have not been allowed in that assessment and are allowed under the Succession Duty Act, 1853 (*g*), and making a deduction for expenses of management (*h*) not exceeding 5 per cent. of the annual value so assessed (*i*).

Meaning of "agricultural property."

"Agricultural property" means agricultural land, pasture, and woodland, and also includes such cottages, farm buildings, farm-houses, and mansion-houses (together with the lands occupied therewith) as are of a character appropriate to the property (*j*).

Shares in a private limited company where alienation is restricted.

261. In the case of shares in a private limited company where the articles of association contain restrictive provisions as to alienation, the value is what the shares would fetch if they could be sold in the open market on the terms of the purchaser being entitled to be registered as holder subject to the articles (*k*).

Benefit accruing by the cesser of an interest.

262. The value of the benefit accruing or arising from the cesser of an interest ceasing on the deceased's death is, if the interest extended to the whole income of the property, the principal

(*c*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 60 (2). The death must be after the 29th April, 1909 (*ibid.*).

(*d*) By the future conversion of the property to a different and more profitable use (*A.-G.* v. *Robinson*, [1901] 2 I. R. 67, *per* PALLES, C.B., at p. 80).

(*e*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 61 (1). As to the small estates in question, see Finance Act, 1894 (57 & 58 Vict. c. 30), s. 16 (1), (3), and p. 203, *ante*. Where the death was before the 30th April, 1909, the special rule applies generally to agricultural property where no part of the principal value is due to the expectation of an increased income from such property (Finance Act, 1894 (57 & 58 Vict. 30), s. 7 (5) (proviso); Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 60 (1)); see *Re Feeny* (1902), 36 I. L. T. 80.

(*f*) See Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 60.

(*g*) Decisions upon the appropriate portions of the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), may be referred to (*A.-G.* v. *Robinson*, [1901] 2 I. R. 67, *per* PALLES, C.B., at p. 79).

(*h*) These expenses do not include expenses of cultivation, but must be restricted to remuneration to a third party incident to the collection of rent (*A.-G.* v. *Robinson*, *supra*, *per* PALLES, C.B., at p. 85). There must, it has been said, be management in fact, and inherently necessary (*ibid.*, *per* JOHNSON, J., at p. 92); although, it has been said, some allowance is always to be made (*ibid.*, *per* PALLES, C.B., at p. 84).

(*i*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 7 (5) (proviso).

(*j*) *Ibid.*, s. 22 (1) (g).

(*k*) *A.-G.* v. *Jameson*, [1905] 2 I. R. 218, C. A. The value of a business is not necessarily the price at which the owner's will gives a person the option of purchasing it (*Lord Advocate* v. *Wood's Trustees* (1910), 53rd Report of Commissioners of Inland Revenue, p. 50).

value of that property; and, if the interest extended to less than such whole income, the principal value of an addition to the property equal to the income to which the interest extended (*l*).

In the latter case, if the property is incumbered, and the incumbrance is not large enough to affect the security of the interest which ceased, the incumbrance is to be disregarded in ascertaining the principal value of the hypothetical addition to the property (*m*).

Lands or chattels settled by Act of Parliament or royal grant.

263. Where any lands or chattels are so settled, whether by Act of Parliament or royal grant, that no one of the persons successively in possession is capable of alienating them, otherwise than under the powers of sale or exchange in the Settled Land Act, 1882 (*n*), whether his interest is in law a tenancy for life or in tail, the property passing on the death of any person in possession of the lands and chattels is the interest of his successor therein, and such interest is to be valued for estate duty in like manner as for succession duty (*o*).

Interest in expectancy.

264. Where an estate includes an interest in expectancy, and the estate duty in respect of it is paid, at the option of the person accountable, when the interest falls into possession, the duty is payable upon its then value (*p*).

How value of property to be ascertained.

265. The value of any property for the purposes of estate duty is, subject to the above provisions, to be ascertained by the Commissioners in such manner and by such means as they think fit (*q*).

Inspection of property by valuers.

If the Commissioners authorise a person to inspect any property and report to them its value, the person having the custody or possession of that property is to permit the person so authorised to inspect it at such reasonable times as the Commissioners consider necessary (*r*).

Where the Commissioners require a valuation to be made by a person named by them, they are to defray the reasonable costs of the valuation (*s*).

Certificate of acceptance of valuation.

266. The Commissioners on application from a person accountable for the duty on any property forming part of an estate are, if they consider that it can conveniently be done, to certify (*t*) the

(*l*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 7 (7). The concluding phrase has been described as an inaccurate expression for property the income of which is equal to the income to which the interest extended (*A.-G.* v. *Power*, [1906] 2 I. R. 272, *per* PALLES, C.B., at p. 277).

(*m*) *Lord Advocate* v. *Henderson's Trustees* (1905), 42 Sc. L. R. 720.

(*n*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 58 (1) (i); *Re Bolton Estates Act*, 1863, [1904] 2 Ch. 289.

(*o*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 5 (5); compare *A.-G.* v. *Richmond (Duke)* (*No.* 2), [1907] 2 K. B. 940. *Semble*, it is immaterial that in the actual case succession duty may in fact not be payable (*Re Bolton Estates Act*, 1863, [1904] 2 Ch. 289, *per* JOYCE J., at p. 303).

(*p*) *Re Eyre*, [1907] 1 K. B. 331.

(*q*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 7 (8).

(*r*) *Ibid.*, s. 7 (8).

(*s*) *Ibid.*, s. 7 (9).

(*t*) See note (*b*), p. 218, *post*.

SECT. 6. **Value Chargeable.**

amount of the valuation accepted by them for any class or description of property forming part of the estate (*a*).

SUB-SECT. 2.—*Deductions.*

What allowances may be made.

267. In determining the value of an estate for the purpose of estate duty, allowance is made for reasonable funeral expenses (*b*), and for debts and incumbrances (*c*), including mortgages and terminable charges (*d*).

What debts may not be deducted.

An allowance is not made for debts incurred by the deceased, or incumbrances created by a disposition made by him, unless such debts etc. were incurred or created (*e*) *bonâ fide* (*f*), for full consideration in money or money's worth (*g*), wholly for his own use and benefit (*h*), and take effect out of his interest (*i*).

Where a debt or incumbrance has been incurred or created in whole or in part for the purpose of or in consideration for the purchase or acquisition or extinction, whether by operation of law or otherwise, of any interest in expectancy in any property passing, or

(*a*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 8 (8).

(*b*) Compare *Edwards* v. *Edwards* (1834), 2 Cr. & M. 612 (amount depends upon deceased's condition in life, and the price of the requisite articles at the particular place); *Hancock* v. *Podmore* (1830), 1 B. & Ad. 260 (as against a creditor); *R.* v. *Price* (1884), 12 Q. B. D. 247, *per* STEPHEN, J., at p. 254, referring to *Williams* v. *Williams* (1882), 20 Ch. D. 659 (cremation); *Stag* v. *Punter* (1744), 3 Atk. 119 (carriage of body from distance); *Bridge* v. *Brown* (1843), 2 Y. & C. Ch. Cas. 181 (tomb); *Mellick* v. *Asylum* (*President and Guardians*) (1821), Jac. 180 (expensive monument); *Johnson* v. *Baker* (1825), 2 C. & P. 207 (mourning); *Pitt* v. *Pitt* (1758), 2 Lee, 508 (ditto); *Ambrose* v. *Kerrison* (1851), 10 C. B. 776 (married woman separated from husband); *Gregory* v. *Lockyer* (1821), Madd. & G. 90 (married woman with separate estate); *Re M'Myn, Lightbown* v. *M'Myn* (1886), 33 Ch. D. 575 (married woman who appointed husband executor).

(*c*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 7 (1). *Semble*, this provision applies only to the case of an estate passing from a deceased owner subject to his debts and incumbrances (*Cowley* (*Earl*) v. *Inland Revenue Commissioners*, [1899] A. C. 198, *per* Lord DAVEY, at p. 221).

(*d*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 22 (1) (k).

(*e*) *Quære*, whether the words "wholly for the deceased's own use and benefit" in *ibid.*, s. 7 (1) (a), are to be read with the word "created," or relate only to the "consideration" (*A.-G.* v. *Richmond and Gordon* (*Duke*), [1909] A. C. 466, *per* Lord LOREBURN, L.C., at p. 469); see also note (*h*), *infra*.

(*f*) A *bonâ fide* transaction is a real and genuine transaction intended to have full and real operation without any secret or covinous arrangement or reservation (*A.-G.* v. *Richmond* (*Duke*) (No. 1), [1907] 2 K. B. 923, *per* BRAY, J., at p. 937; affirmed, *A.-G.* v. *Richmond and Gordon* (*Duke*), *supra*, *per* Lord ATKINSON, at p. 475).

(*g*) A debt for a philanthropic purpose is not allowable (*H. M. Advocate* v. *Gunning's Trustees* (1902), 39 Sc. L. R. 534), nor is a debt in consideration of the release of a voluntary debt of like amount (compare *A.-G.* v. *Cobham* (*Viscount*) (1904), 90 L. T. 816), nor a debt in consideration of marriage and money (*H. M. Advocate* v. *Alexander's Trustees* (1905), 42 Sc. L. R. 307, 310; compare also *H. M. Advocate* v. *Warrender's Trustees* (1906), 43 Sc. L. R. 278, *per* the Lord Ordinary (PEARSON), at p. 281). As to dissection of the consideration in questions under the Finance Act, 1894 (57 & 58 Vict. c. 30), s. 3 (2), see *Re Lombard*, [1904] 2 I. R. 621.

(*h*) These words apply to the consideration given for the incumbrance, not to the incumbrance itself (*A.-G.* v. *Richmond and Gordon* (*Duke*), [1909] A. C. 466, *per* Lord ATKINSON, at p. 478). The motive for incurring the debt is immaterial, and so also what the debtor intends to do with the money (*ibid.*, at pp. 475, 478); see also note (*e*), *supra*.

(*i*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 7 (1) (a).

deemed to pass, on the deceased's death, and any person whose interest in expectancy is so purchased etc. becomes (under any disposition made by, or through devolution of law from, or under the intestacy of, the deceased) entitled to any interest in that property, then no allowance is made in respect of such debt etc., and any property charged with any such debt etc. is deemed to pass freed therefrom (*j*).

If part only of such debt etc. was incurred etc. for such purpose etc., the above provision applies to that part only (*k*).

If a person whose interest in expectancy in the property so purchased etc. becomes entitled to an interest in part only of that property, the above provision applies only to such part of the debt etc. as bears the same proportion to the whole debt etc. as the value of the part of the property to an interest in which he becomes entitled bears to the value of the whole of that property (*l*).

An allowance is not made for any debt in respect of which there is a right to reimbursement from any other estate or person, unless the reimbursement cannot be obtained (*m*)

Increment value duty to be allowed.

268. Allowance is made for increment value duty which is to be collected on the occasion of the death in respect of the fee simple of any land, or any interest in land, comprised in the property passing on the death, as if such duty were a debt (*n*).

Against what property debts are to be allowed.

269. Any debt or incumbrance for which an allowance is made is to be deducted from the value of the land or other subjects of property liable thereto (*o*), and the allowance is not made more than once for the same debt etc. charged upon different portions of the estate (*p*).

Debts to persons resident out of the United Kingdom.

An allowance is not made in the first instance for debts due from the deceased to persons resident out of the United Kingdom (unless contracted to be paid in the Kingdom, or charged on property situate therein), except out of the value of any personal property of the deceased situate out of the Kingdom in respect of which estate duty is paid; and there is to be no repayment of estate duty in respect of any such debts, except to the extent to which it is shown to the satisfaction of the Commissioners that the personal property of the deceased situate in the foreign country or British Possession in which the person to whom such debts are due resides, is insufficient for their payment (*q*).

Mortgage of an interest in expectancy.

270. In the case of settled property, where the expectant successor mortgages his interest in expectancy, no allowance can be made in respect of the incumbrance when the interest falls into possession (*r*).

(*j*) Finance (1909-10) Act, 1910 (10 Edw. 7. c. 8), s. 57.
(*k*) *Ibid.*, s. 57 (a).
(*l*) *Ibid.*, s. 57 (b).
(*m*) Finance Act, 1894 (57 & 58 Vict. c. 30), s.7 (1) (b).
(*n*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 62.
(*o*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 7 (1) (last branch).
(*p*) *Ibid.*, s. 7 (1) (c).
(*q*) *Ibid.*, s. 7 (2).
(*r*) *Re Vernon*, [1901] 1 K. B. 297. Here the mortgage was before the

SECT. 6. Value Chargeable.

Where the tenant for life and the expectant successor mortgage their respective interests, and the tenant for life is indemnified, allowance for the incumbrance cannot be made (*s*).

Mortgage of settled property by tenant for life and remainderman.

Where the tenant for life and the expectant successor, under a joint general power of appointment, appoint the settled property by way of mortgage, only the equity of redemption passes on the life tenant's death, so that, in effect, allowance is made for the incumbrance (*t*).

Annuity which ceases on death.

No allowance can be made for an annuity which ceases on the deceased's death, and is not an incumbrance when the settled property passes (*u*).

Cost of realising or administering foreign property.

271. Where the Commissioners are satisfied that any additional expense in administering or in realising property has been incurred by reason of the property being situate out of the United Kingdom, they may make an allowance from the value of the property on account of such expense, not exceeding in any case 5 per cent. on the value of the property (*v*).

Duty paid in a foreign country on foreign property.

Where any property passing on the death of the deceased is situate in a foreign country, and the Commissioners are satisfied that by reason of such death any duty is payable in the foreign country in respect of the property, they are to make an allowance the amount of the duty from the value of the property (*w*).

SECT. 7.—*Collection of the Duty.*

SUB-SECT. 1.—*The Duty.*

The duty is a stamp duty.

272. Estate duty is a stamp duty (*a*), which is to be collected by means of stamps or such other means (*b*) as the Commissioners (*c*) may prescribe (*d*).

Payment in kind.

The Commissioners may, if they think fit, on the application of any person liable to pay estate duty in respect of any real or

Finance Act, 1894 (57 & 58 Vict. c. 30). Where the mortgage is after the Act, *à fortiori* it is so.

(*s*) *A.-G.* v. *Montagu* (*Lord*), [1904] A. C. 316.

(*t*) *Cowley* (*Earl*) v. *Inland Revenue Commissioners*, [1899] A. C. 198. *Semble*, the result is the same where tenant for life and remainderman mortgage their respective interests (*ibid.*, *per* Lord DAVEY, at p. 219; *A.-G.* v. *Montagu* (*Lord*), [1904] A. C. 316, *per* Lord DAVEY, at p. 319; but see, *contra*, *Cowley* (*Earl*) v. *Inland Revenue Commissioners*, *supra*, *per* Lord WATSON, at p. 208).

(*u*) *Cowley* (*Earl*) v. *Inland Revenue Commissioners*, *supra*. But if property definitely vests in the successor during the deceased's lifetime, subject to this, that the successor until the death is only to enjoy the income, there is no liability to estate duty (*Re Townsend*, [1901] 2 K. B. 331).

(*v*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 7 (3).

(*w*) *Ibid.*, s. 7 (4).

(*a*) *Ibid.*, s. 6 (1).

(*b*) The fixed duty of 30*s.* or 50*s.* (Finance Act, 1894 (57 & 58 Vict. c. 30), s. 16 (1)) is paid by means of adhesive stamps to be affixed to the Inland Revenue affidavit. In all other payments of duty, a stamped receipt for the amount paid is given on the affidavit or account on which the duty is assessed. The stamp indicates the nature of the duty, but not the rate.

(*c*) *I.e.*, the Commissioners of Inland Revenue (*ibid.*, s. 22 (1) (m)).

(*d*) *Ibid.*, ss. 8 (16), 22 (1) (o). As to remission of duty and interest, see p. 182, *ante*.

leasehold property, accept in satisfaction of the whole or any part of such duty such part of the property as may be agreed upon (*e*).

SECT. 7. Collection of the Duty.

The law and practice existing at the time of the imposition of the estate duty, relating, in matters of procedure (*f*), to any of the death duties are, subject to the provisions of the Finance Act, 1894 (*g*), and so far as the same are applicable, to apply for the purpose of the collection of the estate duty as if in terms made applicable to such duty (*h*).

Application of existing law and practice as on the 2nd August, 1894.

SUB-SECT. 2.—*When the Duty is payable.*

273. The duty is due on the delivery of the Inland Revenue affidavit or account upon which it is to be collected (*i*), or on the expiration of six months from the death, whichever first happens (*j*), and, except as stated below, interest from the date of the death is to be paid (*k*).

When the duty is due.

274. Where an estate includes an interest in expectancy, the estate duty in respect of that interest is to be paid, at the option of the person accountable, either with the estate duty in respect of the rest of the estate or when the interest falls into possession (*l*).

Rule as regards (1) an interest in expectancy;

The estate duty due upon an account of real property (*m*) may, at the option of the person delivering the account, be paid by eight equal yearly instalments or sixteen half-yearly instalments, with interest at the rate of 3 per cent. per annum from the date at which the first instalment is due, *i.e.*, at the expiration of twelve months from the death (*n*), and the interest on the unpaid portion of the duty is to be added to each instalment and paid accordingly, but the duty for the time being unpaid, with any interest due, may be paid at any time, and if the property is sold, is to be paid on completion of the sale, and if not so paid is duty in arrear (*o*).

(2) Real estate;

The estate duty in respect of timber trees or wood is payable on the net moneys (if any), after deducting all necessary outgoings since the death, which may from time to time be received from the sale thereof when felled, until the land on which the timber etc. is growing again becomes liable to estate duty, or would but for this

(3) Woodlands;

(*e*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 56 (1). No stamp duty is payable on any conveyance or transfer of land to the Commissioners under this provision (*ibid.*, s. 56 (2)). The provision extends also to settlement estate duty and succession duty (*ibid.*, s. 56 (1)).

(*f*) *Watherston's Trustees* v. *Lord Advocate* (1901), 38 Sc. L. R. 324.

(*g*) Finance Act, 1894 (57 & 58 Vict. c. 30).

(*h*) *Ibid.*, s. 8 (1).

(*i*) See pp. 215, 216, *post*.

(*j*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 6 (7).

(*k*) *Ibid.*, s. 6 (6); Finance Act, 1896 (59 & 60 Vict. c. 28), s. 40, Sched., Part III.; see also note (*p*), p. 223, *post*.

(*l*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 7 (6).

(*m*) For the purpose of succession duty, real property includes leaseholds for years (Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 1), but there is no similar provision in the case of estate duty, except for the specific purpose of the Finance Act, 1896 (59 & 60 Vict. c. 28), s. 15 (4); see p. 195, *ante*.

(*n*) Under the Finance Act, 1894 (57 & 58 Vict. c. 30), s. 6 (8), income tax could be deducted against the interest on the duty. This provision was repealed by the Finance Act, 1896 (59 & 60 Vict. c. 28), s. 40, Sched., Part III.

(*o*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 6 (8).

SECT. 7. Collection of the Duty.

provision have become so liable, and is to be paid as and when such moneys are received, with interest at the rate of 3 per cent. per annum from the date of receipt (*p*).

If, however, at any time the timber, trees etc., are sold, either with or apart from the land on which they are growing, the amount of estate duty on the principal value thereof which, but for the above provision, would have been payable on the death of the deceased, after deducting the amount (if any) of estate duty paid in respect of the timber etc. since that date, becomes payable (*q*).

(4) An annuity or other definite annual sum;

The estate duty due in respect of any annuity or other definite annual sum, whether terminable or perpetual, purchased or provided by the deceased (*r*), may, at the option of the person delivering the account, be paid by four equal yearly instalments, the first of which is due at the expiration of twelve months from the death, and after that period interest at 3 per cent. per annum on the unpaid duty is to be added to each instalment and paid accordingly, but the duty for the time being unpaid, with any interest due, may be paid at any time (*s*).

(5) Settled objects of national etc. interest;

The estate duty due in respect of pictures, prints, books etc. of national, scientific, historic, or artistic interest becomes payable within one month after the property is sold (*t*).

(6) Advowson or church patronage.

When an advowson or church patronage is sold or disposed of by the successor or in concert with him for money or money's worth, the estate duty due in respect of the money etc. becomes payable at the time of such disposal (*u*).

Postponement of payment where excessive sacrifice is involved in raising the duty.

275. Where the Commissioners are satisfied that the estate duty leviable in respect of any property cannot, without excessive sacrifice, be raised at once, they may allow payment to be postponed for such period, to such an extent, and on payment of such interest, not exceeding 4 per cent., or any higher interest yielded by the property, and on such terms, as they think fit (*a*).

SUB-SECT. 3.—*By whom the Duty is payable.*

(1) *Personal Property of which the Deceased was competent to dispose at his Death.*

Duty which the executor

276. The executor of the deceased is accountable for (*b*) the estate duty in respect of all personal property wheresoever

(*p*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 61 (5). The death must be after the 28th April, 1910 (*ibid.*). The value of the timber etc. is to be aggregated with the other property passing on the death of the deceased to determine the value of the estate and the rate of estate duty (*ibid.*).

(*q*) *Ibid.*, s. 61 (5) (proviso).

(*r*) *I.e.*, the annuity or annual sum indicated in the Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2 (1) (d).

(*s*) Finance Act, 1896 (59 & 60 Vict. c. 28), ss. 16, 18 (1).

(*t*) *Ibid.*, s. 20 (2); Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 63. In the case of deaths before the 30th April, 1909, where the exception from duty is restricted as stated in note (*m*), p. 202, *ante*, the estate duty is alternatively payable, in the case of a person coming into possession, or if in possession becoming competent to dispose of the property, within six months after the date thereof (Finance Act, 1896 (59 & 60 Vict. c. 28), s. 20 (2)).

(*u*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 15 (4), incorporating Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 24.

(*a*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 8 (9).

(*b*) *Ibid.*, s. 8 (3).

situate (*c*) of which the deceased was competent to dispose at his death, and is to pay it on delivering the Inland Revenue affidavit (*d*).

must pay on the Inland Revenue affidavit.

The "Executor" means the executor or administrator of a deceased person, and includes, as regards any obligation under the estate duty part of the Finance Act, 1894 (*e*), any person who takes possession of or intermeddles with the personal property of a deceased person (*f*).

The "Inland Revenue Affidavit" means the affidavit of value of the estate which is delivered in connection with an application for probate or letters of administration, with the account and schedule annexed thereto, or an affidavit correcting the same (*g*).

Duty of executor.

277. The executor is to the best of his knowledge and belief (*h*) to specify in appropriate accounts annexed to the Inland Revenue affidavit all the property in respect of which estate duty is payable (*i*) upon the death of the deceased (*k*).

Executor to furnish particulars of "other property" passing.

Where the executor does not know the amount or value of any property which has passed on the death, he may state in the Inland Revenue affidavit that such property exists, but he does not know the amount or value of it, and that he undertakes, as soon as the amount and value are ascertained, to bring in an account of it, and to pay both the duty for which he is liable,

(*c*) Accordingly, it appears to be incumbent on the executor, to the extent of the assets which he has received as such, or might but for his own neglect or default have received (Finance Act, 1894 (57 & 58 Vict. c. 30), s. 8 (3)), to pay the estate duty on the deceased's personal property locally situate out of the United Kingdom at the death, whether or not such property comes under his control. It does not, however, pass to him as executor (*Re Dixon, Penfold* v. *Dixon*, [1902] 1 Ch. 248, *per* BUCKLEY, J., at p. 251).

(*d*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 6 (2); see also *Winans* v. *A.-G.*, [1910] A. C. 27, 37. Estate duty is not a "disbursement" within the Solicitors Act, 1843 (6 & 7 Vict. c. 73), s. 37 (*Re Kingdon and Wilson*, [1902] 2 Ch. 242, C. A., overruling *Re Lamb* (1889), 23 Q. B. D. 5 (a case which related to probate duty)). Where the deceased is a Greek subject resident in Greece, and his only asset in this country consists of shares in the Ionian Bank, the bank, on paying the duty, may, without a British grant of representation, transfer the shares to any Greek subject, who in Greece, and according to Greek law, has established his right to be considered the owner of the shares (Ionian Bank (Limited) Act, 1899 (62 & 63 Vict. c. xcix.), s. 2).

(*e*) Finance Act, 1894 (57 & 58 Vict. c. 30), Part I.

(*f*) *Ibid.*, s. 22 (1) (d); compare *New York Breweries Co.* v. *A.-G.*, [1899] A. C. 62.

(*g*) *I.e.*, the affidavit made under the following enactments, namely:—Stamp Act 1815 (55 Geo. 3, c. 184), s. 38; Customs and Inland Revenue Act, 1880 (43 Vict. c. 14), s. 10; Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), ss. 29, 32; Finance Act, 1894 (57 & 58 Vict. c. 30), s. 22 (1) (n), Sched. II. As to who may administer oaths, see note (*t*), p. 216, *post*. An original Inland Revenue affidavit may not be sworn before the solicitor acting for the deponent, or before his agent, correspondent, clerk, or partner (Commissioners for Oaths Act, 1889 (52 & 53 Vict. c. 10), s. 1 (3); R. S. C., Ord. 38, rr. 16, 17).

(*h*) He must make full inquiry before deposing to the affidavit (*In the Goods of Beech* (1904), *Times*, 9th August), and must ascertain the value of the property within a reasonable time (*Re Horrex* (1910), *Times*, 9th March).

(*i*) The whole duty on the deceased's personal property is to be paid although application is being made for a grant of administration *pendente lite* only (*In the Goods of Grimthorpe* (*Baron*), *Beal* v. *Grimthorpe* (*Baron*) (1905), *Times*, 6th June and 1st and 8th August).

(*k*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 8 (3); see also *Winans* v. *A.-G.*, *supra*, *per* Lord SHAW OF DUNFERMLINE, at pp. 48, 49; and title EXECUTORS AND ADMINISTRATORS.

SECT. 7. Collection of the Duty.

and any further duty payable by reason thereof for which he is liable in respect of the other property mentioned in the affidavit (*l*).

The affidavit is to be in such form and to contain such particulars as the Commissioners may prescribe (*m*).

The Commissioners may, if they think fit, accept a statement, by or on behalf of the executor, correcting an affidavit without requiring the statement to be verified on oath (*n*).

(2) *Other Property.*

Duty which the executor may pay on the affidavit.

278. The executor of the deceased may also, on delivering the Inland Revenue affidavit, pay the estate duty in respect of any other property passing on the deceased's death which, by virtue of any testamentary disposition (*o*) of the deceased, is under his control (*p*), or, in the case of property which is not under his control, if the accountable persons request him to make such payment (*q*).

How "other property" to be accounted for.

279. Estate duty, so far as not paid by the executor, is to be collected upon an account setting forth the particulars of the property, and delivered to the Commissioners within six months after the death by the person accountable for the duty, or within such further time as the Commissioners may allow (*r*).

Form of account.

The account is to be to the best of the knowledge and belief of the accountable person (*s*), and is to be verified on oath (*t*), and by production of books and documents in the manner prescribed by the Commissioners (*a*).

The account is to be in the form, and to contain such particulars, as may be prescribed by the Commissioners, and, if required by them, is to be in duplicate (*b*).

The Commissioners may, if they think fit, accept a statement, by or on behalf of the accountable person, correcting an account, without requiring the statement to be verified on oath (*c*).

Persons accountable.

280. If the executor is not accountable for the estate duty on the property passing on the death, every person (*d*) to whom any

(*l*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 6 (3).
(*m*) *Ibid.*, s. 8 (14). If required, the affidavit is to be in duplicate (*ibid.*).
(*n*) Finance Act, 1900 (63 & 64 Vict. c. 7), s. 13 (2).
(*o*) The expression "will" includes any testamentary instrument (Finance Act, 1894 (57 & 58 Vict. c. 30), s. 22 (1) (b)).
(*p*) In his capacity as executor (*Re Meyrick, Meyrick* v. *Hargreaves*, [1897] 1 Ch. 99, *per* CHITTY, J., at p. 108).
(*q*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 6 (2).
(*r*) *Ibid.*, s. 6 (4).
(*s*) *Ibid.*, s. 8 (4).
(*t*) Oath includes affirmation and declaration (Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 3). Oaths, affirmations, and declarations, relating to duties may be made before any of the Commissioners, or any officer or person authorised by them, or before any commissioner for oaths, or any justice or notary public in the United Kingdom, or at any place elsewhere before any person duly authorised to administer oaths there (Stamp Duties Management Act, 1891 (54 & 55 Vict. c. 38), s. 24; Revenue Act, 1898 (61 & 62 Vict. c. 46), s. 7 (6)).
(*a*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 8 (14).
(*b*) *Ibid.*, s. 8 (14).
(*c*) Finance Act, 1900 (63 & 64 Vict. c. 7), s. 13 (2).
(*d*) As to the position of a mortgagor, see *Re Vernon*, [1901] 1 K. B. 297, *per* PHILLIMORE, J., at p. 307.

SECT. 7. Collection of the Duty.

property so passes for any beneficial interest in possession, and also, to the extent of the property actually received or disposed of by him, every trustee, guardian, committee or other person in whom any interest in the property so passing or the management thereof is at any time vested (*e*), and every person in whom the same is vested in possession by alienation or other derivative title, is accountable (*f*) for the estate duty (*g*).

Statement to be delivered where Commissioners believe that property passing has not been accounted for.

Every person so accountable, and every person whom the Commissioners believe to have taken possession of or administered (*h*) any part of the estate in respect of which estate duty is leviable on the deceased's death, or of the income of any part thereof, is, to the best of his knowledge and belief, if required by the Commissioners, to deliver to them, and verify on oath, a statement, in such form as may be prescribed by them, of such particulars, together with such evidence as they may require relating to any property which they have reason to believe to form part of such an estate (*i*).

Persons accountable in various cases.

281. Where the deceased was life tenant of property comprised in a settlement, and, subject to a succeeding life interest therein under such settlement, he had and exercised by his will an absolute power of appointment over the fund, the trustee of the settlement, and not the deceased appointor's representative, is accountable for the estate duty payable on the death of the deceased in respect of such property (*j*).

When objects of national, scientific, historic, or artistic interest become liable to estate duty, the person by whom or for whose benefit they are sold is accountable for the duty (*k*).

Where the sale moneys of timber etc. become liable to estate duty, the owners or trustees of the land on which the same was growing are to account for and pay the duty (*l*).

(*e*) In the case of a jointure charged on land the owner of the land is accountable for the duty (*Inland Revenue* v. *Maclachlan* (1899), 36 Sc. L. R. 727, *per* the Lord President (ROBERTSON), at p. 731). As to whether an insurance company is a person having the management of policy moneys, compare *Matthew* v. *Northern Assurance Co.* (1878), 9 Ch. D. 80.

(*f*) It has been said that an accountable person is a "debtor to the Crown" for the duty (*Berry* v. *Gaukroger*, [1903] 2 Ch. 116, C. A., *per* VAUGHAN WILLIAMS, L.J., at p. 130).

(*g*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 8 (4).

(*h*) *A.-G.* v. *Wack* (1899), *Times*, 14th June; and compare *New York Breweries Co.* v. *A.-G.*, [1899] A. C. 62. Where moneys are payable by a British insurance company to the representatives of a person dying domiciled abroad, and a grant of representation in the United Kingdom is not necessary by virtue of the provisions of the Revenue Act, 1889 (52 & 53 Vict. c. 42), s. 19, such moneys nevertheless are, *semble*, chargeable with estate duty (Finance Act, 1894 (57 & 58 Vict. c. 30), s. 1), and the duty is a charge thereon (*ibid.*, s. 9 (1)).

(*i*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 8 (5), (14).

(*j*) *Re Dixon, Penfold* v. *Dixon*, [1902] 1 Ch. 248.

(*k*) Finance Act, 1896 (59 & 60 Vict. c. 28), s. 20 (2); Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 63. In the case of deaths before the 30th April, 1909, where the exception from duty is restricted as stated in note (*m*), p. 202, *ante*, a person being in possession and competent to dispose of the settled objects is accountable for the estate duty in respect of them (Finance Act, 1896 (59 & 60 Vict. c. 28), s. 20 (2)).

(*l*) Finance (1909-10) Act, 1910 (10 Edw. 7, c, 8), s. 61 (5); see p. 213, *ante*.

SECT. 7. Collection of the Duty,

Persons not accountable.

282. A *bonâ fide* purchaser for valuable consideration without notice is not liable to or accountable for estate duty (*m*), and a person who acts merely as agent or bailiff for another person in the management of property is not accountable for any estate duty payable in respect of such property (*n*).

(3) *Limitation of Personal Liability.*

Extent of executor's liability.

283. The liability of an executor (or administrator) for the payment of estate duty is limited to the amount of the assets which he has received as executor, or might but for his own neglect or default have received (*o*).

Relief after lapse of time from settlement of account.

The limitation of personal liability to duty, in certain circumstances, after a specified lapse of time from the date of the settlement of the account in respect of which duty is payable, which obtains with regard to legacy duty (*p*) and succession duty (*q*), applies also to estate duty (*r*). In the case, however, of estate duty, an account is not regarded as "settled" until the time for the payment of the duty thereon has arrived (*s*).

There is a power also, as in the case of succession duty (*t*), to deposit with the Commissioners attested copies of certain documents which create a liability to estate duty, and to give notice of the facts which give rise to immediate claims for the duty, after the specified period from the date of which notices personal liability for the payment of the estate duty ceases (*a*).

Certificate of discharge.

284. When a person accountable for the estate duty in respect of any property passing on a death applies to the Commissioners and delivers to them and verifies a full statement, to the best of his knowledge and belief, of all property so passing and the several persons entitled thereto, the Commissioners may determine the rate of the estate duty in respect of the property for which the applicant is accountable, and on payment of the duty at that rate the applicant, so far as regards that property, is discharged from any further claim for estate duty, and the Commissioners are to give a certificate of such discharge (*b*).

(*m*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 8 (18).

(*n*) *Ibid.*, s. 8 (4).

(*o*) *Ibid.*, s. 8 (3). The term "assets" applies to personal property appointed by the will of the deceased under a general power of appointment as well as to the deceased's own personal property (*Re Fearnsides, Baines* v. *Chadwick*, [1903] 1 Ch. 250, *per* SWINFEN EADY, J., at p. 256).

(*p*) See p. 256, *post*.

(*q*) See p. 297, *post*.

(*r*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 8 (2), incorporating the Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 14.

(*s*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 8 (2).

(*t*) See p. 298, *post*.

(*a*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 8 (2), incorporating Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 13. As to the form of notice, compare the Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 15, which, however, although explanatory of s. 13 (3), is not, in terms, incorporated in the Finance Act, 1894 (57 & 58 Vict. c. 30), by s. 8 (2); see p. 298, *post*.

(*b*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 11 (2), as modified by Finance Act, 1907 (7 Edw. 7, c. 13), s. 14. Certificates are to be in such form, and to contain such particulars, as the Commissioners may prescribe (Finance Act, 1894 (57 & 58 Vict. c. 30), s. 8 (14)), and are to be issued free of charge (*ibid.*, s. 8 (15)).

The certificate does not operate as a discharge in case of fraud or failure to disclose material facts (*c*), except as regards a *bonâ fide* purchaser for valuable consideration without notice (*d*).

SUB-SECT. 4.—*Out of what Property the Duty is payable.*

(1) *Property which passes to the Executor as such.*

The deceased's personal estate.

285. The estate duty payable in respect of the deceased's personal estate in this country (*e*), including any leasehold property forming part of it (*f*), passing or deemed to pass on his death, which the executor as such (*g*) is liable to pay, is payable out of the residue (*h*) of such personal estate (*i*), and, consequently, is not a specific charge upon the individual assets.

Personal property appointed in exercise of a general power.

Personal property which a deceased person appoints by his will, in exercise of a general power for that purpose, constitutes property passing to his executor as such, and the duty in respect of it is, accordingly, payable by him out of the testator's general

(*c*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 11 (3).

(*d*) *Ibid.*, s. 11 (4).

(*e*) Foreign personal property does not pass to the executor as such (*Re Dixon, Penfold* v. *Dixon*, [1902] 1 Ch. 248, *per* BUCKLEY, J., at p. 251).

(*f*) *Re Culverhouse, Cook* v. *Culverhouse*, [1896] 2 Ch. 251; and compare *Re Fish, Lea* v. *Fish* (1897), 103 L. T. Jo. 267.

(*g*) Compare *Re Hadley, Johnson* v. *Hadley*, [1909] 1 Ch. 20, C. A.

(*h*) Compare *De Quetteville* v. *De Quetteville*, [1905] W. N. 130, C. A., where the general residue was insufficient to satisfy the duty. Where the residuary personal estate is insufficient, a specific bequest does not exonerate real estate taken by the heir (*Re Pullen, Parker* v. *Pullen*, [1910] 1 Ch. 564). A legacy out of personal estate, given "subject to death duties," other legacies being given free of duty, is not subject to its rateable proportion of the estate duty in respect of the personal estate (*Re Morrison, Morrison* v. *Morrison* (1910), 102 L. T. 530). A direction in a will made before the Finance Act, 1894 (57 & 58 Vict. c. 30), where the testator died after that Act, that the probate duty attributable to a legacy of Consols was to be paid thereout does not cover estate duty (*Re Boxer, Morris* v. *Woore*, [1910] 2 Ch. 69).

(*i*) *Re Webber, Gribble* v. *Webber*, [1896] 1 Ch. 914; and compare *Re Bourne, Martin* v. *Martin*, [1893] 1 Ch. 188. The estate duty in respect of a deceased person's personal estate is a "testamentary expense" (*Re Clemow, Yeo* v. *Clemow*, [1900] 2 Ch. 182; *Re Pullen, Parker* v. *Pullen, supra*), and where the deceased directs payment of his testamentary expenses, the duty falls to be paid out of the particular fund to which the direction refers (*Re Clemow, Yeo* v. *Clemow, supra*), and is to be paid out of the assets in the same order as other testamentary expenses (*Re Pullen, Parker* v. *Pullen, supra*). Estate duty in respect of the bequest of a personal annuity secured by a first charge on specific real property is also a "testamentary expense" (*Re Trenchard, Trenchard* v. *Trenchard*, [1905] 1 Ch. 82). But the estate duty in respect of settled personal estate passing on the deceased's death, over which, expectant upon the death of a succeeding life tenant, the deceased had, and exercised by will, a general power of appointment, is not a "testamentary expense" (*Re Dixon, Penfold* v. *Dixon, supra*). Where on the death of a deceased person his executors have to satisfy a covenant debt for which, under the Finance Act, 1894 (57 & 58 Vict. c. 30), s. 7 (1) (a), allowance in determining the value of the estate cannot be made, the estate duty payable in respect of his estate, without allowance for the debt, falls to be satisfied out of his residuary estate, and, except there is a deficiency of assets, no portion of it, apart from express direction, can be deducted against the amount due under the covenant (*Re Gray, Gray* v. *Gray*, [1896] 1 Ch. 620; *Re Chisholm, Goddard* v. *Brodie*, [1902] 1 Ch. 457). Where the debt was charged upon specific property, see *Alexander's Trustees* v. *Alexander's Marriage-Contract Trustees* (1910), 47 Sc. L. R. 537.

SECT. 7. Collection of the Duty.

personal estate, and is not a specific charge upon the appointed property (*k*).

(2) *Other Property.*

Duty a first charge on such property.

286. Where property in respect of which estate duty is leviable does not pass to the executor as such (*l*), a rateable part of the duty, in proportion to the value of the property, is a first charge (*m*) on such property, except as against a *bonâ fide* purchaser of it for valuable consideration without notice (*n*).

Inalienable property.

Where lands or chattels are so settled by Act of Parliament or royal grant that no person is capable of alienating them, and the property passing is the interest of the successor (*o*), the duty is payable thereout (*p*).

Inter vivos gifts.

Inter vivos gifts also bear their own charge of estate duty (*q*).

Evidence of the amount of the charge.

287. On an application submitting in the prescribed form the description of the lands or other subjects of property, and of the debts and incumbrances allowed by them in assessing the value of the property for the purpose of estate duty, the Commissioners are

(*k*) *Re Hadley, Johnson* v. *Hadley*, [1909] 1 Ch. 20, C. A., upholding *Re Moore, Moore* v. *Moore*, [1901] 1 Ch. 691; *Re Dixon, Penfold* v. *Dixon*, [1902] 1 Ch. 248; *Re Fearnsides, Baines* v. *Chadwick*, [1903] 1 Ch. 250; *Re Creed, Thomas* v. *Hudson*, [1905] W. N. 94; *Re Orlebar, Wynter* v. *Orlebar*, [1908] 1 Ch. 136; and overruling *Re Treasure, Wild* v. *Stanham*, [1900] 2 Ch. 648; *Re Maddock, Llewelyn* v. *Washington*, [1901] 2 Ch. 372; *Re Power, Re Stone, Acworth* v. *Stone*, [1901] 2 Ch. 659; and *Re Dodson* (*P.*), *Re Dodson* (*A. L. P.*), *Gibson* v. *Dodson*, [1907] 1 Ch. 284.

(*l*) Real estate which becomes vested in the deceased's personal representative under the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), does not pass to the executor "as such" (*Re Palmer, Palmer* v. *Rose-Innes*, [1900] W. N. 9; *Re Sharman, Wright* v. *Sharman*, [1901] 2 Ch. 280). The Land Transfer Act, 1897 (60 & 61 Vict. c. 65), does not affect any duty payable in respect of real estate, or impose on real estate any other duty than was then payable in respect thereof (*ibid.*, s. 5).

(*m*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 9 (1). As regards real property, the duty is a charge upon it whether the death occurred before or after the Land Transfer Act, 1897 (60 & 61 Vict. c. 65) (*Re Palmer, Palmer* v. *Rose-Innes*, [1900] W. N. 9; *Re Sharman, Wright* v. *Sharman*, [1901] 2 Ch. 280); and it is not, in either case, a testamentary expense (*Re Palmer, Palmer* v. *Rose-Innes, supra; Re Jolley, Neal* v. *Jolley* (1901), 17 T. L. R. 244; *Re Sharman, Wright* v. *Sharman, supra; Re Spencer Cooper, Poë* v. *Spencer Cooper*, [1908] 1 Ch. 130). As to real estate converted in equity, re-converted in the deceased's lifetime, and passing on his death as real estate, see *Re Grimthorpe (Lord), Beckett* v. *Grimthorpe (Lord)*, [1908] 1 Ch. 666. The charge of duty upon property is not affected by the fact that a sum sufficient to pay and discharge the estate duty may have been bequeathed by a testator to the successor to the property (*Mexborough (Earl)* v. *Savile* (1903), 88 L. T. 131, H. L.).

(*n*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 9 (1). Marriage settlement trustees are purchasers for valuable consideration for this purpose (*Morris* v. *Morris's Trustees* (1904), 11 Scots Law Times, 793); see also note (*g*), p. 301, *post*.

(*o*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 5 (5).

(*p*) *Re Bolton Estates Act*, 1863, [1904] 2 Ch. 289.

(*q*) Compare *Re Beddington, Micholls* v. *Samuel*, [1900] 1 Ch. 771, *per* BYRNE, J., at p. 773. In the case of account duty in respect of gifts made by persons dying after the 31st May, 1881, and before the 2nd August, 1894, the duty was also payable by the donee, and not out of the donor's estate (*Re Foster, Thomas* v. *Foster*, [1897] 1 Ch. 484).

to grant a certificate (*r*) of the estate duty paid in respect of the property, and to specify the debts and incumbrances so allowed, as well as the lands or other subjects of property in respect of which the payment was made (*s*).

Subject to any repayment (*t*) of estate duty arising from want of title to the property, or from the existence of any debt or incumbrance thereon for which an allowance ought to have been but has not been made, or from any other cause, the certificate so granted is conclusive evidence that the amount of duty named therein is a first charge (*a*) on the lands or other subjects of property after the debts and incumbrances have been allowed (*b*).

Refund of duty paid by (1) executor;

288. If the rateable part of the estate duty in respect of any property is paid by the executor, it is, where occasion requires, to be repaid to him by the trustees or owners of the property, but if the duty is in respect of real property, it may, unless otherwise agreed upon, be repaid by the same instalments (*c*), and with the same interest, as have been mentioned (*d*).

(2) person having a limited interest only in the property.

If a person who has a limited interest in any property pays the estate duty in respect thereof, he is entitled to the like charge as if the estate duty in respect of that property had been raised by means of a mortgage to him (*e*).

Exception to the charge.

289. Estate duty, though leviable, is not a charge upon any property while situate in a British Possession (*f*).

(3) *Apportionment of Duty.*

Apportionment as between owner of property and person entitled to a charge upon it.

290. Where property does not pass to the executor as such, an amount equal to the proper rateable part of the estate duty paid in respect of any property by a person authorised or required to pay it, may be recovered by him from the person entitled to any sum charged on the property (whether as capital or as an annuity or otherwise) (*g*)

(*r*) See note (*b*), p. 218, *ante*.

(*s*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 9 (2).

(*t*) Any such repayment is to be made to the person producing the certificate (*ibid.*, s. 9 (3)).

(*a*) Compare *Laurie, Petitioner* (1898), 35 Sc. L. R. 496, *per* the Lord Ordinary (PEARSON), at p. 498.

(*b*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 9 (3).

(*c*) *Ibid.*, s. 6 (8).

(*d*) *Ibid.*, s. 9 (4); see p. 213, *ante*.

(*e*) *Ibid.*, s. 9 (6); *Lord Advocate* v. *Moray* (*Countess*), [1905] A. C. 531. But not as against purchasers for valuable consideration without notice (*Morris* v. *Morris's Trustees* (1904), 12 Scots Law Times, 612). The life tenant is entitled to a mortgage in fee, and not merely to a terminable rentcharge (*Turnbull* v. *Turnbull* (1910), 47 Sc. L. R. 668). Compare *Re Hole, Davies* v. *Witts*, [1906] 1 Ch. 673, C. A. (estate duty on a lunatic's real estate paid out of his personal estate by his committee); and see note (*n*), p. 220, *ante*.

(*f*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 20 (2).

(*g*) It is intended that the duty should fall upon the beneficiaries in the proportion of their respective interests; see *Re Orford* (*Countess*), *Cartwright* v. *del Balzo* (*Duc*), [1896] 1 Ch. 257, *per* NORTH, J., at p. 263; see also *Re Power, Power* v. *Howell* (1898), 47 W. R. 183; *Re Chisholm, Goddard* v. *Brodie*, [1902] 1 Ch. 457; *Berry* v. *Gaukroger*, [1903] 2 Ch. 116, C. A.; *Cope* v. *Breslin*, [1903] 1 I. R. 418; *Re Hacket, Hacket* v. *Gardiner*, [1907] 1 Ch. 385; *Alexander's Trustees* v. *Alexander's Marriage-Contract Trustees* (1910), 47 Sc. L. R. 537; and

SECT. 7. **Collection of the Duty.**

under a disposition not containing any express provision (*h*) to the contrary (*i*).

The person from whom the rateable part of the estate duty can be recovered is bound by the accounts and valuations as settled between the person entitled to recover the same and the Commissioners (*k*).

Dispute as to apportionment.

Any dispute as to the proportion of estate duty to be borne by any property or person may be determined upon application by any person interested, in the manner directed by rules of court, either by the High Court (*l*) or, where the amount in dispute is less than £50, by a county court (*m*) for the county or place in which the person recovering the same resides or the property in respect of which the duty is paid is situate (*n*).

compare *Re Meyrick, Meyrick* v. *Hargreaves*, [1897] 1 Ch. 99, and *Wade* v. *Wade*, [1898] 2 Ch. 276. As to estates in dower, compare *Ross* v. *Ross' Trustees* (1901), 9 Scots Law Times 340.

(*h*) A direction to pay a jointure "free from any deduction whatever, except income tax," shifts the charge of estate duty (*Re Parker-Jervis, Salt* v. *Locker*, [1898] 2 Ch. 643). So also do directions (1) to pay a jointure "free from all taxes and deductions, except property tax and legacy or succession duty" (*Re Fitzhardinge (Lord), Fitzhardinge (Lord)* v. *Jenkinson* (1899), 80 L. T. 376, C. A.; (2) to pay an annuity "without any deduction except for legacy duty or income tax" (*Re Rayer, Rayer* v. *Rayer*, [1903] 1 Ch. 685); and (3) to pay "my duties" out of residuary estate (*Re Pimm, Sharpe* v. *Hodgson*, [1904] 2 Ch. 345). *Secus*, where there were directions (4) to pay a "legacy" out of the proceeds of the sale of real estate (*Berry* v. *Gaukroger*, [1903] 2 Ch. 116, C. A.); (5) to raise "such sums as may be required to pay all . . . succession duties which may fall upon [the wife] after my decease" (*Fraser* v. *Croft* (1898), 25 R. (Ct. of Sess.) 496); and (6) to pay "the necessary expenses connected with this trust" out of a particular share (*Michie's Executors* v. *Michie* (1905), 42 Sc. L. R. 386).

A direction to pay out of residuary estate "all estate and other duties other than settlement estate duties" does not include the estate duty payable in respect of real property comprised in a voluntary conveyance made by the testator within twelve months of his death (*Re Baxter, Baxter* v. *Baxter* (1898), 42 Sol. Jo. 611).

Where a mortgage on Blackacre is directed to be paid out of Whiteacre, the case is not within the Finance Act, 1894 (57 & 58 Vict. c. 30), s. 14 (1), and the estate duty is to be paid without regard to such direction (*Re Stamford and Warrington (Earl), Payne* v. *Grey*, [1910] 2 Ch. 83).

(*i*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 14 (1). Where, under the exercise of a power of appointment over property, which does not pass to the executor as such, sums of "clear amount or value" and "like amount or value" are appointed, the duty in respect of such sums is payable out of the residue of the appointed property (*Re Coxwell's Trusts, Kinloch-Cooke* v. *Public Trustee*, [1910] 1 Ch. 63). Where, however, the appointed sums are of specific amounts, they bear their proper rateable proportions of the duty (*ibid.*; see also *Re Chisholm, Goddard* v. *Brodie*, [1902] 1 Ch. 457). And it is so, also, where the appointment is of sums of "cash value" (*Kekewich* v. *Kekewich* (1909), 101 L. T. 887). In the case of account duty, where the death was after the 31st May, 1881, and before the 2nd August, 1894, appointees of specific sums, in the absence of any express provision to the contrary, bore the duty rateably (*Re Croft, Deane* v. *Croft*, [1892] 1 Ch. 652; *Re Shaw, Tucket* v. *Shaw*, [1895] 1 Ch. 343).

(*k*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 14 (3).

(*l*) R. S. C., Ord. 54, r. 4B, and App. K, No. 1A; Ord. 55, r. 9c; see title PRACTICE AND PROCEDURE.

(*m*) County Court Rules, 1903, Ord. 42, r. 12. Compare County Courts Act, 1903 (3 Edw. 7, c. 42), s. 3. See title COUNTY COURTS, Vol. VIII., pp. 648 *et seq.*

(*n*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 14 (2).

(4) *Powers to raise the Duty.*

Mode of raising the duty.

291. For the purpose of paying the estate duty, or of raising the amount thereof when already paid, a person authorised or required to pay the duty in respect of any property (*o*) has power, whether the property is or is not vested in him, to raise the amount of such duty, and any interest (*p*) and expenses (*q*) properly paid or incurred by him in respect thereof, by the sale (*r*), or mortgage (*s*), or a terminable charge on such property, or any part of it (*t*).

Application of capital moneys in a settlement.

Any money arising from the sale of property comprised in a settlement, or held upon trust to lay out upon the trusts of a settlement, and capital money arising under the Settled Land Act, 1882 (*a*), may be expended in paying any estate duty in respect of property comprised in the settlement and held upon the same trusts (*b*).

(5) *Limitation of the Charge of Duty.*

As against purchasers and mortgagees.

292. The limitation of the charge of estate duty on property, in the case of purchasers for valuable consideration, and mortgagees, after specified lapses of time from certain events, which obtains with regard to succession duty (*c*), applies also to estate duty (*d*).

(*o*) This applies to all property passing, whether "free property" of the testator or not (*Berry* v. *Gaukroger*, [1903] 2 Ch. 116, C. A., *per* VAUGHAN WILLIAMS, L.J., at p. 130).

(*p*) In the case of settled property the tenant for life would appear, in general, to be personally liable for the payment of interest on the duty (*Re Howe's (Earl) Settled Estates, Howe (Earl)* v. *Kingscote*, [1903] 2 Ch. 69, C. A.); *secus*, in the case of the interest from the date of the death up to the delivery of the affidavit or account, or the expiration of six months after the death, whichever first happened, which, under the Finance Act, 1894 (57 & 58 Vict. c. 30), s. 6 (6) (repealed as to the provision in question by the Finance Act, 1896 (59 & 60 Vict. c. 28), s. 40, and Sched., Part III.), was to form part of the estate duty (*Re Fish, Lea* v. *Fish* (1897), 103 L. T. Jo. 267).

(*q*) *I.e.*, expenses incurred in paying the duty; see *Harris's Trustees* v. *Harris* (1904), 41 Sc. L. R. 357, 358. As to the charging of expenses upon Scottish heritable property under the cognate provision in the Finance Act, 1894 (57 & 58 Vict. c. 30), s. 23 (18), see *Mackechnie, Petitioner* (1898), 6 Scots Law Times, 242; *Menzies, Petitioner* (1903), 10 Scots Law Times, 636; and compare *Laurie, Petitioner* (1898), 35 Sc. L. R. 496. With regard to the rateable apportionment of the costs of raising the duty on funds in a marriage settlement, as between the appointees of capital sums and of the residue, see *Re Chisholm, Goddard* v. *Brodie*, [1902] 1 Ch. 457.

(*r*) The court made an order for sale in the Scottish case of *Mackechnie, Petitioner, supra*, under the cognate provision in the Finance Act, 1894 (57 & 58 Vict. c. 30), s. 23 (18) (a).

(*s*) *Harris's Trustees* v. *Harris* (1904), 41 Sc. L. R. 357.

(*t*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 9 (5). As to payment of estate duty out of a fund in court, see Supreme Court Fund Rules, 1905, rr. 20, 52 (b), 66; County Court Rules, 1903, Ord. 2, r. 14; see title COUNTY COURTS, Vol. VIII., p. 500.

(*a*) Settled Land Act, 1882 (45 & 46 Vict. c. 38).

(*b*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 9 (7).

(*c*) See p. 301, *post*.

(*d*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 8 (2), incorporating Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 12. As to the charge of duty in general remaining until the duty has been paid, see *Re Jolley, Neal* v. *Jolley* (1901), 17 T. L. R. 244, *per* JOYCE, J., at p. 245. The charge of duty is an "equitable charge" within the Real Estate Charges Act, 1877 (40 & 41 Vict. c. 34), s. 1 (*Re Bowerman, Porter* v. *Bowerman*, [1908] 2 Ch. 340).

SECT. 7. **Collection of the Duty.**

Certificate of discharge of the property.

The Commissioners, on being satisfied that the full estate duty has been or will be paid in respect of an estate or any part thereof, are, if required by the person accounting for the duty, to give a certificate (*e*) to that effect, and such certificate discharges from any further claim for estate duty the property shown by the certificate to form the estate or part thereof (*f*).

Where a person accountable for the estate duty in respect of any property passing on a death proceeds in the manner elsewhere stated (*g*), the property, as well as the applicant, is discharged from any further claim for estate duty (*h*).

The certificate of the Commissioners, in the case of the property as in the case of the applicant, does not operate as a discharge in case of fraud or failure to disclose material facts (*i*), except as regards a *bonâ fide* purchaser for valuable consideration without notice (*k*).

SUB-SECT. 5.—*Remission of Duty and Interest.*

Power to remit.

293. The Commissioners and the Treasury, respectively, have, as already stated (*l*), certain powers to remit estate duty and interest thereon.

SUB-SECT. 6.—*Commutation of Duty and Composition of Claims.*

Commutation of future claims.

294. The Commissioners, in their discretion (*m*), upon application by a person entitled to an interest in expectancy, may, by means of

(*e*) See note (*b*), p. 218, *ante*.

(*f*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 11 (1). As to a certificate that property may be registered under the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), without notice of any liability to the Crown for any death duty (see *ibid.*, s. 13), by reason of a death, see the Land Transfer Rules, 1903 (Statutory Rules and Orders Revised, Vol. VII., Land (Registration) England, pp. 33, 68, 69), rr. 208—211). Applicants for a certificate under r. 210 (b) should fill in the official form No. 0500 in duplicate, and transmit it to the Estate Duty Office. The certificate, if it can be issued, will be placed upon one copy of the application; and see note (*b*), p. 218, *ante*.

(*g*) See p. 218, *ante*.

(*h*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 11 (2), as modified by Finance Act, 1907 (7 Edw. 7, c. 13), s. 14.

(*i*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 11 (3).

(*k*) *Ibid.*, s. 11 (4).

(*l*) See p. 182, *ante*.

(*m*) It is the practice to commute future claims for estate duty in those cases only in which the property is being so dealt with as to render it desirable to free it from the charge of duty. The application should disclose the dealings with the property, which is the subject of the application, and should set forth the circumstances which are regarded as sufficient to warrant the commutation. It should also contain the following particulars, namely: (1) a full description of the property, and also, as regards real estate and leaseholds, the gross annual value and the gross amount for which the property has been contracted to be sold, or the gross amount for which it is being mortgaged; (2) the title to the property, including, if derived under a will, the name of the testator, the date of his death, and the date and place of probate, and, if under a deed, the date thereof (if the deed has not hitherto been noted in the Estate Duty Office, the deed, or a copy of it, should accompany the application); and (3) the date of birth of the tenant for life or the annuitant in connection with whose death the presumptive claim is considered to be outstanding, and also the date of birth of the remainderman.

If there is no objection to the commutation, the applicants are notified accordingly, and appropriate forms of account are forwarded with the notification. Every agreement to commute is made subject to the reservation

SECT. 7. Collection of the Duty.

a present payment, commute the estate duty presumptively payable in respect of that interest (*n*).

In arriving at the present value to be set upon the duty, the contingencies affecting the liability to, and the rate and amount of, the duty, are to be taken into consideration, and the rate of interest is to be reckoned at 3 per cent. (*n*).

When the duty agreed to be accepted by way of commutation has been paid, the Commissioners are to give a certificate (*o*) of discharge accordingly (*p*).

Power to compound.

The Commissioners, as already stated (*q*), have certain powers to compound for estate duty.

SECT. 8.—*Interest, Penalties, and Proceedings.*

SUB-SECT. 1.—*Interest.*

Rate of interest payable.

295. Simple interest at the rate of 3 per cent. per annum (*r*), without deduction for income tax (*s*), is payable upon all estate duty from the date of the death of the deceased, except where the duty is payable by instalments (*t*), or becomes due at any date later than six months after the death, in which case interest commences to run from the date at which the first instalment of the duty, or the whole duty, as the case may be, becomes due (*a*).

How recoverable.

Interest is recoverable in the same manner as if it were part of the duty (*b*).

Small estates.

Where the fixed estate duty of 30*s*. or 50*s*. is paid within twelve months after the death of the deceased, interest on such duty is not chargeable (*c*).

SUB-SECT. 2.—*Penalties.*

On executors and other accountable persons.

296. Any person who wilfully fails to comply with any of the foregoing provisions as to the delivery of an Inland Revenue affidavit, an account or statement, in the manner prescribed by the Commissioners, or as to the production of books, documents, or

(1) that the life tenant or annuitant is in ordinary good health, and (2) that the commuted sum for duty is paid in his or her lifetime, and forthwith.

(*n*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 12. Where a life interest in a fund in court has been released in favour of the remainderman, and the Commissioners deem the case not one for commutation, it appears to be necessary for a sufficient sum to be retained in court to satisfy any claim for estate duty which may arise under the Finance Act, 1900 (63 & 64 Vict. c. 7), s. 11 (1), as amended by the Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 59 (1) (*Taylor* v. *Poncia*, [1901] W. N. 87); see also note (*r*), p. 254, *post*.

(*o*) See note (*b*), p. 218, *ante*.

(*p*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 12.

(*q*) See p. 181, *ante*.

(*r*) Formerly 4 per cent. (Finance Act, 1894 (57 & 58 Vict. c. 30), s. 8 (10), incorporating Inland Revenue Act, 1868 (31 & 32 Vict. c. 124), s. 9); see also note (*p*), p. 223, *ante* (interest which forms part of duty).

(*s*) See note (*n*), p. 213, *ante*.

(*t*) No discount is allowable where the whole estate duty payable by instalments, though not actually due, is paid within the twelve months subsequent to the death.

(*a*) Finance Act, 1896 (59 & 60 Vict. c. 28), s. 18 (1).

(*b*) *Ibid.*

(*c*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 16 (5).

SECT. 8. Interest, Penalties, and Proceedings.

evidence required by them, is liable to pay £100, or a sum equal to double the amount of the unpaid duty for which he is accountable, as the Commissioners may elect (*d*).

Reduction of penalty.

The Commissioners have power to reduce the penalty, and it may be reduced by the court if proceedings (*e*) are taken for its recovery (*f*).

SUB-SECT. 3.—*Proceedings.*

Existing law and practice as on the 2nd August, 1894.

297. The law and practice existing at the time of the imposition of the estate duty relative to the recovery of any of the death duties are, subject to the provisions of the Finance Act, 1894 (*g*), and so far as the same are applicable, to apply, as if in terms made applicable, to the recovery of the estate duty (*h*).

Appointment of a receiver of the property.

Where any proceeding is instituted for the recovery of the estate duty in respect of any property, the High Court has jurisdiction to appoint a receiver of the property and the rents and profits thereof, and to order a sale of the property (*i*).

British Possession.

The Commissioners are not authorised to take proceedings in a British Possession for the recovery of any estate duty (*j*).

Appeal from the decision of the Commissioners.

298. Any person aggrieved by the decision of the Commissioners with respect to the repayment of any excess of duty, or by the amount of duty claimed by them, whether on the ground of the value of any property (not being real or leasehold (*k*)), or the rate charged, or otherwise, may, on payment of the duty claimed by the Commissioners, or such portion of it as is then payable by him, or on giving security for it, appeal to the High Court to determine the amount of duty payable (*l*).

Conditions as to appeal.

The appeal must be made within the time, and in the manner, and on the conditions, directed by rules of court (*m*).

Costs and leave of further appeal.

The costs of the appeal are to be in the discretion of the court, and no appeal from any order, direction, determination, or decision of the court is to be allowed except with the leave of the High Court or Court of Appeal (*n*).

Where the High Court is satisfied that it would impose

(*d*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 8 (6), (14).

(*e*) See Inland Revenue Regulation Act, 1890 (53 & 54 Vict. c. 21), ss. 21 *et seq.*

(*f*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 8 (6). The acceptance of interest by the Commissioners is tantamount to a waiver of penalties (Finance Act, 1896 (59 & 60 Vict. c. 28), s. 18 (1); Inland Revenue Act, 1868 (31 & 32 Vict. c. 124), s. 9).

(*g*) 57 & 58 Vict. c. 30.

(*h*) *Ibid.*, s. 8 (1). See pp. 260, 303, 317, *post;* and title CROWN PRACTICE, Vol. X., p. 20. An order for attachment will be made for non-compliance with a writ (*Re Horrex* (1910), *Times*, 9th March).

(*i*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 8 (13).

(*j*) *Ibid.*, s. 20 (2).

(*k*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 60 (3).

(*l*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 10 (1), which, prior to the Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 60 (3), extended also to real and leasehold property.

(*m*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 10 (1); R. S. C. (Finance Act), 1895; see title PRACTICE AND PROCEDURE.

(*n*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 10 (2), (3).

hardship to require the appellant, as a condition of an appeal, to pay the duty claimed by the Commissioners, or such portion of it as is then payable by him, it may allow the appeal to be brought without payment of any of the duty, or upon payment of such part only thereof as to the court seems reasonable, provided that security, satisfactory to the court, is given for the whole or any part of the duty which remains unpaid (*o*).

Hardship involved in payment of whole duty.

If the court determines the amount of duty payable to be less than the amount paid, the difference is to be returned (*p*), and the court may order interest at the rate of 3 per cent. per annum for such period as appears to the court to be just to be paid by the Commissioners on the amount of duty to be returned (*q*).

Court may order interest to be paid (1) by the Commissioners;

On the other hand, if on the ground of hardship an appeal is allowed to proceed without payment of the whole of the duty claimed by the Commissioners, the court may order interest at the rate of 3 per cent. per annum to be paid upon any unpaid duty which the court determines to be payable (*r*).

(2) by the appellant.

Where the value of the property in respect of which the dispute arises does not, as alleged by the Commissioners, exceed £10,000, the appeal may be to the county court for the county or place in which the appellant resides or the property is situate (*s*).

When appeal may be made to county court.

For the purpose of the appeal, the above provisions are to apply as if the county court were the High Court (*t*), but in every case which comes before the county court, any party has a right of appeal to the Court of Appeal (*a*).

Appeal from decision of county court.

In the case of real or leashold property, the appeal of any person aggrieved by the decision of the Commissioners as to the value of any such property is to be referred, in accordance with rules, to a referee appointed for the purpose of appeals in connection with the duties on land values (*b*). Any person aggrieved by the decision of the referee may appeal against the decision to the court (*c*).

Appeal against the value placed by the Commissioners upon real or leasehold property.

Such appeals to the court are to be in accordance with the above provisions affecting property other than real or leasehold property, save that appeals to the county court can only be made where the value as alleged by the Commissioners of the property in respect of which the dispute arises does not exceed £500 (*c*).

299. The county council of every county or county borough in Great Britain may from time to time appoint qualified persons to act as valuers under the Finance Act, 1894 (*d*), in their respective

Appointment of valuers.

(*o*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 10 (4).
(*p*) *Ibid.*, s. 10 (1).
(*q*) *Ibid.*, s. 10 (3); see *Sprot's Trustees* v. *Lord Advocate* (1903), 10 Scots Law Times, 452.
(*r*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 10 (4).
(*s*) *Ibid.*, s. 10 (5). The form of procedure is indicated in the County Court Rules, Ord. 42; see title COUNTY COURTS, Vol. VIII., p. 649.
(*t*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 10 (5).
(*a*) Finance Act, 1896 (59 & 60 Vict. c. 28), s. 22.
(*b*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), ss. 33, 34, 60 (3). See Land Values (Reference) Rules, 1910, dated 25th July, 1910 (Stat. R. & O. 1910, No. 859, L. 22).
(*c*) *Ibid.*, s. 33 (4) (proviso), applying Finance Act, 1894 (57 & 58 Vict. c. 30), s. 10 (2), (3), (4).
(*d*) Finance Act, 1894 (57 & 58 Vict. c. 30).

SECT. 8. Interest, Penalties, and Proceedings.

counties, and are to fix a scale of charges for their remuneration, and the court may refer any question of disputed value, except as to real or leasehold property (*e*), to the arbitration of any person so appointed for the county in which the appellant resides or the property is situate (*f*).

The costs of the arbitration are to be part of the costs of the appeal (*f*).

SECT. 9.—*Repayment of Overpaid Duty.*

Existing law and practice as on the 2nd August, 1894.

300. The law and practice, existing at the time of the imposition of the estate duty, relating, in matters of procedure (*g*), to the repayment of any of the death duties are, as in the case of the recovery of estate duty (*h*), and to the same extent, applied to the repayment of estate duty (*i*).

Commissioners to refund duty paid in excess.

Where it is proved to the satisfaction of the Commissioners that too much estate duty has been paid, the excess is to be repaid by them, and where the over-payment was due to an over-valuation by them, the repayment is to be with interest at 3 per cent. per annum (*k*).

Part III.—Settlement Estate Duty.

SECT. 1.—*The Imposition of the Duty.*

Further estate duty on settled property.

301. Settlement estate duty (*l*) is a further estate duty (*m*), and is leviable on the principal value (*n*) of settled property (*o*), with certain express exceptions (*p*), in respect of which estate duty is leviable (*q*).

(*e*) *Semble*, compare Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 60 (3).

(*f*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 10 (6).

(*g*) *Watherston's Trustees* v. *Lord Advocate* (1901), 38 Sc. L. R. 324.

(*h*) See p. 226, *ante*.

(*i*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 8 (1).

(*k*) *Ibid.*, s. 8 (12); see *Sprot's Trustees* v. *Lord Advocate* (1903), 10 Scots Law Times, 452. Except as stated here and at p. 227, *ante*, there is no statutory obligation on the Commissioners to allow interest. Interest is only payable by statute or contract (*Re Gosman* (1881), 17 Ch. D. 771, C. A.).

(*l*) Finance Act, 1894 (57 & 58 Vict. c. 30), ss. 5 (1), (4), (5), 16 (3), 21 (4); Finance Act, 1896 (59 & 60 Vict. c. 28), s. 19 (1), (2); Finance Act, 1898 (61 & 62 Vict. c. 10), s. 14; Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), ss. 54, 56 (1). The Finance Act, 1894 (57 & 58 Vict. c. 30), s. 23, contains provisions affecting Scotland exclusively.

(*m*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 5 (1) (a).

(*n*) As to fractional parts of £10 in the principal value, where the deceased died before the 1st July, 1896, and of £100, where the deceased died after the 30th June, 1896, and before the 9th April, 1900, see note (*l*), p. 206, *ante*.

(*o*) See p. 184, *ante*. Property is not "settled" for this purpose where it is limited to the same person for different interests (*Lord Advocate* v. *Wood's Trustees* (1910), 53rd Report of Commissioners of Inland Revenue, 50).

(*p*) See p. 230, *post*.

(*q*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 5 (1) (first branch). The *ratio* for settlement estate duty is that it affords some compensation, where property is settled, for the immunity of the property from a second estate duty when the life tenant dies (*Lord Advocate* v. *Stewart's Trustees* (1899), 36 Sc. L. R. 291, *per* Lord STORMONTH DARLING, at p. 299).

SECT. 2.—*Settled Property.*

SECT. 2. Settled Property.

302. The property must either have been settled by the deceased's will, or, if settled by some other disposition, must pass thereunder on his death to some person not competent to dispose of it (*r*).

Passing to a person not competent to dispose.

If property which has been settled by the deceased's will passes to a person whose competency to dispose of it is only exercisable in a particular event, settlement estate duty is leviable (*s*).

An immediate gift of property *inter vivos*, by way of settlement, excluding the donor, made by him within three years (*t*) of his death, involves the liability to settlement estate duty (*u*). The property so given is deemed to pass on the donor's death under the disposition by which the settlement is effected (*x*).

Gifts *inter vivos*.

303. Property comprised in a contingent settlement is to be regarded as settled property (*y*); and not the less so where, by the same instrument, there is a prior disposition of the same property, the continuance of which would exclude the contingent settlement altogether (*z*).

Contingent settlements.

Where, however, after payment of the settlement estate duty, it is shown that the contingency has not arisen, and cannot arise, the duty is repayable (*a*).

Repayment where contingency does not arise.

304. Where an annuity is bequeathed by the deceased's will, and a capital sum is directed to be set apart to yield it, such sum is to be regarded as settled property, and settlement estate duty is leviable (*b*).

Annuity fund.

(*r*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 5 (1) (first branch).

(*s*) *Lord Advocate* v. *Stewart's Trustees* (1899), 36 Sc. L. R. 297, 300. It is not clearly leviable where the competency is exercisable in any event. That it is leviable, see *Re Palmer, Palmer* v. *Rose-Innes*, [1900] W. N. 9; but compare, *contra*, *A.-G.* v. *Owen*, *A.-G.* v. *Coulson*, [1899] 2 Q. B. 253, *per* GRANTHAM, J., at p. 262.

(*t*) Formerly twelve months; see note (*k*), p. 188, *ante*.

(*u*) *A.-G.* v. *Chamberlain* (1904), 90 L. T. 581; *A.-G.* v. *Smyth*, [1905] 2 I. R. 553; *H. M. Advocate* v. *Heywood-Lonsdale's Trustees* (1906), 43 Sc. L. R. 529; *Inland Revenue* v. *Heywood-Lonsdale's Trustees* (1906), 43 Sc. L. R. 589.

(*x*) *Inland Revenue* v. *Heywood-Lonsdale's Trustees*, *supra*, *per* the Lord Ordinary (JOHNSTON), at p. 591.

(*y*) *A.-G.* v. *Fairley*, [1897] 1 Q. B. 698. In *A.-G.* v. *Clarkson*, [1900] 1 Q. B. 156, C. A., the court, at p. 163, doubted the accuracy of the decision in *A.-G.* v. *Fairley*, *supra*, but regarded the Finance Act, 1898 (61 & 62 Vict. c. 10), s. 14, as a legislative adoption of it.

(*z*) *A.-G.* v. *Fairley*, *supra*, at p. 701.

(*a*) Finance Act, 1898 (61 & 62 Vict. c. 10), s. 14. The death on which the duty was paid must have occurred after the 30th June, 1898 (*ibid.*). Whether a settlement with a competency to dispose of the settled property only in a particular event is a contingent settlement, so that, if the competency to dispose afterwards becomes exercisable in any event, the settlement estate duty is repayable, is not clear. That it is not so repayable, see *Watherston's Trustees* v. *Lord Advocate* (1901), 38 Sc. L. R. 324, *per* the Lord President (BALFOUR), at p. 328; *contra*, see *Lord Advocate* v. *Stewart's Trustees*, *supra*, *per* Lord M'LAREN, at p. 300.

(*b*) *A.-G.* v. *Owen*, *A.-G.* v. *Coulson*, *supra*, at pp. 263, 266; *Re Campbell*, [1902] 1 K. B. 113, 120, 122, C. A. *Secus*, *semble*, in the case of an annuity *simpliciter* (compare *A.-G.* v. *Hannen* (1904), 48th Report of Commissioners of Inland Revenue, 121).

SECT. 2. Settled Property.

The duty is also leviable where a capital sum representing the annuity is bequeathed after the annuitant's death (*c*).

SECT. 3.—*Exceptions from the Charge of Duty.*

Only once during settlement.

305. During the continuance of the settlement, settlement estate duty is not payable more than once (*d*), and it is not payable at all in respect of:—

Dispositions before 2nd August, 1894.

(1) Property settled by a disposition which has taken effect before the 2nd August, 1894 (*e*);

Where only life interest that of spouse.

(2) Property wherein the only life interest after the deceased's death is that of a husband or wife of the deceased (*f*);

Small estates.

(3) Property settled by the deceased's will, where the net value of the whole property passing on his death, in respect of which estate duty is payable, exclusive of other settled property, does not exceed £1,000 (*g*); and

Inalienable property.

(4) Any lands or chattels which are so settled, whether by Act of Parliament or royal grant, that no one of the persons successively in possession is capable of alienating them (*h*), otherwise than under the powers of sale or exchange in the Settled Land Act, 1882 (*i*).

Deduction of stamp duty.

306. Any person paying the settlement estate duty upon settled property may deduct the amount of the *ad valorem* stamp duty (if any) charged on the settlement in respect of that property (*k*).

SECT. 4.—*The Rate of Duty.*

Rate of duty.

307. The rate of the settlement estate duty is 2 per cent. (*l*).

SECT. 5.—*Collection of the Duty.*

Payment in kind.

308. Land may be transferred in satisfaction of settlement estate duty (*m*), as in the case of estate duty (*n*).

(*c*) *A.-G.* v. *Owen*, *A.-G.* v. *Coulson*, [1899] 2 Q. B. 253. The capital sum required to yield the annuity, and not the capital sum bequeathed on the annuitant's death, is, seemingly, the measure of taxation (S. C. (1899), 81 L. T. 121, *per* KENNEDY, J., at p. 127). The annuity may, seemingly, be contingent (*Re St. Albans (Duke)*, *Loder* v. *St. Albans (Duke)*, [1900] 2 Ch. 873).

(*d*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 5 (1) (b).

(*e*) *Ibid.*, s. 21 (4). Where, however, under such a disposition, the deceased is absolutely entitled to the property, expectant on his own death, without issue, and settles it by his will, settlement estate duty is leviable (*Re Lewis*, *Lewis* v. *Smith*, [1900] 2 Ch. 176).

(*f*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 5 (1) (a).

(*g*) *Ibid.*, s. 16 (3).

(*h*) *Ibid.*, s. 5 (5).

(*i*) Settled Land Act, 1882 (45 & 46 Vict. c. 38); *Re Bolton Estates Act*, 1[illegible] [1904] 2 Ch. 289.

(*k*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 5 (4); Stamp Act, 18[illegible] (54 & 55 Vict. c. 39), Sched.

(*l*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 17; Finance (1909-10) Act 1910 (10 Edw. 7, c. 8), s. 54. In the case of deaths prior to the 30th April 1909, the rate is 1 per cent. (*ibid.*).

(*m*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 56 (1).

(*n*) See p. 212, *ante*.

SECT. 5. Collection of the Duty.

309. The settlement estate duty in respect of a legacy, or other personal property, settled by the deceased's will, is to be collected upon an account setting forth the particulars thereof (*o*).

Personal property settled by deceased's will.

The account is to be delivered to the Commissioners, by the executor, within six months after the deceased's death, or within such further time as the Commissioners may allow (*p*).

An Inland Revenue affidavit (*q*), rendered on obtaining a grant of representation to the deceased, is not an "account" within the meaning of this enactment (*r*).

The settlement estate duty in respect of such legacy etc. is payable thereout, in exoneration of the rest of the deceased's estate, unless the will contains an express provision to the contrary (*s*).

Annuitants under the will are to bear their proper proportion of the settlement estate duty (*t*).

Not a testamentary expense.

Settlement estate duty in respect of personal property settled by the deceased's will is not a testamentary expense (*u*).

SECT. 6.—*Application of General Estate Duty Enactments.*

The duty is estate duty.

310. Settlement estate duty is estate duty, and, except where there is special provision, the legislative enactments as to estate duty cover also the settlement estate duty (*a*).

(*o*) Finance Act, 1896 (59 & 60 Vict. c. 28), s. 19 (2).

(*p*) *Ibid.*

(*q*) See p. 215, *ante*.

(*r*) *A.-G.* v. *Montefiore* (1909), 52nd Report of Commissioners of Inland Revenue, 85 (a case on the limitation of liability under the Finance Act, 1894 (57 & 58 Vict. c. 30), s. 8 (2), embodying the Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 14).

(*s*) Finance Act, 1896 (59 & 60 Vict. c. 28), s. 19 (1). Compare *Re Gibbs, Thorne* v. *Gibbs*, [1898] 1 Ch. 625. Apparently the law under the Finance Act, 1894 (57 & 58 Vict. c. 30), was the same (*Re Maryon-Wilson, Wilson* v. *Maryon-Wilson*, [1900] 1 Ch. 565, C. A., *per* LINDLEY, M.R., at p. 570), although the contrary had been decided in *Re Webber, Gribble* v. *Webber*, [1896] 1 Ch. 914. A direction in the will for the payment out of the testator's residuary estate of "the estate duty on the whole of the real and personal estate" (*Re Leveridge, Spain* v. *Lejoindre*, [1901] 2 Ch. 830); or of "my duties" (*Re Pimm, Sharpe* v. *Hodgson*, [1904] 2 Ch. 345); or of "the death duties payable out of my estate" (*Re Cayley, Awdry* v. *Cayley*, [1904] 2 Ch. 781); or for the payment of legacies "free from duty" (*Re Turnbull, Skipper* v. *Wade*, [1905] 1 Ch. 726); or to set aside a fund to produce a "clear" annuity (*Re Dyet, Morgan* v. *Dyet* (1902), 87 L. T. 744); shifts the burden of the settlement estate duty from the settled legacy etc. to the residuary estate. Where also a sum is covenanted to be paid "without any deduction," any settlement estate duty payable in respect of the sum is payable out of the covenantor's residuary estate (*Re Maryon-Wilson, Wilson* v. *Maryon-Wilson, supra*). A direction in the will, however, to pay out of the testator's residuary estate "all duties payable by law out of my estate" does not shift the burden of the settlement estate duty (*Re Lewis, Lewis* v. *Smith*, [1900] 2 Ch. 176). A direction which is operative to shift the charge of duty confers an additional legacy, which, on a deficiency of assets, is to be added to the original legacy for abatement (*Re Turnbull, Skipper* v. *Wade, supra*).

(*t*) *Re St. Albans (Duke), Loder* v. *St. Albans (Duke)*, [1900] 2 Ch. 873, which applied to settlement estate duty the principle of *Re Parker-Jervis, Salt* v. *Locker*, [1898] 2 Ch. 643.

(*u*) *Re King, Travers* v. *Kelly*, [1904] 1 Ch. 363. *À fortiori*, in other circumstances, it is not.

(*a*) *Re Leveridge, Spain* v. *Lejoindre*, [1901] 2 Ch. 830, 832; compare, also, *Re Webber, Gribble* v. *Webber, supra*, at p. 921; and *Re Maryon-Wilson, Wilson* v. *Maryon-Wilson, supra*, at p. 570.

Part IV.—Legacy Duty.

SECT. 1. The Imposition of the Duty.

SECT. 1.—*The Imposition of the Duty.*

The extent of the charge.

311. Legacy duty (*b*) is payable, save as expressly provided (*c*), according to the value, ascertained in the prescribed manner (*d*), in respect of every "legacy" of personal estate (*e*), or succession thereto upon intestacy (*f*).

The date of the death of the testator or intestate is immaterial (*g*).

(*b*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), ss. 4—6, 8—31, 33—35, 37—39, 41, 43, 44; Legacy Duty Act, 1799 (39 Geo. 3, c. 73), s. 1; Legacy Duty Act, 1805 (45 Geo. 3, c. 28), ss. 5, 7; Probate and Legacy Duties Act, 1808 (48 Geo. 3, c. 149), s. 44; Stamp Act, 1815 (55 Geo. 3, c. 184), s. 2, Sched., Part III.; Revenue Act, 1845 (8 & 9 Vict. c. 76), s. 4; Succession Duty Act, 1853 (16 & 17 Vict. c. 51), ss. 11, 19, 31, 53; Crown Suits etc. Act, 1865 (28 & 29 Vict. c. 104), Part V.; Inland Revenue Act, 1868 (31 & 32 Vict. c. 124), s. 9; Customs and Inland Revenue Act, 1880 (43 Vict. c. 14), ss. 11—13; Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), ss. 36, 41—43; Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), s. 21 (2); Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 14; Finance Act, 1894 (57 & 58 Vict. c. 30), ss. 1, 5 (2), 13, 15 (2), 16 (1), (3), 21 (2), Sched. I. (5); Finance Act, 1896 (59 & 60 Vict. c. 28), ss. 18 (2), (3), 21, 40, Sched., Part III.; Finance Act, 1898 (61 & 62 Vict. c. 10), s. 13; Finance Act, 1900 (63 & 64 Vict. c. 7), s. 14 (1), (2); Finance Act, 1907 (7 Edw. 7, c. 13), ss. 13, 15; Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), ss. 58, 63, 64.

The following further statutes deal with legacy duty in Scotland:—Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 48; Probate Duty Act, 1861 (24 & 25 Vict. c. 92), s. 1.

The following further statutes deal with legacy duty in Ireland:—Probate and Legacy Duties (Ireland) Act, 1814 (54 Geo. 3, c. 92), ss. 5, 7—33, 35—39, 43; Probate Duty (Ireland) Act, 1816 (56 Geo. 3, c. 56), ss. 115, 128; Stamp Duties (Ireland) Act, 1842 (5 & 6 Vict. c. 82), ss. 37—39; Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 48; Probate Duty Act, 1861 (24 & 25 Vict. c. 92), s. 1.

The general provisions and regulations of the Legacy Duty Act, 1796 (36 Geo. 3, c. 52), so far as not expressly repealed, remain in full force, notwithstanding that the actual charge of duty no longer arises under that Act (*Advocate-General* v. *Stair* (*Earl*) (1850), Scotch Exchequer, not reported). See also *Re Cholmondeley* (1832), 1 Cr. & M. 149, which (*Advocate-General* v. *Stair* (*Earl*), *supra*, *per* Lord FULLERTON) was decided on that very ground.

(*c*) See pp. 239—242, *post*.

(*d*) See pp. 245—249, *post*.

(*e*) Stamp Act, 1815 (55 Geo. 3, c. 184), s. 2, Sched., Part III.; Revenue Act, 1845 (8 & 9 Vict. c. 76), s. 4; Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), s. 21 (2).

(*f*) Stamp Act, 1815 (55 Geo. 3, c. 184), s. 2, Sched., Part III.

(*g*) Provided that the interest was not reduced into possession, and the executor fully exonerated, on or before the 31st August, 1815 (Stamp Act, 1815 (55 Geo. 3, c. 184), Sched., Part III.; *A.-G.* v. *Hancock* (1837), 2 M. & W. 563, 597). As to earlier cases, see stat. (1780) 20 Geo. 3, c. 28; stat. (1783) 23 Geo 3, c. 58; stat. (1789) 29 Geo. 3, c. 51 (all repealed); Legacy Duty Act 1796 (36 Geo. 3, c. 52); Stamp Act, 1804 (44 Geo. 3, c. 98); Legacy Duty Act 1805 (45 Geo. 3, c. 28); Probate and Legacy Duties Act, 1808 (48 Geo. 3, c. 149) *Green* v. *Croft* (1792), 2 Hy. Bl. 30; *Hill* v. *Atkinson* (1816) 2 Mer. 45.

SECT. 2.—*Legacies, and Successions upon Intestacy.*

SECT. 2. Legacies, and Successions upon Intestacy.

SUB-SECT. 1.—*The "Legacy."*

Gifts by will.

312. Every gift by any will or testamentary instrument of any person, which, by virtue thereof, is payable, or has effect, or is satisfied, out of (*h*) the personal or movable (*i*) estate or effects of such person (*k*), or out of any personal estate which such person had power to dispose of (*l*), whether the gift is by way of annuity or in any other form, is deemed to be a "legacy" (*m*), and is chargeable with legacy duty accordingly (*n*).

Donationes mortis causâ.

Every gift which has effect as a donation *mortis causâ* is also deemed to be a "legacy" (*o*), and is chargeable with legacy duty (*p*).

Legacy with a condition annexed.

313. A gift by will with a condition annexed is liable to legacy duty without regard to the condition (*q*), unless the performance of

(*h*) A gift out of the profits to arise from the testator's business, carried on by his executors after his death, is a legacy chargeable with duty (*Re Thorley, Thorley* v. *Massam*, [1891] 2 Ch. 613, 625, C. A.; *Inland Revenue* v. *Dick's Trustees* (1907), 44 Sc. L. R. 567). So is a gift of the profits to arise after the testator's death from a patent for an invention (*Advocate-General* v. *Oswald* (1848), 10 Dunl. (Ct. of Sess.) 969). And so would be a gift of the fruit of an orchard of trees for a term of years (*Re Thorley, Thorley* v. *Massam*, *supra*, *per* KAY, L.J., at p. 627).

(*i*) Every such gift which is payable or has effect or is satisfied out of, or is charged or made a burden upon, the testator's real estate, or any real estate, or the rents or profits thereof, which he had any right or power to charge, burden, or affect, with the payment of money, or out of or upon any moneys to arise by the sale, burden, mortgage, or other disposition of any such real estate or any part thereof, is also deemed to be a legacy (Revenue Act, 1845 (8 & 9 Vict. c. 76), s. 4; which superseded the Legacy Duty Act, 1805 (45 Geo. 3, c. 28), s. 4), and, where the testator died before the 1st July, 1888, is chargeable with legacy duty (Stamp Act, 1815 (55 Geo. 3, c. 184), s. 2, Sched., Part III.). Where, however, the testator died on or after that date, succession duty and not legacy duty is chargeable (Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), s. 21 (2); see p. 264, *post*). As to leaseholds for years, see p. 235, *post*.

(*k*) This expression does not extend to the personal estate of a stranger, which the testator induced him to dispose of, as the condition upon which he should be entitled to take a legacy (*Laurie* v. *Clutton* (1852), 15 Beav. 131, *per* ROMILLY, M.R., at p. 139).

(*l*) This expression extends to personal estate over which the testator had a general power of appointment (*Re Cholmondeley* (1832), 1 Cr. & M. 149; *Drake* v. *A.-G.* (1843), 10 Cl. & Fin. 257, H. L.).

(*m*) Revenue Act, 1845 (8 & 9 Vict. c. 76), s. 4; see note (*o*), *infra*.

(*n*) Stamp Act, 1815 (55 Geo. 3, c. 184), s. 2, Sched., Part III.

(*o*) Revenue Act, 1845 (8 & 9 Vict. c. 76), s. 4; which superseded the Legacy Duty Act, 1805 (45 Geo. 3, c. 28), s. 4, which, in its turn, superseded the Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 7.

(*p*) There are no special provisions with regard to the collection of legacy duty in respect of donations *mortis causâ*.

(*q*) *A.-G.* v. *Sharpe* (1891), 7 T. L. R. 558, C. A. (sum to be invested by trustees, and income paid to legatee on a condition, namely, that she should, *inter alia*, provide a home for such (if any) of testator's children as, in the judgment of the trustees, required it; compare note (*k*), p. 237, *post*). See also *Re Thorley, Thorley* v. *Massam*, *supra*, at pp. 626, 628 (gift on condition of carrying on business); *Inland Revenue* v. *Dick's Trustees*, *supra* (ditto); *Re White, Pennell* v. *Franklin*, [1898] 1 Ch. 297, 299; affirmed, [1898] 2 Ch. 217, 219, C. A. (gift on condition of acting as professional trustee).

SECT. 2. Legacies, and Successions upon Intestacy.

the condition causes something to be returned to the testator's personal estate, in which case it seems that only the difference would be liable to the duty (*r*).

The condition may be imposed by the donee of a limited power of appointment (*s*), or it may be annexed by the testator himself to the exercise of such a power (*t*).

Legacy in satisfaction of a covenant.

A bequest of residue, or a share thereof, although made in fulfilment of a covenant in a marriage settlement, is chargeable with legacy duty (*a*). It is otherwise, however, where the bequest, in fulfilment of the covenant, is of a definite sum (*b*).

Forgiveness of a debt.

The forgiveness of a debt due to the testator is a legacy (*c*), except where the debt is not recoverable at law (*d*). If the debt is owing jointly by two persons, one of whom predeceases the testator, the bequest operates in favour of the survivor, who is liable to the duty as upon a legacy to him (*e*).

Direction to pay debts.

A direction in a deceased person's will to pay his own debts does not constitute a legacy even where the debts are statute-barred (*f*), although it is otherwise where they have been legally released or extinguished (*g*). But a direction to pay interest on debts which do not bear interest constitutes a legacy as regards the interest (*h*).

A direction in a will to pay the debts of another person, who has died insolvent, confers a legacy on that person's creditors (*i*).

Legacy to an executor or trustee for his trouble.

Where there is a disposition by will in favour of an executor or trustee, in return for his trouble, the sums received by him are legacies (*k*).

(*r*) *Sweeting* v. *Sweeting* (1853), 1 Drew. 331, *per* KINDERSLEY, V.-C., at p. 334; *Re Kirk*, *Kirk* v. *Kirk* (1882), 21 Ch. D. 431, C. A., *per* JESSEL, M.R., at p. 437; *Re Thorley*, *Thorley* v. *Massam*, [1891] 2 Ch. 613, C. A., *per* KAY, L.J., at p. 629.

(*s*) *Henniker* (*Lord*) v. *A.-G.* (1852), 8 Exch. 257, Ex. Ch. (jointure on condition of release of dower).

(*t*) *Sweeting* v. *Sweeting*, *supra* (ditto).

(*a*) Compare *Jervis* v. *Wolferstan* (1874), L. R. 18 Eq. 18, *per* JESSEL, M.R., at p. 24; see also *Moir's Trustees* v. *Lord Advocate* (1874), 11 Sc. L. R. 157 (whole residue); *Marshall* v. *Lord Advocate* (1874), 11 Sc. L. R. 392 (share of residue); *A.-G.* v. *Murray* (1887), 20 L. R. Ir. 124, C. A. (whole residue).

(*b*) *Graham* v. *Wickham* (1863), 1 De G. J. & Sm. 474, 486, C. A.; see also *Eyre* v. *Monro* (1857), 3 K. & J. 305; *Lord Advocate of Scotland* v. *Hagart* (1872), L. R. 2 Sc. & Div. 217. In such circumstances, succession duty is presumptively chargeable (see p. 263, *post*).

(*c*) *A.-G.* v. *Holbrook* (1823), 3 Y. & J. 114; see also *Morris* v. *Livie* (1842), 1 Y. & C. Ch. Cas. 380; *A.-G.* v. *Hollingworth* (1857), 2 H. & N. 416.

(*d*) Compare *A.-G.* v. *Hollingworth*, *supra*.

(*e*) *A.-G.* v. *Holbrook*, *supra*, *per* HULLOCK, B., at p. 123.

(*f*) *Williamson* v. *Naylor* (1838), 3 Y. & C. (EX.) 208; see also *Re O'Leary's Estate*, [1896] 1 I. R. 283, where the statement in a will that a bequest was made in satisfaction of a debt was regarded as sufficient evidence that the testator was so indebted.

(*g*) *Turner* v. *Martin* (1857), 7 De G. M. & G. 429.

(*h*) *Cooke* v. *Turner* (1850), cited, Hanson's Death Duties, 5th ed., p. 361 (reported on other points (1848), 15 Sim. 611).

(*i*) *Foster* v. *Ley* (1835), 2 Bing. (N. C.) 269.

(*k*) *Re Thorley*, *Thorley* v. *Massam*, *supra* (legacies to trustee and to manager of business); see also *Inland Revenue* v. *Dick's Trustees* (1907), 44 Sc. L. R. 56 (legacies to managers of business).

Where a testator appoints a professional person as his executor or trustee, and empowers him to charge for business done in relation to the estate, his profit costs constitute a legacy (*l*), which is chargeable with duty (*m*).

SUB-SECT. 2.—*Successions upon Intestacy.*

Residue under intestacy.

314. The clear residue (when devolving to one person), and every share of residue (when devolving to two or more persons), of the personal or movable estate of any deceased person (after deducting debts, funeral expenses, legacies, and other charges first payable thereout), whether the title to such residue, or any share of it, accrues upon a partial or total intestacy, although not deemed to be a "legacy," is chargeable with legacy duty (*n*).

SUB-SECT. 3.—*Personal Estate.*

Partnership real estate.

315. Personal estate (*o*) chargeable with legacy duty (*p*) includes an interest in a partnership, even where attributable to partnership real estate (*q*).

Mortgage debts etc.

It includes also a mortgage debt (*r*), even if secured on the testator's own real estate, provided that in that case he kept it alive in his lifetime, and notwithstanding that it devolved on his death upon the person upon whom the real estate itself devolved (*s*).

It includes also a capital sum, to which the testator was entitled, to be raised out of settled real estate at his own death, although, in the event, as the legatee to whom it eventually came was the owner of the real estate out of which the sum was raisable, it was not in fact raised (*t*).

Leaseholds for years.

It does not, however, include leaseholds for years, which are deemed for this purpose to be real property (*a*).

Estates *pur autre vie.*

Estates *pur autre vie*, applicable by law in the same manner as personal estate, are chargeable with legacy duty as personal

(*l*) *Re White, Pennell* v. *Franklin*, [1898] 2 Ch. 217, C. A.

(*m*) S. C. [1898] 1 Ch. 297, *per* KEKEWICH, J., at p. 299.

(*n*) Stamp Act, 1815 (55 Geo. 3, c. 184), s. 2, Sched., Part III.

(*o*) Tolls of a lighthouse, levied under a private Act of Parliament, have been held to be real estate, and so not liable to legacy duty (*A.-G.* v. *Jones* (1849), 1 Mac. & G. 574).

(*p*) It has been said that property was personal estate liable to legacy duty because the executor had taken it, had dealt with it as executor, and had, as executor, authorised the delivery of it to the legatee, although he was not bound, in the particular circumstances, in order to get it, to take out probate or administration (*Re Ewin* (1830), 1 Cr. & J. 151, *per* ALEXANDER, C.B., at pp. 152, 154).

(*q*) *Forbes* v. *Steven*, *Mackenzie* v. *Forbes* (1870), L. R. 10 Eq. 178; *Re Stokes*, *Stokes* v. *Ducroz* (1890), 38 W. R. 535. It would, however, very materially alter the case if it could be made out that the real estate was not a partnership asset, but belonged to the partners as tenants in common (*Forbes* v. *Steven*, *Mackenzie* v. *Forbes*, *supra*, *per* JAMES, V.-C., at p. 188).

(*r*) *Lawson* v. *Inland Revenue Commissioners*, [1896] 2 I. R. 418.

(*s*) *Swabey* v. *Swabey* (1848), 15 Sim. 502.

(*t*) *A.-G.* v. *Metcalfe* (1851), 6 Exch. 26.

(*a*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 19. Prior to this Act, legacy duty was chargeable; see p. 263, *post*.

SECT. 2. Legacies, and Successions upon Intestacy.

estate (*b*). It is otherwise, however, with estates *pur autre vie* descending to the heir as special occupant (*c*).

SUB-SECT. 4.—*The Will or Intestacy.*

What is a testamentary instrument.

316. A testamentary instrument is any writing, whatever the form and however by law it may be required to be executed, if it remains dormant during the life of the person executing it, if it be revocable until his death, and if it only comes into active power at his death (*d*).

Transmitted interests.

317. Legacy duty is payable under the will or intestacy of every person, whether legatee, or successor upon intestacy, for the benefit of whose estate a fund is retained, and it is immaterial that a person entitled to an expectant interest dies before the interest falls into possession (*e*).

SUB-SECT. 5.—*The Legatee or Successor.*

Gift to persons to be chosen by trustees.

318. Under a bequest to trustees to dispose of the testator's estate in favour of such persons and for such purposes as the trustees in their discretion think proper, the persons in whose favour the trustees dispose of the estate, when ascertained, are the legatees (*f*).

(*b*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 20. The phrase "estate *pur autre vie*" includes the unexhausted residue of an estate for the deceased's own life and the life of others (*Chatfield* v. *Berchtoldt* (1872), 7 Ch. App. 192).

(*c*) *R.* v. *Norreys* (1852), 2 I. C. L. R. 414 (a case upon the Probate and Legacy Duties (Ireland) Act, 1814 (54 Geo. 3, c. 92), s. 22).

(*d*) *Advocate-General* v. *Ramsay's Trustees* (1823), 2 Cr. M. & R. 224, n., *per* SHEPHERD, C.B., at p. 229. A secret voluntary deed, reserving a life interest and a power of revocation, has been held to be testamentary (*A.-G.* v. *Jones and Bartlett* (1817), 3 Price, 368, WOOD, B., *dub.*, at p. 383). *Secus*, in the case of a secret deed of covenant to pay during life or after death, subject to debts and legacies, a sum upon charitable trusts (*Jeffries* v. *Alexander* (1860), 8 H. L. Cas. 594, 613). So also where the deed was not secret, and the settled securities were duly transferred to the trustees (*Tompson* v. *Browne* (1835), 3 My. & K. 32). So also where there was a covenant on marriage to pay to children a capital sum at death, with reservation of a limited power of appointment (*Advocate-General* v. *Trotter* (1847), 10 Dunl. (Ct. of Sess.) 56). And so also where there was a mutual irrevocable settlement, by the deceased and others, upon themselves, and the survivor, subject to the debts of any dying (*Brown* (*Agnes and Mary*) v. *H. M. Advocate-General* (1852), 1 Macq. 79, H. L.). It has been said that the phrase "testamentary instrument" was used in the statute for the purpose of including any informal instrument which might still be in effect a will, for a will, properly speaking, is not complete unless there be executors appointed, or it relates to Scotland, where the term testamentary instrument is used instead of will (*A.-G.* v. *Jones and Bartlett*, *supra*, *per* WOOD, B., at p. 383); and see title WILLS.

(*e*) *A.-G.* v. *Malkin* (1846), 2 Ph. 64 (gift by will to a daughter and her husband for their joint lives, and the life of the survivor, and, on the death of the survivor, as the daughter should appoint, and in default to her executors etc. She died in her husband's lifetime without appointing, and he afterwards died, having, by his will, left the property to his own daughter. Legacy duty was payable under the original testator's will, and under the son-in-law's will. It would also have been payable under the daughter's intestacy, but for the fact that her husband was entitled); *A.-G.* v. *Maxwell* (1860), 10 I. C. L. R. 262 (a case upon the Stamp Duties (Ireland) Act, 1842 (5 & 6 Vict. c. 82), s. 37). The position is unaffected by the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 14 (*A.-G.* v. *Cleave* (1873), 31 L. T. 86).

(*f*) *Lord Advocate* v. *Nisbet's Trustees* (1878), 15 Sc. L. R. 508.

If the person to benefit is named, but the amount of the benefit is in the absolute discretion of the trustees, the person is a legatee of any sums in fact paid by the trustees to him or for his benefit (*g*).

Where, however, the bequest is to persons in confidence that they will apply it in a particular manner, but with the express declaration that no trust is imposed upon them, the persons in whose favour it is applied are not legatees (*h*). Gift in confidence.

Where the bequest to the trustees is in terms absolute, although, in truth, the property is bound in their hands by a secret trust, imposed upon them by the testator in his lifetime, it seems that the trustees are the legatees (*i*). Gift bound by secret trust.

A gift by will to a person in terms which create a trust of an indefinite part of a legacy for the benefit of another person confers a legacy upon that other person of any sums in fact applied for his benefit under the trust (*k*). Trust of indefinite sum.

319. Upon a legacy being accepted and bequeathed by a legatee, his executors cannot disclaim the gift to him, in order to permit the legatee's legatee to take the legacy directly from the original testator, and so to affect the claim for legacy duty under the prior will (*l*); and a legatee cannot, with a like object, disclaim a gift to him under a will made in exercise of a general power of appointment by which the donee of the power has successfully assumed to himself the entire dominion over the fund, and elect to take, as in default of appointment, under the will creating the power (*m*). When a legacy cannot be disclaimed.

320. Where a testator bequeaths a legacy and directs that, in the event of the legatee predeceasing him, the legacy is to be paid to the legatee's personal representatives, the persons entitled to the legatee's personal estate take as substituted legatees under the original testator's will (*n*), and are chargeable with legacy duty accordingly (*o*). Gift to predeceasing legatee.

Where, however, the gift is to a child or other issue who predeceases the testator, but leaves issue living at the testator's death, and the subject of the gift forms part of the property of the dead legatee (*p*), it is, seemingly, liable to legacy duty as part of the legatee's estate (*q*).

(*g*) *A.-G.* v. *Wade*, [1910] 1 K. B. 703.

(*h*) *Re Martineau* (1884), 48 J. P. 295.

(*i*) *Cullen* v. *A.-G. for Ireland* (1866), L. R. 1 H. L. 190 (a case upon the Stamp Duties (Ireland) Act, 1842 (5 & 6 Vict. c. 82), s. 38); compare *Re Maddock*, *Llewelyn* v. *Washington*, [1902] 2 Ch. 220, 229, C. A.

(*k*) *Re Harris* (1852), 7 Exch. 344 (gift to wife, sole executrix, for maintenance of herself and the children); compare *A.-G.* v. *Sharpe* (1891), 7 T. L. R. 558, C. A. (gift upon a condition; and see note (*q*), p. 233, *ante*).

(*l*) *A.-G.* v. *Munby* (1858), 3 H. & N. 826.

(*m*) *A.-G.* v. *Brackenbury* (1863), 1 H. & C. 782; see also *H. M. Advocate* v. *Routledge's Trustees* (1907), 44 Sc. L. R. 305, *per* the Lord President (Lord DUNEDIN), at p. 309.

(*n*) *Long* v. *Watkinson* (1852), 17 Beav. 471.

(*o*) *Lord Advocate* v. *Bogie*, [1894] A. C. 83; see also *A.-G.* v. *Loyd*, [1895] 1 Q. B. 496.

(*p*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 33.

(*q*) Compare *Perry's Executors* v. *R.* (1868), L. R. 4 Exch. 27; *Re Scott*, [1901] 1 K. B. 228, C. A.

SECT. 2. Legacies, and Successions upon Intestacy.

SUB-SECT. 6.—*The Testator or Intestate.*

Exercise of powers of appointment.

321. Where a will exercises a general power of appointment, the appointee's interest is to be treated for the purpose of legacy duty as derived under that will (*r*), even where the instrument creating the power was itself a will (*s*). But where a will confers a limited power of appointment, and the power is exercised, whether by will (*t*) or deed (*a*), the appointee's interest is to be treated as derived under the will which created the power.

Legacies in joint tenancy.

Where any legacy is given to or for the benefit of any persons in joint tenancy, if any legatee becomes entitled by survivorship, or by severance of the joint tenancy, to a larger interest in the property, such interest is to be treated as derived from the original testator, and not from the deceased joint tenant (*b*).

SUB-SECT. 7.—*Domicil and Situs.*

Domicil of testator etc. and situation of property.

322. In order that personal estate may become liable to legacy duty, the testator or intestate must have been domiciled in this country at the time of his death, but the local situation of the property is immaterial (*c*).

Partnership real estate abroad, owner domiciled here.

Where a person dying domiciled in this country was a partner in a firm owning foreign real estate, as a partnership asset, his interest in the partnership, including such property, being personal estate, is liable to legacy duty (*d*).

Estates *pur autre vie* in British real estate, wherever owner domiciled.

An estate *pur autre vie* in real property in this country, applicable by law as personal estate, is chargeable with legacy duty, even where the owner was domiciled abroad (*e*).

(*r*) Revenue Act, 1845 (8 & 9 Vict. c. 76), s. 4; *Re Cholmondeley* (1832), 1 Cr. & M. 149; *Drake* v. *A.-G.* (1843), 10 Cl. & Fin. 257, H. L.

(*s*) *Drake* v. *A.-G.*, *supra*.

(*t*) *Pickard* v. *A.-G.* (1838), 3 M. & W. 552, affirmed, *Pickard* v. *A.-G.* (1840), 6 M. & W. 348, Ex. Ch.; see also *A.-G.* v. *Henniker* (*Lord*) (1852), 7 Exch. 331, affirmed, *Henniker* (*Lord*) v. *A.-G.*, 8 Exch. 257, Ex. Ch.

(*a*) *Sweeting* v. *Sweeting* (1853), 1 Drew. 331.

(*b*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 16.

(*c*) *Re Ewin* (1830), 1 Cr. & J. 151 (testator domiciled in this country, assets abroad); *Jackson* v. *Forbes* (1832), 2 Cr. & J. 382; affirmed *sub nom. A.-G.* v. *Jackson* (1834), 8 Bli. (N. S.) 15, H. L. (testator domiciled abroad, assets abroad, but remitted to this country for distribution: no representation in this country); *Arnold* v. *Arnold* (1837), 2 My. & Cr. 256 (ditto, save that there was representation in this country); *Thomson* v. *Advocate-General* (1845), 12 Cl. & Fin. 1, H. L. (testator domiciled abroad, assets in this country). The operation of the statute is limited to the property of persons who die domiciled in this country, and personal property in contemplation of the law is supposed to be situate where the deceased owner was domiciled (*Thomson* v. *Advocate-General*, *supra*, *per* Lord CAMPBELL, at pp. 28, 29). The above cases supersede or overrule *A.-G.* v. *Cockerell* (1814), 1 Price, 165; *A.-G.* v. *Beatson* (1819), 7 Price, 560; *Logan* v. *Fairlie* (1825), 2 Sim. & St. 284; *Hay* v. *Fairlie* (1826), 1 Russ. 117; *Re Bruce* (1832), 2 Cr. & J. 436; *Re Coales* (1841), 7 M. & W. 390. See also *A.-G.* v. *Napier* (1851), 6 Exch. 217; *Lyall* v. *Paton* (1856), 25 L. J. (CH.) 746; *Winans* v. *A.-G.*, [1904] A. C. 287; *H. M. Advocate* v. *Brown's Trustees* (1907), 44 Sc. L. R. 275, where the principle of *Thomson* v. *Advocate-General*, *supra*, was applied.

(*d*) *Forbes* v. *Steven*, *Mackenzie* v. *Forbes* (1870), L. R. 10 Eq. 178; *Stokes* v. *Ducroz* (1890), 38 W. R. 535.

(*e*) *Chatfield* v. *Berchtoldt* (1872), 7 Ch. App. 192. The same holds with regard to legacies out of real estate in this country under the will of a person

SECT. 3.—*Exceptions from the Charge of Duty.*

SECT. 3. Exceptions from the Charge of Duty.

Various exceptions.

323. There are like exceptions from legacy duty as from succession duty (*f*) where estate duty (*g*) has been paid (*h*).

Where personal estate is directed to be applied in the purchase of real estate, and is given so as to be enjoyed by different persons in succession, no legacy duty accrues in respect of it after it has been actually so applied (*i*).

Leasehold hereditaments are excepted from the duty (*k*).

The personal estate generally of any person dying after the 24th March, 1880, where the whole value is less than £100, is also excepted from the duty (*l*).

No legacy of specific articles of less value than £20 is chargeable with the duty unless the total value of the benefit taken by the legatee under the will amounts to £20 (*m*).

dying before the 1st July, 1888, domiciled abroad (*Advocate-General* v. *Grant* (1825), cited 12 Cl. & Fin. at p. 16; *Thomson* v. *Advocate-General* (1845), 12 Cl. & Fin. 1, H. L., *per* Lord LYNDHURST, L.C., at p. 22). Where the testator died on or after that date succession duty is chargeable (Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), s. 21 (2)).

(*f*) See p. 278, *post*.

(*g*) It is so also where probate duty has been paid; see notes (*m*), (*r*), p. 279, *post*.

(*h*) Finance Act, 1894 (57 & 58 Vict. c. 30), ss. 1, 5 (2), 16 (1), (3), Sched. I. (5); Finance Act, 1898 (61 & 62 Vict. c. 10), s. 13. As to exceptions from legacy duty where probate or account duty has been paid, see Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), ss. 36, 41.

(*i*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 19. Succession duty would be presumptively payable upon the purchased real estate on the death of the tenant for life. Where, before the money has been actually applied, the person entitled to an estate of inheritance in the real estate to be purchased died, having survived the limited owner, but having refused to receive either income or capital, it was held that legacy duty, and not succession duty, was payable under her intestacy (*De Lancey* v. *R.* (1872), L. R. 7 Exch. 140, Ex. Ch.; see also *Re De Lancey* (1870), L. R. 5 Exch. 102, Ex. Ch., which, *per* MATHEW, J., in *A.-G.* v. *Dodd*, [1894] 2 Q. B. 150, at p. 156, is qualified by *A.-G.* v. *Lomas* (1873), L. R. 9 Exch. 29, and is inconsistent with the judgment of Lord MACNAGHTEN in *A.-G.* v. *Ailesbury* (*Marquis*) (1887), 12 App. Cas. 672).

(*k*) Except where the legacy duty was already due on the 18th May, 1853, prior to which date leaseholds for years were chargeable with legacy duty as personal estate (Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 19). Such property is, however, now presumptively chargeable with succession duty.

(*l*) Customs and Inland Revenue Act, 1880 (43 Vict. c. 14), s. 13.

(*m*) Stamp Act, 1815 (55 Geo. 3, c. 184), s. 2, Sched., Part III. Pecuniary legacies, and residue, or a share of residue under the value of £20, which were exempt from legacy duty under this Act, unless the total benefit taken by the legatee amounted to £20, were charged with the duty in the case of persons dying on or after the 1st June, 1881, provided that the whole personal estate amounted to £100, by the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 42. As to charitable gifts before that date, see *Re Wilkinson* (1834), 1 Cr. M. & R. 142, affirmed *sub nom. A.-G.* v. *Nash* (1836), 1 M. & W. 237, Ex. Ch., where it was held that no duty was payable, on the ground that each beneficiary received less than £20. *Contrà*, see *Re Francklin's Charity* (1829), 3 Sim. 147; *A.-G.* v. *Fitzgerald* (1843), 13 Sim. 83; *Re Griffiths* (1845), 14 M. & W. 510; *Re Pearce* (1857), 24 Beav. 491; *Re Parker* (1859), 4 H. & N. 666; *Harris* v. *Howe* (*Earl*) (1861), 29 Beav. 261, where it was held that duty was payable, on the ground that the gifts were *in solido*. Gifts to the different mission schemes of the Free Church of Scotland (*Stewart's Trustees* v. *Lord Advocate* (1857), 20 Dunl. (Ct. of Sess.) 453), or of the General Assembly of the Presbyterian Church in Ireland (*A.-G.* v. *Wilson's Executor* (1869), referred to in

SECT. 3. **Exceptions from the Charge of Duty.**

The duty is not chargeable in respect of specific articles, bequeathed to or in trust for any body corporate, whether aggregate or sole, or to any inn of court or chancery, or an endowed school, to be preserved (*n*).

The position is the same in respect of articles not yielding income, and given to be enjoyed by different persons in succession, while enjoyed in kind only by any person not having any power of selling or disposing of them, so as to convert them into money or other property yielding an income (*o*).

In the case of objects which appear to the Treasury to be of national, scientific, historic, or artistic interest, the duty is only chargeable when the property is sold, and then only in respect of the last death on which the property passed (*p*).

Money applied under a direction in a will for the payment of the legacy duty chargeable upon any legacy out of some other fund (*q*), so that the legacy may pass free of duty to the legatee, is not itself chargeable with the duty (*r*). The testator's intention may be collected from any direction in the will (*s*).

Hanson's Death Duties, 5th ed., p. 470), are not separate legacies to the same legatee.

(*n*) Legacy Duty Act, 1799 (39 Geo. 3, c. 73), s. 1; Stamp Act, 1815 (55 Geo. 3, c. 184), s. 2, Sched., Part III.

(*o*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 14.

(*p*) Finance Act, 1896 (59 & 60 Vict. c. 28), s. 20; Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 63; see also p. 202, *ante*. The exception from duty only applies, however, in the case of deaths on or after the 30th April, 1909 (Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 63).

(*q*) *I.e.*, the residue or the real estate (*Lord Advocate* v. *Taylor* (1884), 21 Sc. L. R. 709, *per* the Lord Ordinary (FRASER), at p. 711).

(*r*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 21.

(*s*) *Gude* v. *Mumford* (1837), 2 Y. & C. (EX.) 445, 448, *per* ALDERSON, B., at p. 456. The following terms have been held to amount to a direction that a legacy or annuity is to be paid free of duty: **in the case of a legacy,** "without any deduction," or "without deduction," or "without any deduction whatever" (*Barksdale* v. *Gilliat* (1818), 1 Swan. 562; explained, *Gude* v. *Mumford*, *supra*, *per* ALDERSON, B., at p. 456, dissenting from the explanation of LEACH, M.R., in *Smith* v. *Anderson* (1828), 4 Russ. 352, at p. 354; *Ferguson* v. *Ogilby* (1862), 12 I. Ch. R. 411); "clear of property tax and all expenses whatsoever attending the same" (*Courtoy* v. *Vincent* (1823), Turn. & R. 433); "free from all expense" (*Gosden* v. *Dotterill* (1832), 1 My. & K. 56, 60); "to be paid clear" (*Ford* v. *Ruxton* (1844), 1 Coll. 403, 408); "free from any charge or liability in respect thereof" (*Warbrick* v. *Varley* (No. 1) (1861), 30 Beav. 241); or "free of all outgoings and payments, except the annual and other rent" (*Re Taber, Arnold* v. *Kayess* (1882), 46 L. T. 805); and **in the case of an annuity,** "clear of property tax and all expenses whatsoever attending the same" (*Courtoy* v. *Vincent*, *supra*); "clear of all deductions" (*Dawkins* v. *Tatham* (1829), 2 Sim. 492); "clear of all taxes and outgoings" (*Louch* v. *Peters* (1834), 1 My. & K. 489); "without any deduction or abatement out of the same on any account or pretence whatsoever" (*Smith* v. *Anderson*, *supra*); "clear of all taxes and deductions whatsoever" (*Stow* v. *Davenport* (1833), 5 B. & Ad. 359, 366); "one annuity or clear yearly sum" (*Gude* v. *Mumford*, *supra*; *Wilks* v. *Groom* (1856), 4 W. R. 697, 699); "one clear yearly rentcharge or annuity" (*Baily* v. *Boult* (1851), 14 Beav. 595); "a clear annuity or yearly sum" (*Haynes* v. *Haynes* (1853), 3 De G. M. & G. 590, 598, C. A.); or "clear yearly annuity" (*Re Robins, Nelson* v. *Robins* (1888), 58 L. T. 382). Pecuniary legacies "free" covers annuities (*Pearse* v. *Pearse* (1853), 2 W. R. 129). "Net" means "clear" (*Re Saunders, Saunders* v. *Gore*, [1898] 1 Ch. 17, C. A.). An implied direction to pay

SECT. 3. Exceptions from the Charge of Duty.

free of duty is not cut down by an explicit direction to pay another legacy "free of duty" (*Warbrick* v. *Varley* (No. 1) (1861), 30 Beav. 241), or another annuity "free from legacy duty" (*Re Robins, Nelson* v. *Robins* (1888), 58 L. T. 382). A bequest of a sum of money to purchase an annuity "clear for A." means free from taxes (*Hodgworth* v. *Crawley* (1742), 2 Atk. 376), but not a gift of a share of an estate "after discharging the necessary expenses connected with this trust" (*Michie's Executors* v. *Michie* (1905), 42 Sc. L. R. 386). A gift of six months "full" salary is not free from legacy duty (*Re Marcus, Marcus* v. *Marcus* (1887), 56 L. J. (CH.) 830). Where there is a direction to invest a capital sufficient to produce a yearly sum, "clear of legacy duty and all other deductions," to be enjoyed by different persons in succession, liable to the same rate of duty, the whole capital is free of duty (*Calvert* v. *Sebbon* (1838), 2 Keen, 672), and so also where the direction is to invest a capital to produce a "clear yearly sum" (*Harper* v. *Morley* (1838), 2 Jur. 653), or with the added direction "clear of all deductions whatsoever" (*Marris* v. *Burton* (1840), 11 Sim. 161; explained, *Baily* v. *Boult* (1851), 14 Beav. 595, *per* ROMILLY, M.R., at pp. 596, 597); but it is otherwise where the persons entitled to the "clear yearly sum" are liable to different rates of duty (*Sanders* v. *Kiddell* (1835), 7 Sim. 536; explained, *Baily* v. *Boult, supra; Pridie* v. *Field* (1854), 19 Beav. 497), the word "clear," in those circumstances, being taken to refer to the expenses of investment etc., and not to legacy duty (*Pridie* v. *Field, supra, per* ROMILLY, M.R., at p. 500, on the authority of *Sanders* v. *Kiddell, supra*). A gift of the income of a capital sum sufficient to realise a clear yearly income of a stated amount is not a gift free from legacy duty (*Banks* v. *Braithwaite* (1862), 32 L. J. (CH.) 35), although it is otherwise where the gift is to pay "such income or yearly sum" which the capital sum is to be sufficient to realise (*Re Coles' Will* (1869), L. R. 8 Eq. 271). A general direction in a will that all the testator's legacies are to be paid free of duty will apply also to legacies by codicil (*Byne* v. *Currey* (1834), 2 Cr. & M. 603), and a like direction in a codicil will apply to legacies by a subsequent codicil (*Re Dresden, Lindo* v. *London Hospital* (1910), *Times*, 22nd July); and so also where the direction is to pay free of duty all the legacies given by "this my will" and, by a codicil, additional and fresh legacies are given "all in addition to those already bequeathed" (*Re Sealy, Tomkins* v. *Tucker* (1901), 85 L. T. 451). The position is the same where the amounts of the legacies bequeathed by the will are varied by a codicil (*Fisher* v. *Brierley* (No. 2) (1861), 30 Beav. 267). But where the testator directs that the legacies "hereinbefore" bequeathed (*Early* v. *Benbow* (1846), 2 Coll. 342, 354), or the "foregoing legacies" (*Brown's Trustees* v. *Gow* (1902), 40 Sc. L. R. 62; *contra, Williams* v. *Hughes* (1857), 24 Beav. 474, 482), are to be free of duty, the direction does not extend to legacies by a subsequent codicil. A general direction to "pay" legacies free of duty includes a gift of stock (*Ansley* v. *Cotton* (1846), 16 L. J. (CH.) 55), and of specific articles (*Re Johnston, Cockerell* v. *Essex* (*Earl*) (1884), 26 Ch. D. 538, 554; *Re Dresden, Lindo* v. *London Hospital, supra*), but a direction to pay "pecuniary legacies" free of duty does not include a gift of stock (*Douglas* v. *Congreve* (1836), 1 Keen, 410, 424), although it includes the forgiveness of a debt (*Morris* v. *Livie* (1842), 11 L. J. (CH.) 172, 173). Where a testator bequeaths "sums" of money and shares, a direction that the above-mentioned "sums" are to be paid free of duty does not extend to the shares (*Dakers* v. *Lilburn* (1865), 13 W. R. 568, C. A.). A direction that "legacies and bequests" are to be free of duty does not extend to the produce of the sale of real estate (*White* v. *Lake* (1868), L. R. 6 Eq. 188). Where a legacy or annuity is given by will free of duty, and, by a codicil, another legacy or annuity is substituted for it, the latter gift is to be paid free of duty (*Cooper* v. *Day* (1817), 3 Mer. 154; *Shaftesbury* (*Earl*) v. *Marlborough* (*Duke*) (1835), 7 Sim. 237), but not where the gift is to a different legatee by reason of the death of the legatee named in the will (*Chatteris* v. *Young* (1827), 2 Russ. 183), or where, although the gift is to the same legatee, its character has been so altered that it is to be regarded as a separate and distinct gift (*Burrows* v. *Cottrell* (1830), 3 Sim. 375). If a legacy is given free of duty, an added legacy is also free (*Johnstone* v. *Harrowby* (*Earl*) (1859), 1 De G. F. & J. 183, 192), but not where the character of the gifts is entirely different (*Re Howe, Wilkinson* v. *Ferniehough*, [1910] W. N. 190). Where the testator directs that the legacy duty on the annuities given by his will is to be paid out of his general personal estate, the income of the residuary personal estate is not itself an annuity within this direction (*Londesborough*

SECT. 3. Exceptions from the Charge of Duty.

Legacies, and successions upon intestacy, given or devolving to any of the Royal Family, are excepted from the duty (*t*).

No sum of money which by any marriage settlement is subject to any limited power of appointment in favour of any persons specially named or described, or in favour of their issue, is liable to duty under the will in which the power is exercised (*u*).

In the case of an annuitant, or legatee chargeable as an annuitant, whose interest ceases by the death of any person before four years' payments of the annuity or income of the legacy have become due and payable, the duty is payable in proportion only to so many of the payments of the annuity etc. as actually accrued and became due etc. (*a*).

SECT. 4.—*Rates of Duty.*

How rate determined.

324. The degree of consanguinity (if any) subsisting between the legatee or successor and the testator or intestate determines the rate of duty chargeable in respect of the legacy or succession.

(*Lord*) v. *Somerville* (1854), 19 Beav. 295, 301). Where residue is given in moieties, one moiety free of duty, the legacy duty on such moiety is payable out of any lapsed residue (*Warbrick* v. *Varley* (No. 1) (1861), 30 Beav. 241); but if there is none, *quære* whether it is payable out of the other moiety (*Warbrick* v. *Varley* (No. 1), *supra*), or is to bear its own charge of duty (*Re Dalrymple, Bircham* v. *Springfield* (1901), 49 W. R. 627). A gift of a share of residue "free" must be in clear terms (*Macdonald's Trustees* v. *Aberdeen Corporation* (1902), 39 Sc. L. R. 745, 746). The gift of the legacy duty payable on a specific or pecuniary legacy is to be treated as itself a pecuniary legacy, and, where there is a deficiency of assets, must abate accordingly (*Farrer* v. *St. Catharine's College, Cambridge* (1873), L. R. 16 Eq. 19, 25). Where there is in fact no residue, the legatee must bear the legacy duty to the extent to which the estate is insufficient to provide it (*Wilson* v. *O'Leary* (1874), L. R. 17 Eq. 419). The legacy duty is to be added to the legacy for the purpose of abatement, and the abated legacy is to bear its own duty (*Lord Advocate* v. *Taylor* (1884), 21 Sc. L. R. 709; *Re Turnbull, Skipper* v. *Wade*, [1905] 1 Ch. 726, 728; see also *Re Wilkins, Wilkins* v. *Rotherham* (1884), 27 Ch. D. 703, followed in principle, but disapproved in arithmetic, *Re Turnbull, Skipper* v. *Wade, supra, per* FARWELL, J., at p. 730). Prior to the Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), the duty on a charitable legacy, given free of duty, could not be paid out of impure personalty any more than the legacy itself could be (*Wilkinson* v. *Barber* (1872), L. R. 14 Eq. 96). Where a testator directed his estate not to be wasted by too hasty a realisation, a direction to pay the duty on a legacy out of the residuary estate was, nevertheless, operative (*Re Whiteley, Whiteley* v. *London* (*Bishop*) (1909), 26 T. L. R. 16, C. A.). See also p. 281, *post*.

(*t*) Stamp Act, 1815 (55 Geo. 3, c. 184), s. 2, Sched., Part III. Where the deceased died before the 30th April, 1909, there is an exception also in the case of the husband or wife of the deceased (Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 58 (2), (4)).

(*u*) Revenue Act, 1845 (8 & 9 Vict. c. 76), s. 4. Moneys payable under a policy of insurance in the Customs Annuity and Benevolent Fund, over which a subscriber has only a limited power of appointment in favour of a particular class, are not liable to legacy duty (*A.-G.* v. *Rowsell* (1844), 36 Ch. D. 67, n.). In each case, however, succession duty may be chargeable.

As to the non-liability to duty under the Legacy Duty Act, 1805 (45 Geo. 3, c. 28), s. 4 (superseded by the Revenue Act, 1845 (8 & 9 Vict. c. 76), s. 4, and repealed by the Statute Law Revision Act, 1872 (35 & 36 Vict. c. 63), of an annuity which, under a general power created by deed, a testator charged by will upon real estate, see *A.-G.* v. *Hertford* (*Marquis*) (1845), 14 M. & W. 284; and as to the application of the Revenue Act, 1845 (8 & 9 Vict. c. 76), s. 4, to all legacies actually paid after the commencement of that Act, without regard to the time when they became payable, see *A.-G.* v. *Hertford* (*Marquis*) (1849), 3 Exch. 670.

(*a*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), ss. 8, 9, 12.

Rates and relationship: (1) Where testator or intestate died before 30th April, 1909;

325. The rates of duty, where the testator or intestate died before the 30th April, 1909, are as follows (*b*):—In the case of a child, or a descendant of a child, or a lineal ancestor, of the testator or intestate, there is no duty (*c*). In the case of a brother or sister, or a descendant of a brother or sister, of the testator etc., the rate is 3 per cent. In the case of a brother or sister of the father or mother, or a descendant of a brother or sister of the father or mother, of the testator etc., the rate is 5 per cent. In the case of a brother or sister of a grandfather or grandmother, or a descendant of a brother or sister of a grandfather or grandmother, of the testator etc., the rate is 6 per cent. In the case of a person in any other degree of collateral consanguinity to the testator etc. than is above described, or in the case of a stranger in blood to him, the rate is 10 per cent. (*d*).

(2) Where testator or intestate died on or after the 30th April, 1909.

326. Where, however, the testator or intestate died on or after the 30th April, 1909, the rate of duty, in the case of a child etc., is 1 per cent. (*e*), and it is so also in the case of the husband or wife (*e*), who, prior to that date, were specifically excepted from the duty (*f*). In the case of other persons, 5 per cent. is substituted for 3 per cent., and 10 per cent. for 5 per cent. and 6 per cent. (*g*).

Exceptions as to the 1 per cent. duty.

The 1 per cent. duty, however, is not levied—(1) where the principal value of the property passing on the death of the deceased (*i.e.*, the testator, intestate, or person making a donation *mortis causâ* (*h*)), in respect of which estate duty is payable (other than property in which the deceased never had an interest, and property of which the deceased never was competent to dispose and which on his death passes to persons other than the husband or wife, or a

(*b*) Stamp Act, 1815 (55 Geo. 3, c. 184), s. 2, Sched., Part III. Where the testator or intestate died before or upon the 5th April, 1805, the rates, subject to the condition in note (*g*), p. 232, *ante*, are *nil*, 2½ per cent., 4 per cent., 5 per cent., and 8 per cent. respectively (*ibid.*).

(*c*) One per cent. duty is imposed by the Stamp Act, 1815 (55 Geo. 3, c. 184), s. 2, Sched., Part III., but it is not payable under the will or intestacy of any person dying after the 1st August, 1894 (Finance Act, 1894 (57 & 58 Vict. c. 30), s. 1, Sched. I. (5)), or in respect of any legacy or succession consisting of any estate or effects according to the value whereof (*i.e.*, in the case of persons dying before the 2nd August, 1894) duty has been paid on the affidavit or account in conformity with the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 41.

(*d*) Natural children, if legitimated according to the law of the father's domicil, are not chargeable with duty as strangers in blood (*Skottowe* v. *Young* (1871), L. R. 11 Eq. 474). See also, on this point, note (*s*), p. 283, *post*. See titles CHARITIES, Vol. IV., p. 205; CORPORATIONS, Vol. VIII., p. 378. In Ireland, charitable legacies are not chargeable with the duty (Stamp Duties (Ireland) Act, 1842 (5 & 6 Vict. c. 82), s. 38).

(*e*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 58 (2), (4). The duty is to be paid notwithstanding any repeal effected by or anything contained in the Finance Act, 1894 (57 & 58 Vict. c. 30) (except s. 16 (3) thereof), or any other Act (Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 58 (2)). The provision saving *bonâ fide* purchasers and mortgagees, for value in money or money's worth, of an interest in expectancy, before the 30th April, 1909, which obtains in the case of the increased estate duty under the Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8) (see p. 205, *ante*), obtains also in the case of the increased legacy duty (*ibid.*, s. 64).

(*f*) See note (*t*), p. 242, *ante*.

(*g*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 58 (1), (4). As to purchasers and mortgagees, see note (*e*), *supra*.

(*h*) *Ibid.*, s. 58 (3).

SECT. 4. Rates of Duty.

lineal ancestor or descendant of the deceased) does not exceed £15,000, whatever may be the value of the legacy, or residue, or share thereof (*i*); or (2) where the amount or value of the legacy or succession, together with any other legacies or successions derived by the same person from the testator, intestate, or predecessor does not exceed £1,000, whatever may be the principal value of such property (*j*); or (3) where the person taking the legacy etc. is the widow or a child under twenty-one of the testator or intestate, and the amount etc. of the legacy etc., together with etc., does not exceed £2,000, whatever etc. (*k*).

Persons married to persons liable to lower rate.

327. Any legatee or successor who has been married to a person of nearer consanguinity to the testator or intestate pays the same rate of duty only as such person would have been chargeable with (*l*).

Disclaimer of legacy.

328. If a legatee, other than the residuary legatee, declines a bequest, and it becomes merged in the residue, the rate of duty depends upon the relationship of the residuary legatee to the testator; and the result is the same if it follows from an order of the court by consent (*m*).

Probate revoked and administration issued.

If the probate of a will is revoked, and letters of administration are issued, the rate of duty depends upon the relationship of the next of kin to the intestate, notwithstanding that the revocation may have been the result of a compromise under which persons claiming under the will received part of the estate (*n*).

The grounds on which the court proceeds cannot be inquired into (*o*), and the result, whether the decree was obtained by consent for the reason that the will could not be defended, or whether it was obtained after contested litigation, is alone to be regarded. It might, however, be different if the arrangement between the parties was collusive (*p*).

Will challenged, but allowed to stand on terms.

Where, in consequence of intrinsic defects applicable to a will as a whole, the will is challenged by the next of kin, but allowed to stand on terms of the next of kin receiving part of the estate, the

(*i*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 58 (2) (a).
(*j*) *Ibid.*, s. 58 (2) (b).
(*k*) *Ibid.*, s. 58 (2) (c).
(*l*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 11. In strictness, the testator or intestate must have died after the 18th May, 1853 (*ibid.*). Prior to this enactment, in the case of a legacy to a married woman, who was not entitled to her separate use, the manner in which, by force of the marital rights of the husband, the bequest might ultimately operate could not be taken into consideration in determining the rate of duty (*A.-G.* v. *Bacchus* (1823), 11 Price, 547, 571, Ex. Ch.; *A.-G.* v. *Burnie* (1830), 3 Y. & J. 531, 543).
(*m*) *Lord Advocate* v. *Gordon* (1895), 32 Sc. L. R. 532, *per* Lord M'LAREN, at p. 534; *Lord Advocate* v. *Hamilton* (*Duke*) (1891), 29. Sc. L. R. 213, *per* Lord ADAM, at p. 222.
(*n*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 37; *R.* v. *Stamps Commissioners* (1844), 6 Q. B. 657.
(*o*) *Lord Advocate* v. *Freckleton's Judicial Factor* (1894), 21 R. (Ct. of Sess.) 743, *per* Lord WELLWOOD, at p. 745, on the authority of *R.* v. *Stamps Commissioners*, *supra*.
(*p*) *Lord Advocate* v. *Freckleton's Judicial Factor*, *supra*, *per* Lord ADAM, at p. 747.

duty is to be paid at the rate which is applicable to the person in whose favour the compromise has been made, but only upon the benefit which he has received; and as regards the benefit which results to the next of kin, they only pay upon it at their proper rate (*q*).

The position is the same where, owing to an objection, not to the will as a whole, but to a particular clause, by reason, *e.g.*, of the uncertainty of the objects of a bequest, a compromise is made under which the next of kin receive part of the bequest (*r*); and this is the case even where no judgment is given by the court upon the validity of the bequest (*s*).

SECT. 5.—*Value Chargeable.*

SUB-SECT. 1.—*Gross Value.*

The general rule.

329. The value for legacy duty purposes of any legacy or succession about to be paid to or retained for the benefit of any legatee or successor is its actual value at the date of the due delivery of the account for computation of the duty, including all accretions of income to that date (*t*).

Annuities.

330. The value of any legacy given by way of annuity, whether payable annually or otherwise, for any life or lives (*u*), or for years determinable on any life or lives, or for years or other period of time, is to be calculated according to the tables (*v*) provided for the purpose (*w*).

The value of the annuity, if determinable upon any contingency besides death (*x*), is to be calculated without regard to the

(*q*) *Lord Advocate* v. *Freckleton's Judicial Factor* (1894), 21 R. (Ct. of Sess.) 743, *per* Lord ADAM, at p. 748; see also *Lord Advocate* v. *Christie's Trustees* (1905), 12 Scots Law Times, 690.

(*r*) *Lord Advocate* v. *Freckleton's Judicial Factor*, *supra*, *per* Lord ADAM, at p. 747.

(*s*) *Ibid.*, *per* Lord KINNEAR, at p. 748.

(*t*) *A.-G.* v. *Cavendish* (*Lord G.*) (1810), Wight. 82 (duty payable upon the aggregate amount of residue retained by the executor as residuary legatee); *Thomas* v. *Montgomery* (1827), 3 Russ. 502 (ditto upon the interest on a pecuniary legacy which could not be paid until long after the testator's death); *Nisbett's Trustees* v. *Learmonth* (1845), 8 Dunl. (Ct. of Sess.) 69 (ditto upon the interest accrued on a pecuniary legacy to which a purchaser from the legatee was entitled); *Advocate-General* v. *Oswald* (1848), 10 Dunl. (Ct. of Sess.) 969 (ditto upon the profits of patents for inventions accumulated under a trust); *Bate* v. *Payne* (1849), 13 Q. B. 900 (ditto upon the income of a specific bequest received by the legatee for many years without payment of the duty). In the case of the forgiveness of a debt, no interest on the debt after the death can be added (*A.-G.* v. *Holbrook* (1823), 3 Y. & J. 114); but interest on the duty as from the death is chargeable (Finance Act, 1896 (59 & 60 Vict. c. 28), s. 18 (2)).

(*u*) See *A.-G.* v. *Wynford* (*Lord*) (1854), 9 Exch. 746 (income of property to A. for life subject to an annuity to B. for life; legacy duty payable by A. in the first instance upon an annuity for A.'s life, and not for the joint lives).

(*v*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 31, Sched. When calculations had to be made before the 19th May, 1853, the tables annexed to the Legacy Duty Act, 1796 (36 Geo. 3, c. 52), were applicable; see *Re Cornwallis* (*Earl*) (1856), 11 Exch. 580, *per* POLLOCK, C.B., at p. 582.

(*w*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 8.

(*x*) An investment of personal estate in the purchase of real estate under a direction for that purpose (compare, *ibid.*, s. 19) is not a contingency other than

SECT. 5. Value Chargeable.

contingency; provided that if it determines upon the contingency the value of the annuity, upon application by the persons who paid the duty, is to be calculated by the tables according to the term for which it endured (*y*).

Annuity payable out of another legacy.

Where the legacy so given by way of annuity is charged on and made payable out of any other legacy it is, nevertheless, to be valued in the same manner as other annuities, and any duty payable on the legacy charged with the annuity is to be calculated on the value of the legacy after deducting the value of the annuity (*z*).

Annuity to be purchased.

The duty payable on any legacy given by direction to purchase an annuity of a certain amount for life or any other term is to be calculated upon the sum necessary to purchase the annuity according to the tables (*a*) previously mentioned (*b*).

Where, however, the gift is by direction to apply a stated sum in the purchase of an annuity there is, in effect, a legacy of the sum itself (*c*).

Benefits from time to time.

331. Where the value of any benefit given by any will can only be ascertained from time to time by the actual application of the fund allotted for the purpose, or made chargeable with the benefit, or where, by reason of the form and manner of the gift, the value of the benefit cannot be so ascertained that the duty can be charged under any other of the directions before mentioned, the duty is to be charged upon the sums of money or effects applied from time to time as separate and distinct legacies (*d*).

Legacies in succession.

332. The duty on any legacy given so as to be enjoyed in succession by different persons liable to the same rate of duty is to be charged upon the legacy as in the case of a legacy to one person (*e*).

This rule applies also where the legacy is bequeathed on a future event to legatees to whom the income is given in the meantime in different proportions (*f*).

The rule does not, however, apply where an annuity, as distinguished from the income of a fund, is given to one legatee, and the fund out of which the annuity is payable is given to another legatee (*g*).

Where any legacy is given to different persons in succession, some of whom are not chargeable with duty, or who are chargeable wit

death (*Advocate-General* v. *Stair* (*Earl*) (1850), Scotch Exchequer, referred to in Trevor's Taxes on Succession, 4th ed., pp. 118, 119).

(*y*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 8.

(*z*) *Ibid.*, s. 9.

(*a*) See note (*v*), p. 245, *ante*.

(*b*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 10. The annuity is to be reduced in proportion to the amount of duty payable upon it, the reduction being calculated in the same manner as the duty; and the purchase of such reduced annuity, together with the payment of such duty, is to satisfy and discharge such legacy as fully as if an annuity had been purchased equal in amount to the annuity directed to be purchased (*ibid.*).

(*c*) *Bayley* v. *Bishop* (1803), 9 Ves. 6, *per* GRANT, M.R., at p. 11.

(*d*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 11.

(*e*) *Ibid.*, s. 12.

(*f*) *Re Greenwood's Estate and Effects* (1869), 21 L. T. 25.

(*g*) *Crow* v. *Robinson* (1862), 4 De G. F. & J. 337, C. A.

different rates of duty, those who are entitled for life only or other temporary interest are chargeable in respect of the bequest as if the annual produce of it had been given by way of annuity (*h*).

If any other partial interest is given, or arises out of the property to be enjoyed in succession, the duty on the interest is to be charged as in the case of partial interests charged on property given otherwise than to different persons in succession (*h*).

Every person who becomes absolutely entitled to such legacy is chargeable with the duty as if the legacy had come to him immediately on the death of the person by whom it was given to be enjoyed in succession (*h*).

Where any legacy is given so that different persons will become entitled to it in succession, the duty is to be charged upon it as if given to be enjoyed in succession, whether the persons entitled to it take it under the will and the dispositions contained therein, or in default of such dispositions, and as entitled by intestacy (*i*).

Legacies in joint tenancy

333. Where any legacy is given to or for the benefit of any persons in joint tenancy, some of whom are chargeable with legacy duty and others are either not chargeable at all or are chargeable with duty at a different rate (*j*), the duty where chargeable is payable in proportion to the respective interests of the legatees in the bequest; and should any of the legatees so chargeable become entitled by survivorship, or by severance of the joint tenancy, to any larger interest in the property, they are to be charged with the same duty as if the property to which they so become entitled had been given to them in the first instance (*k*).

Legacies subject to a contingency.

334. Where any legacy is given subject to a contingency which may defeat the gift, and whereupon it may go to some other person, the bequest (unless chargeable as an annuity) is to be charged as an absolute bequest to the person who takes it subject to the contingency (*l*).

Legacies subject to powers of appointment.

335. Any legacy which is subjected to a power of appointment in favour of persons specially named or described as objects of the power is to be charged with duty as property given to different persons in succession (*m*). In charging the duty not only the persons who take previous or subject to the power of appointment, but also those who take under or in default of any such appointment, when and as they take respectively, are in respect of their several interests to be charged with the same duty and in the same manner as if those interests had been given to them respectively, in and by the will containing the power, in the same order as will take place under and by virtue of the power of appointment, or in default of execution of it, as the case may be (*n*).

(*h*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 12.
(*i*) *Ibid.*, s. 15.
(*j*) See *A.-G.* v. *Bacchus* (1823), 11 Price, 547, Ex. Ch.; *A.-G.* v. *Burnie* (1830), 3 Y. & J. 531. In both cases the legatees were tenants by entireties.
(*k*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 16.
(*l*) *Ibid.*, s. 17.
(*m*) See *ibid.*, s. 12.
(*n*) *Ibid.*, s. 18.

SECT. 5. Value Chargeable.

Where any property is given for any limited interest, and a general and absolute power (*o*) of appointment is also given to any person to whom the property would not belong in default of appointment, the property, upon the execution of the power, is to be charged with the same duty and in the same manner as if the property had been immediately given to the person having and executing the power, after allowing any duty already paid in respect of it (*p*).

Where any property is given with such general power of appointment to persons who would be entitled to the property in default of appointment, the property is to be charged with duty as if it had been given to those persons absolutely in the first instance without such power of appointment (*p*).

Money directed to be applied in purchase of real estate.

336. Any personal estate, directed to be applied in the purchase of real estate, is to be charged with duty as personal estate, except where it is so given as to be enjoyed by different persons in succession, in which case each person entitled to it in succession is to pay duty in the same manner as if the personal estate had not been directed to be applied in the purchase of real estate, unless it has been actually so applied before the duty accrues (*q*).

If, however, before the personal estate, or some part of it, has been actually so applied, any person, including a tenant in tail in possession (*r*), although a minor (*s*), becomes entitled (*t*) to an estate of inheritance (*a*) in possession in the real estate to be purchased with it, or with so much of it as has not been applied in the purchase of real estate (*b*), the same duty is to be charged as if that person had become absolutely entitled to it as personal estate by virtue of any bequest of it as such (*c*).

(*o*) A power of appointment exercisable only by will, and from the benefit of which certain persons were excluded, is a general and absolute power of appointment within the meaning of this section—*i.e.*, as distinguished from a power of appointment for the benefit of persons specially named or described (*Platt* v. *Routh* (1841), 3 Beav. 257; affirmed, *sub nom. Drake* v. *A.-G.* (1843), 10 Cl. & Fin. 257, 288, H. L.).

(*p*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 18.

(*q*) *Ibid.*, s. 19.

(*r*) *Macfarlane* v. *Lord Advocate*, [1894] A. C. 291.

(*s*) *A.-G.* v. *Twyford* (1849), 9 Hare, 730, n., 732, n., referred to in Trevor's Taxes on Succession, 4th ed., p. 113. The person claiming to be tenant in tail was a minor (Burke's Peerage (1907), p. 572), but the fact is not alluded to in the report.

(*t*) This expression means "will become entitled if real estate is purchased, or as and when purchased" (*Macfarlane* v. *Lord Advocate*, *supra*, *per* Lord HERSCHELL, L.C., at p. 304). A person can become entitled upon his own death without issue (*Kenlis* (*Lord*) v. *Hodgson*, [1895] 2 Ch. 458, *per* KEKEWICH, J., at p. 465).

(*a*) The expression "an estate of inheritance" in the Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 19, has the ordinary meaning of an estate which does not terminate with the life of the possessor (*Macfarlane* v. *Lord Advocate*, *supra*).

(*b*) *Macfarlane* v. *Lord Advocate*, *supra*. Money expended in building a house upon land does not come within the words "purchase of real estate" (*ibid.*, *per* Lord HERSCHELL, L.C., at p. 306).

(*c*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 19; *De Lancey* v. *R.* (1872) L. R. 7 Exch. 140, 142, Ex. Ch.

SECT. 5. Value Chargeable.

Legacies etc. compounded for.

337. The legacy duty on any legacy or residue satisfied otherwise than by payment of money or application of specific effects, or released for consideration, or compounded for less than its value, is to be charged according to the value of the property taken in satisfaction (*d*), or as consideration for the release or composition (*e*).

If, however, any legacy is given in satisfaction of any other legacy, or title to any residue, or part of residue, of any personal estate remaining unpaid, the duty is not to be paid on both subjects, but on the one yielding the largest duty (*f*).

SUB-SECT. 2.—*Deductions.*

Deductions allowed.

338. The legacy duty payable in respect of the residue of the personal estate of a deceased person is to be calculated upon the value remaining after deducting his debts and funeral expenses and any legacies and other charges first payable thereout (*g*).

SECT. 6.—*Collection of the Duty.*

SUB-SECT. 1.—*The Duty.*

The duty is a stamp duty.

Commissioners are to appoint receivers of duties and keep accounts etc.

339. Legacy duty is a stamp duty, and the Commissioners (*h*) are to provide proper stamps for denoting the rate per cent. (*i*).

The Commissioners are required to appoint receivers of the duty, and to keep accounts of all payments, with proper references in alphabetical order, according to the surname of the testator, or intestate, in respect of whose personal estate the payments have been made (*k*).

SUB-SECT. 2.—*When the Duty is payable.*

The duty is to be paid when the legacy is paid.

340. Legacy duty is, except where otherwise provided (*l*), to be paid upon retainer, delivery, payment, or other satisfaction or discharge whatsoever, of any legacy or residue, or any part thereof, respectively, to which any person is entitled (*m*). In other words, the duty is payable when the legacy is paid, and not when the title to it accrues (*n*).

(*d*) According to its then value (*A.-G.* v. *Cavendish* (*Lord G.*) (1810), Wight. 82, *per* MACDONALD, C.B., at p. 93).

(*e*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 23. This section contemplates an extra-judicial compromise of the legacy, but it equally applies where the compromise has taken place with reference to a legacy which has been the subject of a decree, and where the decree gives only partial effect to the claim of the legatee (*Lord Advocate* v. *Freckleton's Judicial Factor* (1894), 21 R. (Ct. of Sess.) 743, *per* Lord ADAM, at p. 747).

(*f*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 23.

(*g*) Stamp Act, 1815 (55 Geo. 3, c. 184), s. 2, Sched., Part III.

(*h*) *I.e.*, the Commissioners of Stamps, afterwards the Commissioners for Stamps and Taxes (Land Tax Act, 1834 (4 & 5 Will. 4, c. 60), s. 8; repealed by Inland Revenue Regulation Act, 1890 (53 & 54 Vict. c. 21), s. 40), and now the Commissioners of Inland Revenue (Inland Revenue Board Act, 1849 (12 & 13 Vict. c. 1), s. 1; repealed and replaced by Inland Revenue Regulation Act, 1890 (53 & 54 Vict. c. 21), ss. 1, 39, 40).

(*i*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 3 (repealed by Statute Law Revision Act, 1872 (35 & 36 Vict. c. 63)).

(*k*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 4.

(*l*) See pp. 250—252, *post.*

(*m*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 6.

(*n*) *Re Hillas* (1850), 2 Ir. Jur. 36, *per* LEFROY, B., at p. 36. The duty,

SECT. 6. Collection of the Duty.

In order that there may be a retainer, the executor must be discharged (*o*).

What amounts to a retainer.

There is a retainer where the executor pays a fund into court, whether under an order of the court with a view to the investment of the fund under the protection of the court, either for persons declared to be entitled in succession under the will (*p*), or for a life tenant and, subject to the life interest, for other persons who had contingent interests, and might eventually become entitled (*q*), or to the credit generally of an action for the administration of the estate (*r*).

There is, however, no retainer for the benefit of the legatee who may become entitled after the death of a life tenant, where the executor keeps the fund in his own hands as trustee for the purposes of the will (*s*).

Satisfaction of legacy without payments.

341. A legacy may be satisfied without payment, as, *e.g.*, where a testator bequeaths a sum of money charged upon real estate to the owner of the real estate (*t*).

Payments from time to time.

Where the duty in respect of any benefit given by any will is to be charged upon the sums of money or effects applied from time to time as separate and distinct legacies, the general rule as to the time of payment of the duty applies (*a*), and so also where *interim* distributions of an estate are made (*b*).

Legacy to purchase an annuity.

The duty on a legacy given to purchase an annuity is to be paid at the same time as in the case of other pecuniary legacies (*c*).

however, must be considered as appropriated for the Crown from the time when the legacy is payable (*Thomas* v. *Montgomery* (1827), 3 Russ. 502, *per* Lord LYNDHURST, L.C., at p. 510). In a sense, it legally vests in Government at the death (*A.-G.* v. *Cavendish* (*Lord G.*) (1810), Wight. 82, *per* MACDONALD, C.B., at p. 94). As to the remission of legacy duty and interest thereon, see p. 182, *ante*.

(*o*) *A.-G.* v. *Wood* (1828), 2 Y. & J. 290, *per* ALEXANDER, C.B., at p. 301.

(*p*) *Hill* v. *Atkinson* (1816), 3 Price, 399.

(*q*) *Coombe* v. *Trist* (1835), 1 My. & Cr. 69; see also *A.-G.* v. *Wood* (1828), 2 Y. & J. 290, *per* ALEXANDER, C.B., at p. 301.

(*r*) *A.-G.* v. *Loscombe* (1860), 5 H. & N. 564.

(*s*) *A.-G.* v. *Manners* (*Lady L.*) (1815), 1 Price, 411; *A.-G.* v. *Wood* (1828), 2 Y. & J. 290; *A.-G.* v. *Hancock* (1837), 2 M. & W. 563, 595. In all these cases it was uncertain who would become entitled on the life tenant's death. *Quære*, however, whether the result is not the same where it is certain who will be so entitled. *Semble*, where property is given to several persons in succession, it is, to the extent of their respective interests, paid and satisfied to them in turn, and not the less so to the person absolutely entitled because one or more payments to owners of limited interests may already have taken place (*A.-G.* v. *Hancock*, *supra*, *per* Lord ABINGER, C.B., at p. 596). The words "satisfied" and "discharged" mean when the legacy is "paid," and are synonymous to those ("retained" or "delivered") which precede them (*A.-G* v. *Wood*, *supra*, *per* ALEXANDER, C.B., at pp. 299 *et seq.*). A legacy has not been delivered, retained, satisfied, or discharged, when the money is in the hands of the executor and trustee, and he is liable for it to the person beneficially entitled to the legacy (*ibid.*, at p. 301). Compare, *contra*, *Hill* v. *Atkinson* (1816), 3 Price, 399, *per* Lord ELDON, at p. 404; disapproved, *A.-G.* v. *Wood*, *supra*, *per* ALEXANDER, C.B., at p. 300; *A.-G.* v. *Wood*, *supra*, *semble*, *per* HULLOCK, B., at pp. 301, 302.

(*t*) *A.-G.* v. *Metcalfe* (1851), 6 Exch. 26; see also *Re Taylor's Estate* (1853), 8 Exch. 384.

(*a*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 11.

(*b*) See p. 252, *post*; Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 26.

(*c*) *Ibid.*, s. 10.

SECT. 6. Collection of the Duty.

342. The duty on a legacy given to be enjoyed by persons in succession, all chargeable at the same rate, is to be paid upon payment etc. by the executor to any trustee, or other person, to whom the legacy is payable or paid in trust for the persons entitled in succession, and if not so paid is to be paid upon receipt, by any persons so entitled, of any produce of the capital of the property, according to the amount of the capital of which the produce is so received (*d*).

Legacy to be enjoyed in succession.

The duty on the capital of a legacy given to be enjoyed in succession by persons who are chargeable at different rates of duty is payable when the person who becomes absolutely entitled to the legacy receives it or begins to enjoy the benefit of it (*e*), which may be at his own death (*f*).

Annuities and temporary or partial interests.

The duty in respect of any legacy given by way of annuity is to be paid by four equal payments, the first before or on completing the payment of the first year's annuity, and the remaining three at yearly intervals before or on completing the payments of the three succeeding years' annuity respectively (*g*).

The duty in respect of an annuity payable out of another legacy is payable in the same manner as other annuities (*h*). So also is the duty in respect of temporary interests in a legacy given to be enjoyed by persons in succession, some of whom are chargeable with no duty, or who are chargeable at different rates (*i*).

The like rule holds in the case of temporary interests in any personal estate directed to be applied in the purchase of real estate to be enjoyed by persons in succession, and not actually so applied (*k*).

The duty in respect of a partial interest given or arising out of property enjoyed in succession is to be paid in the same manner as in like cases of partial interests charged on property not so enjoyed (*l*).

Specific articles.

Articles not yielding income, which are given to be enjoyed by different persons in succession, are, when they are actually sold or disposed of, or come to any person having power to sell or dispose of them, or having an absolute interest in them, chargeable with legacy duty as if they had been originally given absolutely (*m*).

In the case, however, of objects which appear to the Treasury to

(*d*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), ss. 12, 13.

(*e*) *Ibid.*, s. 12.

(*f*) *Kenlis* (*Lord*) v. *Hodgson*, [1895] 2 Ch. 458, *per* KEKEWICH, J., at p. 465.

(*g*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 8.

(*h*) *Ibid.*, s. 9.

(*i*) *Ibid.*, s. 12.

(*k*) *Ibid.*, s. 19. *Semble*, the Crown will, on an equitable extension of this section, restrict the claim to a diminished annuity during the second, third, and fourth years, giving effect to any investments made in land in the course of those years (*Advocate-General* v. *Stair* (*Earl*) (1850), Scotch. Exchequer, referred to in Trevor's Taxes on Succession, 4th ed., pp. 118, 119).

(*l*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), ss. 12, 13.

(*m*) *Ibid.*, s. 14; compare *Lord Advocate* v. *Hamilton* (*Duke*) (1891), 29 Sc. L. R. 213 (chattels settled on a person for life, and to him absolutely, if testator's debts were paid off in his (the legatee's) lifetime; he paid off, or assumed liability for, the debts, and was held liable for legacy duty on the chattels).

SECT. 6. Collection of the Duty.

be of national, scientific, historic, or artistic interest, the duty is only chargeable when the property is sold (*n*).

SUB-SECT. 3.—*By whom the Duty is payable.*

(1) *The Accountable Persons.*

Liability of executor.

343. Legacy duty is, except where otherwise provided, to be accounted for and paid by the person (hereafter called the executor) having or taking the burden of the execution of the will or other testamentary instrument, or the administration of the personal estate of any person deceased (*o*).

Crown debt (1) from the executor;

If the executor retains for his own benefit, or for the benefit of any other person, any legacy or residue, or any part thereof, respectively, which he is entitled to retain, either in his own right or in the right or for the benefit of any other person, and upon which any legacy duty is chargeable, not having first paid such duty, the duty is a debt from him to the Sovereign; and it is so if he delivers, pays, or otherwise howsoever satisfies or discharges any legacy etc. to which any other person is entitled, and upon which legacy duty is chargeable, without receiving or deducting the duty. And in the last-named case the duty is also a debt to the Sovereign from the person to whom delivery etc. of the legacy etc. is made (*p*).

(2) from the legatee.

Power to executor to discharge legacies on payment of duty accrued.

344. The executor may from time to time pay, deliver, or otherwise dispose of any legacy, or any part thereof, or distribute any part of the residue of any personal estate, on payment, from time to time, of the proportion of the duty accruing in respect of the part of the personal estate so administered (*q*).

General powers.

Where personal estate is appointed by will, in pursuance of a general power contained in a settlement, the executor of the will is the proper person to administer it (*r*), and is primarily liable for the payment of the legacy duty.

Annuities.

Where an annuity of a certain amount is directed to be purchased, the payment of legacy duty upon the sum necessary to purchase the annuity, calculated in accordance with the provisions

(*n*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 63. The death must be after the 29th April, 1909 (*ibid.*).

(*o*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 6. The executor is only made liable for the benefit of Government, and not on his own account; he is no more than surety for the legatee, and his case falls within the principles applied to the case of sureties (*Hales* v. *Freeman* (1819), 1 Brod. & Bing. 391, *per* PARK, J., at p. 399), that is, his principal becomes liable to him for whatever he has paid (*ibid.*, *per* RICHARDSON, J., at p. 400).

(*p*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 6; *Re Sammon* (1838), 3 M. & W. 381, *per* PARKE, B., at p. 386. In *Re Pigott* (1833), 1 Cr. & M. 827, the court, in exercise of its discretion under the stat. (1802) 42 Geo. 3, c. 99, s. 2 (repealed by the Crown Suits etc. Act, 1865 (28 & 29 Vict. c. 104), s. 53), declined to order the surviving executor of the sole executor of the sole executor of a testator to account for legacy duty, he having only interfered in the estate of his own testator to sign necessary documents, and no assets of the original testator ever having come to his hands.

(*q*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 26.

(*r*) *Re Philbrick's Settlement* (1865), 11 Jur. (N. S.) 558; *Hayes* v. *Oatley* (1872), L. R. 14 Eq. 1; *Re Hoskin's Trusts* (1877), 6 Ch. D. 281, C. A.

for that purpose, discharges the person paying or satisfying the legacy, as well as the legatee himself, from all other demands in respect of the legacy duty payable thereon (*s*).

The legacy duty on any legacy given by way of annuity, and made payable out of another legacy, is to be paid by the person entitled to the legacy charged with the annuity (*t*).

Legacies enjoyed by persons in succession.

The legacy duty payable on any legacy given to be enjoyed in succession by different persons liable to the same rate of duty is to be paid by the executor (*a*).

Where, however, the duty is chargeable at different rates the executor is chargeable with the duties in succession, unless the property bequeathed has been transferred to trustees, including any new or substituted trustees (*b*), in which case such trustees or their representatives are chargeable with the duties (*a*).

So also where any partial interest is given or arises out of any such property, and the partial interest is satisfied or paid by the persons enjoying the property, those persons are chargeable with the duty on the partial interest (*a*).

Crown debtors

The persons so chargeable with the duty are debtors to the Sovereign in like manner as the executor (*a*).

Settled articles not yielding income.

The legacy duty on articles not yielding income, and given to be enjoyed by different persons in succession, is to be paid by and is to become the debt of any person for whose benefit the things are sold, or who has power to sell or dispose of them, or who has an absolute interest in them, but is not to be a charge upon any person by reason of his having assented as executor to the bequest (*c*).

Where the articles are given as heirlooms to be enjoyed with settled real estate, and tenant for life and remainderman in tail join to disentail and re-settle the real estate and assign the articles to trustees, to the intent that they may continue to be enjoyed as heirlooms therewith, the persons who at the moment when the interest actually vests in possession have the right to call for the property are the persons who have an absolute interest in it and are liable for the duty (*d*).

Legacy subject to contingency.

Where any legacy (not chargeable by way of annuity) is given subject to a contingency which may defeat the gift, and the contingency afterwards happens, and the legacy goes to a person liable to a higher rate of duty than the duty already paid, such person is to pay the difference (*e*).

Legacy paid without

345. Where a pecuniary (*f*) or specific (*g*) legacy is satisfied without the legacy duty having been deducted or received, the

(*s*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 10.
(*t*) *Ibid.*, s. 9.
(*a*) *Ibid.*, s. 13.
(*b*) *Re Jones's Trust* (1852), 21 L. J. (CH.) 566.
(*c*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 14. As to objects of national, scientific, historic, or artistic interest, see p. 251, *ante*.
(*d*) *A.-G.* v. *Bruce*, [1901] 2 K. B. 391, 399, following Lord CRANWORTH, L.C., in *Bryan* v. *Mansion* (1857), 3 Jur. (N. S.) 473.
(*e*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 17.
(*f*) *Foster* v. *Ley* (1835), 2 Bing. (N. C.) 269.
(*g*) *Bate* v. *Payne* (1849), 13 Q. B. 900.

SECT. 6. Collection of the Duty.

executor may recover from the legatee, or a purchaser from the legatee (*h*), the amount he is subsequently called upon to pay for duty on account of the legacy. This right of recoupment is not affected by the fact that payment to the legatee was made by order of the court (*i*), or that a deed of release and indemnity to the executor, to which he was a party, recited, without fraud or deception on his part, that he had retained the amount of the duty (*k*), or that in the case of a legacy given by way of annuity the legacy duty was not deducted, as it should have been, from the first four yearly payments of the annuity (*l*), and this notwithstanding that the legatee has parted with the annuity. The purchaser of a legacy is, however, not liable for the duty in respect of a separate legacy bequeathed by the same will to the same legatee (*m*).

duty having been deducted.

Where the duty has been paid by the legatee to the agent of the executor, and the agent has misappropriated it, the executor cannot recover the amount from the legatee (*n*).

In administration action, court to provide for payment of duty.

346. Where an action is instituted in any court (*o*) concerning the administration of the personal estate of any person dying testate or intestate, or any part of such estate, in which any direction is given touching payment of any legacy, or residue, or any part thereof, the court, in giving directions concerning the same, is to provide for the due payment of legacy duty; and in taking any account of the personal estate, or otherwise acting concerning it, the court is to take care that no allowance is made for any legacy etc. without due proof of the legacy duty having been paid (*p*).

The court is charged with the duty of seeing that all duties on every transmission from the testator to the person obtaining payment through the action before the court are paid; but is not bound to follow the legacy till its present beneficial owner is found and see that all duties due by him are paid (*q*).

The court, moreover, is not bound to provide for future duties (*r*).

(*h*) *Jennings* v. *Bond* (1845), 8 I. Eq. R. 755, *per* SUGDEN (afterwards Lord ST. LEONARDS), L.C., at p. 760; *Nisbett's Trustees* v. *Learmonth* (1845), 8 Dunl. (Ct. of Sess.) 69. *Secus, semble*, where the executor himself sells (*Farwell* v. *Seale* (1849), 3 De G. & Sm. 359).

(*i*) *Foster* v. *Ley* (1835), 2 Bing. (N. C.) 269.

(*k*) *Brooke* v. *Haymes* (1868), L. R. 6 Eq. 25. The sum retained by the executor in this case proved to be only a part of the legacy duty payable.

(*l*) *Hales* v. *Freeman* (1819), 1 Brod. & Bing. 391 (annuity assigned with a covenant that it was free from incumbrance; action against legatee).

(*m*) *Btgnold* v. *Giles* (1858), 28 L. J. (CH.) 238; *A.-G.* v. *Giles* (1860), 5 H. & N. 255.

(*n*) *Horn* v. *Coleman* (1856), 2 Jur. (N. S.) 1127.

(*o*) Including the county courts (County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 56; County Courts Act, 1903 (3 Edw. 7, c. 42), s. 3. See title COUNTY COURTS, Vol. VIII., pp. 428 *et seq.*

(*p*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 25. See Supreme Court Funds Rules, 1905, rr. 20, 52 (b), 66 (duties generally); Trustee Act, 1893 (56 & 57 Vict. c. 53), ss. 42, 50; County Court Rules, 1903, Ord. 2, r. 1 (legacy duty, succession duty, and estate duty).

(*q*) *Ewing's Trustees* v. *Mathieson* (1906), 44 Sc. L. R. 12, 13.

(*r*) *Re Bowes, Strathmore* v. *Vane*, [1907] W. N. 198 (settled fund paid out to trustees to be held upon trusts). Where life interest released, and fund paid out to beneficiary, compare note (*n*), p. 225, *ante*.

SECT. 6. Collection of the Duty.

Although the court has to provide for the payment of the duty, the executor, being a party to the action, must see that the duty is paid (*s*), and, notwithstanding that the action is still pending, must account for the duty in respect of any legacies which he has satisfied (*t*).

Transmission of particulars to Commissioners before retainer of legacy.

347. The executor is required, previously to retaining for his own use any legacy, or residue, or any part thereof, to which he is entitled, and which is chargeable with legacy duty upon retainer, to transmit to the Commissioners a note containing the particulars of the personal property intended to be retained, and the amount or value thereof, and of the duty payable; and the Commissioners are to assess the duty accordingly. Upon payment of the duty the Commissioners are to give a receipt for it duly stamped (*a*).

Stamped receipts.

No accountable person is to satisfy or compound for any legacy, or any residue, or any part thereof respectively, in respect of which the duty is payable, without taking a receipt (*b*) or discharge in writing for the same. The receipt etc. is to be dated, and is to disclose the name of the deceased person under whose will etc. the title to the legacy etc. accrues, the name of the person to whom the receipt etc. is given, and the name of the legatee or successor, and also the amount or value of the legacy etc. for which the discharge is given, and the amount and rate of duty payable and allowed thereon (*c*).

No such receipt etc. is to be received in evidence, or is to be available in any manner, unless duly stamped; and no evidence as to any payment etc. of any legacy etc. is to be given without production of the receipt etc. duly stamped, unless the actual payment of the legacy duty, as, *e.g.*, by a certificate on behalf of the Commissioners that the duty has been paid (*d*), is first given in evidence (*e*).

Stamped receipts are not required for payments of annuities, or for legacies chargeable with duty as annuities, except the several payments which complete the payments for each of the first four years during which such annuity is payable, or in respect of which such legacy or bequest is chargeable with duty as an annuity (*e*).

(*s*) *Bowra* v. *Rhodes* (1862), 10 W. R. 747. Solicitors should also assist the court in seeing that payment of the duty is provided for (*Bryan* v. *Mansion* (1857), 3 Jur. (N. S.) 473, *per* Lord CRANWORTH, L.C., at p. 474).

(*t*) *Re Sammon* (1838), 3 M. & W. 381.

(*a*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 35; see note (*f*), p. 256, *post*.

(*b*) The Commissioners may provide printed forms (Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 5).

(*c*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 27.

(*d*) *Howe* (*Earl*) v. *Lichfield* (*Earl*) (1867), 2 Ch. App. 155. A copy of the entry in the books of the Commissioners of the payment of the duty is to be admitted as evidence thereof (Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 27; *Harrison* v. *Borwell* (1839), 10 Sim. 380). Where, on application for payment out of court of a legacy on which duty had been paid, a certificate had been refused, because the general residuary account had not been filed, notice was ordered to be given to the Commissioners that the fund would be paid out within seven days unless cause to the contrary was shown by them (*Re Marsham* (1863), 9 L. T. 533).

(*e*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 27.

SECT. 6. **Collection of the Duty.**

Every receipt etc. for a legacy etc. must be transmitted to the office appointed by the Commissioners to be stamped, and the duty must be paid within twenty-one days of the date thereof; and the proper officer is to write a dated receipt for the duty upon the receipt etc. and enter the amount in a book, and the receipt etc. is to be stamped with a stamp denoting the rate of duty (*f*).

Every receipt etc. for any legacy etc. so duly stamped is to be free from all other stamp duties upon receipts or discharges for money (*g*).

(2) *Limitation of Personal Liability.*

Liability ceasing after a specified period.

348. Under a testamentary document admitted to probate, or under letters of administration, no person is liable for payment of any legacy duty after the expiration of six years from the date of settlement of the account in respect of which the duty is payable, provided that such account was in all respects a full and true account, and contained all material facts for the ascertainment of the rate and amount of duty; and no trustee, executor, or administrator is, after the expiration of such six years, liable for the duty, if it is proved to the satisfaction of the Commissioners that the account rendered was correct to the best of his knowledge, information, and belief (*h*).

Discharge of executor etc. from duty on distribution of fund.

When an executor, administrator, or trustee, has given notice, in writing to the Commissioners for any claim to legacy duty or succession duty in respect of any fund in his hands which he intends to distribute, and has delivered to the Commissioners all particulars which they may require in order to ascertain the existence and extent of any such claim, he is at liberty to distribute the fund amongst the parties entitled thereto, after satisfaction of any claims to duty made by the Commissioners, and is entitled to receive from them a certificate discharging him from his liability to any duty in respect of the fund (*i*).

The certificate does not, however, in any way affect the liability of any person other than the person in whose favour it is expressed to be given (*i*).

SUB-SECT. 4.—*Out of what Property the Duty is payable.*

The duty is payable out of the legacy itself.

349. Legacy duty is chargeable upon (*k*), and, apart from express direction (*l*), is to be deducted from (*m*), or retained out of (*n*), or paid out of (*o*), or raised and paid out of (*p*), the legacy or residue

(*f*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 29. The machinery provided by this section is now for the most part obsolete. The receipt should be sent by post, addressed to the Secretary of the Estate Duty Office, when it will be examined, and if satisfactory a formal assessment of the duty and any interest payable will be made, and, upon payment of the amount assessed, the form, duly stamped and receipted, will be returned to the sender.

(*g*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 41.

(*h*) Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 14.

(*i*) Customs and Inland Revenue Act, 1880 (43 Vict. c. 14), s. 12.

(*k*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), ss. 6, 8, 11, 12, 14, 17—19, 21.

(*l*) *Ibid.*, s. 21.

(*m*) *Ibid.*, ss. 6, 10, 13, 24.

(*n*) *Ibid.*, ss. 9, 13; Legacy Duty Act, 1805 (45 Geo. 3, c. 28), s. 5.

(*o*) Legacy Duty Act 1796 (36 Geo. 3, c. 52), ss. 11, 12, 17.

(*p*) *Ibid.*, s. 19.

in respect of which it is payable, or, in the case of specific effects, is to be received (*q*) from the legatee in exchange for them.

Where a legacy is compounded for, the legacy duty, apart from express stipulation to the contrary, comes out of the amount of the composition (*r*), although it is otherwise where the amount is the agreed price for a release of all claims (*s*).

The duty follows the legacy.

350. The duty is a Government charge (*t*) on the legacy etc. itself (*a*), and not on the estate generally (*b*). It is, however, not an incumbrance (*b*), properly so called (*c*), although it is a burden (*d*) upon the legacy, apart from express stipulation to the contrary (*e*), and follows it, in the absence of express contract (*f*), in the hands of everyone who acquires a right to it (*g*), whether it was acquired in possession (*h*) or reversion (*i*).

The legacy duty payable in respect of a bequest etc. to one person cannot be deducted from the assets comprised in a bequest etc. to another person (*k*). Nor can the unpaid duty in respect of a life interest be paid out of the capital to which another legatee is entitled (*l*). Even where separate legacies under a will are bequeathed to the same legatee, there is no lien upon one legacy for the duty on the other legacy (*m*); and the same rule holds with regard to separate parts of one and the same legacy (*n*).

(*q*) Legacy Duty Act, 1796 (36 Geo. 3, c. **52**), ss. 6, 24.

(*r*) *Fischer* v. *Seafield* (*Earl*) (1825), 4 Sh. (Ct. of Sess.) 192, *per* the Lord Ordinary (MEADOWBANK), at p. 194. In the actual case, the legatee agreed to give a full and ample discharge, and such discharge, to be available in law, must be duly stamped and at the expense of the legatee (*ibid.*, *per* the Lord President (HOPE), at p. 196).

(*s*) *Greville* v. *Greville* (No. 2) (1859), 27 Beav. 596.

(*t*) *Bliss* v. *Putnam* (1843), 7 Beav. 40, *per* Lord LANGDALE, M.R., at p. 41.

(*a*) *Warbrick* v. *Varley* (No. 1) (1861), 30 Beav. 241, *per* ROMILLY, M.R., at p. 242.

(*b*) *Noel* v. *Henley* (*Lord*) (1819), 7 Price, 241, *per* RICHARDS, C.B., at p. 253.

(*c*) *Re Repington*, *Wodehouse* v. *Scobell*, [1904] 1 Ch. 811, *per* FARWELL, J., at p. 814.

(*d*) *Fischer* v. *Seafield* (*Earl*) (1825), 4 Sh. (Ct. of Sess.) 192, *per* the Lord Ordinary (MEADOWBANK), at p. 196; *Nisbett's Trustees* v. *Learmonth* (1845), 8 Dunl. (Ct. of Sess.) 69, 74, 75, 76. A "burden" in the sense here used is an obligation on a person as owner of the legacy (compare Green's Encyclopædia of Scots Law, Vol. II., p. 239).

(*e*) *Fischer* v. *Seafield* (*Earl*), *supra*.

(*f*) *Re Repington*, *Wodehouse* v. *Scobell*, *supra*.

(*g*) *Bryan* v. *Mansion* (1857), 3 Jur. (N. S.) 473; *Bliss* v. *Putnam*, *supra*; *Nisbett's Trustees* v. *Learmonth*, *supra*; *A.-G.* v. *Bruce*, [1901] 2 K. B. 391; *Re Repington*, *Wodehouse* v. *Scobell*, *supra*. A covenant for further assurance does not bind the assignor to indemnify the assigned legacy against legacy duty (*Re Repington*, *Wodehouse* v. *Scobell*, *supra*).

(*h*) *Bliss* v. *Putnam*, *supra*; *Nisbett's Trustees* v. *Learmonth*, *supra*.

(*i*) *Bryan* v. *Mansion*, *supra*; *A.-G.* v. *Bruce*, *supra*; *Re Repington*, *Wodehouse* v. *Scobell*, *supra*.

(*k*) *Wright* v. *Barnewall* (1849), 13 Jur. 1041; see also *Hicks* v. *Keat* (1840), 3 Beav. 141.

(*l*) *Bowra* v. *Rhodes* (1862), 10 W. R. 747.

(*m*) *Bignold* v. *Giles* (1858), 28 L. J. (CH.) 238; *A.-G.* v. *Giles* (1860), 5 H. & N. 255. See also *Re Currie*, *Bjorkman* v. *Kimberley* (*Lord*) (1888), 57 L. J. (CH.) 743, cited note (*o*), p. 317, *post*.

(*n*) *Re Repington*, *Wodehouse* v. *Scobell*, *supra*.

SECT. 6. Collection of the Duty.

Where a legacy is given free of duty, the duty, apart from express direction, is payable out of the same property as the legacy (*o*).

Provision of duty by court.

351. Whenever any action is pending in any court for the administration of any property chargeable with legacy duty, the court is to provide, out of any property in its possession and control, for the payment of duty to the Commissioners (*p*).

SUB-SECT. 5.—*Remission of Duty and Interest.*

Power to remit duty and interest.

352. The Commissioners and the Treasury, respectively, have, as already stated (*q*), certain powers to remit legacy duty and interest thereon.

SUB-SECT. 6.—*Commutation of Duty and Composition of Claims.*

Power to commute.

353. The Commissioners may, upon application of the accountable persons, commute, for a certain sum to be presently paid, the legacy duty presumptively payable in respect of any interest in expectancy upon the determination of a life or other temporary interest in possession in a legacy, or residue, provided that any duty payable upon the life etc. interest has been satisfied (*r*). For assessing the amount of duty payable, the Commissioners are to set a present value upon the presumptive duty, regard being had to any contingencies affecting the liability to the duty, and interest being reckoned at the rate of 3 per cent. (*s*), and upon receipt of the certain sum the Commissioners are to give a discharge for the duty accordingly (*r*).

Power to compound.

The Commissioners, upon application of the person acting in the execution of the will of any deceased person, and upon delivery to them of an account showing the amount of the estate and effects in respect of which legacy duty is payable, and the names or description of class of the persons entitled in possession or expectancy, and their degrees of consanguinity to the testator, may assess the duty upon the amount shown by the account at such a sum by way of composition as, having regard to the circumstances, appears to be proper, and may accept payment of the duty so assessed in full discharge of all claims for legacy duty under the will (*t*). If the Commissioners are of opinion that the application should receive the assent of any person, they are to refuse to entertain the application until the assent has been given (*t*). This power is distinct from the Commissioners' power, already stated (*a*), to compound for death duties generally (*b*).

(*o*) *Noel* v. *Henley* (*Lord*) (1819), 7 Price, 241, 253; see also *Re Fermoy* (*Lord*) (1890), fully stated, MacCarthy's Leading Cases in Land Purchase Law, at p. 55.

(*p*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 53.

(*q*) See p. 182, *ante*.

(*r*) Customs and Inland Revenue Act, 1880 (43 Vict. c. 14), s. 11.

(*s*) *I.e.*, the rate of discount for the time being allowed by the Commissioners in respect of succession duty paid in advance (*ibid.*).

(*t*) Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 43.

(*a*) See p. 181, *ante*.

(*b*) There is a power in the Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 33, to compound for legacy duty, in certain circumstances, under the authority of the court. This provision is, however, in practice obsolete.

SECT. 7.—*Interest, Penalties, and Proceedings.*

SECT. 7. Interest, Penalties, and Proceedings.

SUB-SECT. 1.—*Interest.*

354. The provision with regard to the payment of interest on estate duty, already stated (*c*), applies also to legacy duty (*d*).

SUB-SECT. 2.—*Penalties.*

Retainer by executor.

355. If the executor retains to his own use any legacy etc. to which he is entitled, but neglects to pay the legacy duty (if any) within fourteen days after it ought to be paid, he is liable to forfeit and pay treble the value of the duty chargeable (*e*).

Paying or receiving legacies without stamped receipts.

Any person accountable for the payment of legacy duty who pays, delivers, or otherwise disposes of, or in any manner satisfies or discharges, or compounds for any legacy given by a will or testamentary instrument, or the residue, or any part of the residue, of the personal estate of a deceased person, to or for the benefit of any person entitled to it, without taking a written receipt or discharge, and causing the same to be stamped within the time allowed, and any person receiving or taking the benefit of the legacy etc. without giving a written receipt or discharge for it expressing that the duty payable in respect of it has been allowed or paid to the person to whom the receipt or discharge is given, and dated on the day of signing, is subject to a penalty of 10 per cent. on the amount or value of such legacy etc. (*f*).

Duty not paid within twenty-one days of the date of signing the receipt.

A receipt or discharge not presented for payment of the duty and stamping within twenty-one days after its date may be stamped thereafter on payment of the duty and a penalty of 10 per cent. on the duty (*g*).

If, however, the receipt or discharge was signed out of Great Britain, and is brought to be stamped within twenty-one days after its being received in Great Britain, the Commissioners may remit any penalty that may have been incurred thereon (*h*).

Mistakes in paying duty rectified.

Persons paying too little legacy duty for any legacy etc., upon satisfying the Commissioners upon oath or affirmation that the payment was made by mistake and without any intention to defraud, may (if no action be instituted concerning the same) have the mistake rectified, on application to the Commissioners within three calendar months from the time that the mistake was made, and on payment of the difference of duty, together with 10 per cent. on the difference by way of penalty (*i*).

Persons paying or satisfying any legacy or residue, or any part

(*c*) See p. 225, *ante*.

(*d*) Finance Act, 1896 (59 & 60 Vict. c. 28), s. 18 (2). If an executor, through negligence, pays too high a rate of duty, he must pay interest to the legatee, upon the amount of duty overpaid, for the period between the payment of the duty and the repayment of the amount overpaid (*Shaw* v. *Turbett* (1862), 14 I. Ch. R. 476, C. A.).

(*e*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 35.

(*f*) *Ibid.*, s. 28.

(*g*) *Ibid.*, s. 29; Probate and Legacy Duties Act, 1808 (48 Geo. 3, c. 149), s. 44.

(*h*) Probate and Legacy Duties Act, 1808 (48 Geo. 3, c. 149), s. 44.

(*i*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 30.

SECT. 7. Interest, Penalties, and Proceedings.

of residue, or receiving the same, contrary to the provisions of the Legacy Duty Act, 1796 (*k*), who, within twelve calendar months after the offence has been committed, discover the other persons offending, so that the persons so discovered are thereupon convicted, are indemnified and discharged from all penalties incurred for any offence under the Act (*l*).

Altering receipts.

A penalty of £500 is incurred by any person who makes any alteration in any assessment or receipt for the duty after it has been signed by the officer appointed to do so, or who publishes as true such altered assessment etc. with intent to defraud the Sovereign or any other person (*m*).

Waiver of penalties by payment of duty with interest.

The acceptance or recovery by the Commissioners of arrears of duty, with interest thereon, is an absolute waiver of the penalties (if any) which may have been incurred under the Legacy Duty Acts (*n*).

Persons swearing falsely guilty of perjury.

Persons convicted of wilfully and corruptly swearing, affirming, or alleging falsely, upon any oath or affirmation, with intent to defraud the Sovereign of any legacy duty, or with intent to charge any person with any greater or other duty than he should be charged with, are liable to the same pains and penalties as if they were convicted of perjury (*o*).

SUB-SECT. 3.—*Proceedings.*

Legatees refusing to accept legacies after deduction of duty.

356. If any accountable person offers to pay any pecuniary legacy etc., deducting the duty payable thereon, or offers to deliver, or otherwise dispose of, any specific legacy or specific property, part of any residue, to or for the benefit of the person entitled thereto, or to any trustee for such person, upon payment of the duty upon it, and the person entitled to it, or the trustee for such person, refuses to accept the offer and to give a proper release and discharge for the legacy etc. offered to be so paid etc., then, although no actual tender be made, if any action is afterwards instituted for such legacy etc., the court may order all costs, charges, and expenses attending the same to be paid by the person so refusing to accept the offer, or to join in the release etc., or to order such costs etc. to be deducted out of the legacy etc., together with the duty upon it, as the court sees fit (*p*). In actions instituted for the payment of any legacy where the party sued may wish to stop proceedings on payment etc. of the bequest, after deducting or receiving the duty, the court, on application in a summary way, may make such order for payment etc. of such legacy etc., and for payment of duty and costs etc., as seems just (*p*).

(*k*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52).
(*l*) *Ibid.*, s. 31.
(*m*) *Ibid.*, s. 39.
(*n*) Inland Revenue Act, 1868 (31 & 32 Vict. c. 124), s. 9. As to the mitigation, recovery, and appropriation of penalties, see the Legacy Duty Act, 1796 (36 Geo. 3, c. 52), ss. 43, 44; Inland Revenue Regulation Act, 1890 (53 & 54 Vict. c. 21), ss. 22 (2), 33 (1), 35 (1), (2). As to the reward, in certain circumstances, of informers out of penalties recovered, see the Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 44; and as to the general power to reward informers, see the Inland Revenue Regulation Act, 1890 (53 & 54 Vict. c. 21), s. 32.
(*o*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 38; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 490.
(*p*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 24.

SECT. 7. Interest, Penalties, and Proceedings.

Mode of ascertaining duty on property not reduced into money.

357. In cases of specific legacies, and where the residue of any personal estate consists of property not reduced into money during the administration of the estate (*q*), the executor or other accountable person may set a value thereon and offer to pay the duty according to such value, or may require the Commissioners to appoint a person to set such value, at the expense of the person by whom the duty ought to be paid; and the Commissioners may accept the duty offered to be paid upon the value set by the accountable person, without such appraisement, if they think fit (*r*). If, however, the Commissioners are not satisfied with the estimate of value upon which the duty is offered, they may appoint a person to appraise the effects and to set a value thereon, and they are to assess the duty upon that value, and are to require the same to be paid (*r*).

If any dispute arises between the legatee etc. and the accountable person with respect to the value of the legacy etc. or the duty to be paid upon it, the duty is to be assessed by the Commissioners on reference to them by either party for that purpose, and if the value of the property is in dispute the Commissioners are to cause an appraisement to be made at the expense of the person by whom the duty ought to be paid and to assess the duty accordingly (*s*).

Summary proceedings for account and payment of duty.

358. If any person accountable for or chargeable with legacy duty required by the Commissioners to deliver an account, makes default in doing so, the Commissioners may sue out of the King's Bench Division a writ of summons (*t*).

Summary proceedings for payment of assessed duty.

It is so also where the Commissioners make an assessment of legacy duty, and the duty is not paid, and there is no notice of disputing the liability to assessment (*a*).

SECT. 8.—*Repayment of Overpaid Duty.*

Repayment of duty where legacy refunded.

359. If at any time after payment of legacy duty any debt is recovered against the estate, or any loss happens, by reason of which, or for any other just cause, any legatee etc. is obliged to refund any legacy etc. received or retained by him, or any part thereof, the Commissioners, upon due proof on oath, to their satisfaction, of the amount refunded, and that by reason thereof there has been an overpayment of duty, are to adjust the amount of the overpaid duty, and to repay the same or to allow the same in future payments (*b*).

(*q*) *A.-G.* v. *Dardier* (1883), 11 Q. B. D. 16, *per* POLLOCK, B., at p. 19; see also *A.-G.* v. *Smith*, [1893] 1 Q. B. 239, C. A.

(*r*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 22. In the event of dispute between the accountable person and the Commissioners, there is a power to the accountable person to appeal to the Commissioners of Land Tax (*ibid.*). This provision is, however, obsolete.

(*s*) *Ibid.* There is a similar power of appeal to the Commissioners of Land Tax (*ibid.*), which provision is, however, also obsolete.

(*t*) Crown Suits etc. Act, 1865 (28 & 29 Vict. c. 104), s. 55; see title CROWN PRACTICE, Vol. X., p. 19.

(*a*) *Ibid.*, s. 56; see title CROWN PRACTICE, Vol. X., p. 19.

(*b*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 34. As to proceedings by petition of right under the Petitions of Right Act, 1860 (23 & 24 Vict. c. 34), if the Commissioners decline to repay, see title CROWN PRACTICE, Vol. X., pp. 26—35.

SECT. 8. **Repayment of Overpaid Duty.**

Repayment of duty if grant made void and duty not payable.

If the authority under or by colour of which any person has administered any part of the estate or effects of any deceased person is void, or is repealed (*c*), or is declared void, and before the avoidance etc. such person has paid any legacy duty which is not allowed to him out of the estate by reason that such duty was not really due or payable, the Commissioners, upon proof satisfactory to them, are to repay to him or his representatives the amount of the duty so paid (*d*).

In case, however, such duty ought to have been paid by the rightful executor or administrator of such deceased person, the payment in respect of the said duty is to be valid and effectual, and is to be allowed in account with them as payments made in the due course of administration (*e*).

Repayment of duty on an annuity determined upon any other contingency than death.

Where an annuity is determinable upon any other contingency than death, and the contingency happens, and the value of the annuity, upon the application of the person who paid the duty, is calculated according to the term for which it endured, the amount of any abatement of duty is to be paid to the person entitled (*f*).

Part V.—Succession Duty.

SECT. 1.—*The Imposition of the Duty.*

The extent of the charge.

360. Succession duty (*g*) is leviable, except where, upon the same acquisition of the same property, legacy duty is charge-

(*c*) In the case of a revoked probate, it is immaterial whether the decree of the court was obtained by consent or not; see p. 244, *ante*.

(*d*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 37.

(*e*) *Ibid.* The person who made the payment is not to be molested etc. in respect of such payment (*ibid.*).

(*f*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 8.

(*g*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), ss. 1—18, 20—46, 49—55; Crown Suits etc. Act, 1865 (28 & 29 Vict. c. 104), Part V.; Customs and Inland Revenue Act, 1880 (43 Vict. c. 14), ss. 11, 12; Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), ss. 36, 41; Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), ss. 21, 22 (Part IV.); Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), ss. 10, 12—15; Finance Act, 1894 (57 & 58 Vict. c. 30), ss. 5, 13, 15, 16, 18, 22 (1) (g), 22 (2) (a), 24, Sched. I.; Finance Act, 1896 (59 & 60 Vict. c. 28), s. 18; Finance Act, 1900 (63 & 64 Vict. c. 7), s. 14; Finance Act, 1907 (7 Edw. 7, c. 13), s. 13; Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), ss. 56 (1), 58, 61 (5), 63, 64. The Succession Duty Act, 1853 (16 & 17 Vict. c. 51), speaks in common parlance, and does not use terms of art (*A.-G.* v. *Middleton* (*Lord*) (1858), 3 H. & N. 125, *per* BRAMWELL, B., at p. 140); and is to be construed according to the popular use of the language employed (*Braybrooke* (*Lord*) v. *A.-G.* (1861), 9 H. L. Cas. 150, *per* Lord CAMPBELL, L.C., at p. 165, stating the result of *Saltoun* (*Lord*) v. *Advocate-General* (1860), 3 Macq. 659, H. L.). The Act was so framed as to embrace estates both in Scotland and in England, and, therefore, notwithstanding the great difference between the tenure of property in the two countries, a construction must be found which would sustain the Act as applying either to an English or a Scottish estate, and the same words must regulate the construction of the Act in both cases (*Zetland* (*Earl*) v. *Lord Advocate* (1878), 3 App. Cas. 505, *per* Lord HATHERLEY, at p. 511, on the authority of *Saltoun* (*Lord*) v. *Advocate-General*, *supra*, at pp. 671, 678, 684, 686). Decisions on the Act (at least of the H. L.) affecting Scottish entailed estate are, therefore, an authority with regard to English entailed estate.

The following further statutes deal with succession duty in Scotland and

able (*h*), and save as expressly provided (*i*), according to the value, ascertained in the prescribed manner (*k*), in respect of every "succession" (*l*) upon death (*m*), whether conferred by disposition or through devolution by law (*n*).

The death must be after the 18th May, 1853 (*o*).

SECT. 2.—*The Succession.*

SUB-SECT. 1.—*Property.*

Meaning of (1) "Succession"; (2) "Property"; (3) "Real property." (4) "Personal property."

361. A "succession" is any property which, in its own nature (*p*), is chargeable with duty under the Succession Duty Act, 1853 (*q*).

"Property" means real and personal property (*r*).

"Real property" includes all freehold, copyhold, customary, leasehold and other hereditaments, corporeal or incorporeal, in the United Kingdom, and all estates therein (*s*).

"Personal property" does not include leaseholds (*t*), but it includes money payable under any engagement (*a*), and all other property which is not "real property" (*b*).

Money payable under an engagement.

An annuity (*c*) or a capital sum (*d*) secured, *e.g.*, by covenant (*e*) or bond (*f*), is money payable under an engage-

Ireland:—Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 47; Probate Duty Act, 1861 (24 & 25 Vict. c. 92), s. 1.

(*h*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 18.

(*i*) See pp. 276—282, *post*.

(*k*) See pp. 286—292, *post*.

(*l*) The word "succession" was adopted for the purpose of denoting any property passing upon death from one person to another by virtue of any gift or descent, or of any contract not being a *bonâ fide* contract of purchase (*Floyer* v. *Bankes* (1863), 3 De G. J. & Sm. 306, *per* Lord WESTBURY, L.C., at p. 311).

(*m*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), ss. 2, 10.

(*n*) It is clear that the terms "disposition" and "devolution" must have been intended to comprehend and exhaust every conceivable mode by which property can pass, whether by act of parties or by act of the law (*Northumberland* (*Duke*) v. *A.-G.*, [1905] A. C. 406, *per* Lord MACNAGHTEN, at p. 410).

(*o*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 54.

(*p*) *A.-G.* v. *Sefton* (*Earl*) (1865), 11 H. L. Cas. 257, *per* Lord CHELMSFORD, at p. 275.

(*q*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 1.

(*r*) *Ibid.*

(*s*) *Ibid.* It includes heritable property in Scotland, but not money secured on such property (*ibid.*), even where the securities are conceived in favour of heirs excluding executors. It includes, also, estates *pur autre vie* which devolve to the heir as special occupant, but presumably not any such estates which are applicable by law as personal estate (see p. 235, *ante*).

(*t*) Prior to 19th May, 1853, leasehold property of a personal nature was chargeable as personal property with legacy duty, but by the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 19, no person is to be chargeable under the then existing Legacy Duty Acts with duty, not then already due, in respect of any leasehold hereditaments of any testator or deceased person as belonging to the personal estate of such testator etc.

(*a*) A mere covenant, bond, or contract to pay money is not a disposition of "property" in the ordinary sense, although it might be if on the death of the person himself, because in that case it gives a right against his assets (*Fryer* v. *Morland* (1876), 3 Ch. D. 675, *per* JESSEL, M.R., at pp. 685, 686).

(*b*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 1. It includes money secured on heritable property in Scotland (*ibid.*).

(*c*) *Re Mickleth waite* (1855), 11 Exch. 452.

(*d*) *Lord Advocate* v. *Roberts' Trustees* (1858), 20 Dunl. (Ct. of Sess.) 449; see also *A.-G.* v. *Montefiore* (1888), 21 Q. B. D. 461 (covenant to transfer stocks).

(*e*) *Re Mickleth waite*, *supra*; *A.-G.* v. *Montefiore*, *supra*.

(*f*) *Lord Advocate* v. *Roberts' Trustees*, *supra*.

SECT. 2. The Succession.

ment, as also are moneys payable under a policy of life insurance (*g*).

Legacies out of real estate.

362. Any legacy payable or having effect, or being satisfied out of, or charged upon, a deceased person's real estate is chargeable as a succession to personal property (*h*); and it is so where the legacy is payable etc. out of any real estate, or the rents or profits thereof, which the deceased person had any right or power to charge or affect with the payment of money (*h*). And the position is the same where the legacy is payable etc. out of or upon any moneys to arise from the sale or mortgage or other disposition of any such real estate, or any part of it (*h*). The legacy may be given by way of annuity or in any other form (*h*).

The interest, generally, of any person (*i*) entitled in moneys

(*g*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), ss. 1, 17; *Fryer* v. *Morland* (1876), 3 Ch. D. 675, *per* JESSEL, M.R., at p. 685; see also *A.-G.* v. *Bumsted* (1893), 37th Report of the Commissioners of Inland Revenue, Appendix, li., decided on the authority of *A.-G.* v. *Yelverton* (1861), 7 H. & N. 306. As to policies in the Customs Annuity and Benevolent Fund, established under stat. (1816) 56 Geo. 3, c. lxxiii., see *A.-G.* v. *Rowsell* (1844), 36 Ch. D. 67, n.; *A.-G.* v. *Abdy* (1862), 1 H. & C. 266; *Re Pocock's Policy* (1871), 6 Ch. App. 445; *Re Maclean's Trusts* (1874), L. R. 19 Eq. 274; *Re Phillips' (William) Insurance* (1883), 23 Ch. D. 235, C. A.; *Urquhart* v. *Butterfield* (1887), 37 Ch. D. 357, C. A.

(*h*) Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), s. 21 (2). The death must be after the 30th June, 1888 (*ibid.*). In cases not governed by this Act, legacy duty is chargeable (see note (*i*), p. 233, *ante*). Apart from this Act, a legal rentcharge created by will is chargeable with legacy duty (*A.-G.* v. *Jackson* (1831), 2 Cr. & J. 101; *Stow* v. *Davenport* (1833), 5 B. & Ad. 359; see also *A.-G.* v. *Wade*, [1910] 1 K. B. 703): but an annuity charged upon real estate by will is only liable to legacy duty where it is charged upon the real estate of a person not the annuitant himself; it is not chargeable where the real estate in truth belongs to the annuitant with a limitation on its enjoyment (*Shirley* v. *Ferrers* (*Earl*) (1842), 1 Ph. 167; *Re De Hoghton, De Hoghton* v. *De Hoghton*, [1896] 1 Ch. 855, C. A., *per* A. L. SMITH, L.J., at p. 865).

(*i*) Even where the death was on or before the 30th June, 1888, provided that the interest is not chargeable with duty under the Legacy Duty Acts in force in 1853. Legacy duty is payable, in cases governed by those Acts, where a will contains an express direction to sell in all events, even although the property is taken *in specie* (*A.-G.* v. *Holford* (1815), 1 Price, 426; *Williamson* v. *Advocate-General* (1843), 10 Cl. & Fin. 1, H. L.), or where the purposes fail (*A.-G.* v. *Lomas* (1873), L. R. 9 Exch. 29). If converting into money is the fair meaning, though a power only is given, the power is regarded as imperative, and legacy duty is payable (*Advocate-General* v. *Ramsay's Trustees* (1823), 2 Cr. M. & R. 224, n.; *Advocate-General* v. *Blackburn's Trustees* (1847), 10 Dunl. (Ct. of Sess.) 166; *Weir* v. *Lord Advocate* (1865), 3 Macph. (Ct. of Sess.) 1006). Where, however, the power is not imperative, but is to be exercised for the convenience and benefit of the parties, conversion in the sense of the statute does not take place, and legacy duty is not payable (*Re Evans* (1835), 2 Cr. M. & R. 206). And where there is a clear and express trust to convert into money, with a power to retain shares of the real estate for the benefit of the parties, the direction is only imperative, and legacy duty is only payable, in respect of the part sold, notwithstanding that the unsold part is directed to be treated as personal property (*A.-G.* v. *Mangles* (1839), 5 M. & W. 120). So also, where there is an authority which, in a given state of circumstances, becomes absolute, to convert real estate into money, and distribute it as such, legacy duty is payable (*A.-G* v. *Simcox* (1848), 1 Exch. 749). And where the testator gives his trustees an absolute discretion whether to sell or not, legacy duty is or is not payable according to whether they sell or not (*Advocate-General* v. *Hamilton* (1856), 18 Dunl. (Ct. of Sess.) 636). Where an option is given to a legatee to buy the testator's real estate, or to take it as part of his share of the estate, and he takes

to arise from the sale of real property, under any trust for that purpose, is deemed to be personal property chargeable with succession duty (*k*). Where, however, the moneys are subject to any trust for reinvestment in the purchase of other real property to which such person would not be absolutely entitled, they are deemed to be real property (*k*).

Personal property to be invested in real property.

The interest of any person entitled in personal property subject to any trust for investment in the purchase of real property to which such person would be absolutely entitled is, in so far as not chargeable with duty under the Legacy Duty Acts in force in 1853 (*l*), chargeable with succession duty as personal property (*m*). But if such person would not be absolutely entitled, the personal property is chargeable with succession duty as real property (*m*).

SUB-SECT. 2.—*Successions under Dispositions.*

What constitutes a succession

363. Every disposition (*n*) of property, by reason whereof (*o*) any person becomes beneficially (*p*) entitled (*q*) to an interest in

it accordingly, no legacy duty is payable (*Lord Advocate* v. *Meiklam* (1860), 22 Dunl. (Ct. of Sess.) 1427); although it is otherwise where the testator devises his real estate to a beneficiary, and gives another person the option to purchase it from that beneficiary, in which case, if the option is exercised, the purchase-money is chargeable (*A.-G.* v. *Wyndham* (1862), 1 H. & C. 563). Where the moneys to arise under a direction for sale are to be invested in other real estate, and the trustees sell, but do not reinvest, legacy duty is not payable (*Heal* v. *Knight* (1853), 8 Exch. 839, n.). And it is so, also, where there is a power to sell, and a direction to invest in the purchase or mortgage of other real estate, and the trustees sell and elect to reinvest in other real estate, but in fact do not so reinvest (*Mules* v. *Jennings* (1853), 8 Exch. 830). Where a sale takes place under the general jurisdiction of the court, no claim for legacy duty arises, notwithstanding that the will contains a power to sell (*Hobson* v. *Neale* (1853), 17 Beav. 178); see also *Advocate-General* v. *Smith* (1854), 1 Macq. 760, H. L., *per* Lord ST. LEONARDS, at pp. 764, 765, where the general principle is laid down.

(*k*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 29.

(*l*) See p. 248, *ante*.

(*m*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 30.

(*n*) The term "disposition" extends to all modes of disposition, whether by will or deed or settlement *inter vivos* (*A.-G.* v. *Fitzjohn* (1857), 2 H. & N. 465, *per* WATSON, B., at p. 473), and, in strictness, includes a sale (*Northumberland* (*Duke*) v. *A.-G.*, [1905] A. C. 406, *per* Lord MACNAGHTEN, at p. 411; compare Succession Duty Act, 1853 (16 & 17 Vict. c. 51), ss. 7, 17). Whenever any person obtains by the death of another any benefit under an arrangement, that benefit is liable to duty (*A.-G.* v. *Middleton* (*Lord*) (1858), 3 H. & N. 125, *per* POLLOCK, C.B., at p. 137). Where, however, a testator by his will creates a trust for the payment of debts, and subject thereto gives property to a beneficiary, and, by a private Act of Parliament, an immediate benefit is secured to the beneficiary, the duration of the trust being correspondingly extended, no claim for duty arises in respect of the immediate benefit (*Lord Advocate* v. *Jamieson* (1886), 23 Sc. L. R. 510).

(*o*) "By reason whereof" is a more comprehensive phrase than "by virtue whereof" (*Lord Advocate* v. *Constable's Trustees* (1880), 17 Sc. L. R. 611, *per* Lord SHAND, at p. 618).

(*p*) *I.e.*, not as a trustee (*Wilcox* v. *Smith* (1857), 4 Drew. 40, *per* KINDERSLEY, V.-C., at p. 51), or merely legally (*Re Peyton* (1861), 7 H. & N. 265, *per* BRAMWELL, B., at p. 297; *A.-G.* v. *Charlton* (1877), 2 Ex. D. 398, C. A., *per* BRAMWELL, L.J., at p. 407); and see note (*q*), p. 293, *post*; compare, however, *Fryer* v. *Morland* (1876), 3 Ch. D. 675, *per* JESSEL, M.R., at p. 683 (means "in possession"); see also *Northumberland* (*Duke*) v. *A.-G.*, [1905] A. C. 406, *per* Lord MACNAGHTEN, at p. 411, and note (*n*), p. 267, *post*.

(*q*) *I.e.*, wholly entitled (*Lord Advocate* v. *Fleming*, [1897] A. C. 145, *per* Lord HALSBURY, L.C., at p. 152).

SECT. 2. The Succession.

possession (*r*) in any property, or the income thereof, upon the death of any person, is deemed to confer on the person so entitled a succession (*s*).

under a disposition.

A person may become entitled either immediately upon death or after any interval (*t*), either certainly or contingently, and either originally or by way of substitutive limitation (*a*).

Any disposition of property which is made to take effect at a period ascertainable only by reference to death is deemed to confer a succession upon the person in whose favour it is made (*b*).

If under a disposition the person entitled may become so upon alternative events, one of which is death, and he in fact becomes entitled upon death, the other possibilities are to be disregarded (*c*).

The right to the property, in point of title, as distinguished from possession, may have been acquired before the commencement of the Succession Duty Act, 1853 (*d*).

The death may be the cause, and is not necessarily the occasion, of the person becoming entitled to possession (*e*), and may be that of a person whose interest in possession was derived under another disposition (*f*).

Entailed property re-settled.

364. In the case of entailed property, where under a disentailing assurance a joint general power of appointment is conferred upon tenant for life and remainderman, and the power is exercised by way of a re-settlement of the property, the re-settlement, by the ordinary rule of law, is to be read into the instrument creating the power, and, except where the transaction is in effect a mere *inter vivos* transfer to another person of the expectant succession or some part

(*r*) *Northumberland* (*Duke*) v. *A.-G.*, [1905] A. C. 406, *per* Lord DAVEY, at p. 419; see also *A.-G.* v. *Littledale* (1871), L. R. 5 H. L. 290, *per* Lord WESTBURY, at p. 301.

(*s*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 2.

(*t*) A new trustee, appointed after the death of a former trustee, who is entitled to remuneration for his services under a direction in the settlement, does not take the same as a succession upon the death of the former trustee (*A.-G.* v. *Eyres*, [1909] 1 K. B. 723).

(*a*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 2.

(*b*) *Ibid.*, s. 8.

(*c*) *A.-G.* v. *Noyes* (1881), 8 Q. B. D. 125, C. A.

(*d*) *Wilcox* v. *Smith* (1857), 4 Drew. 40; *A.-G.* v. *Fitzjohn* (1857), 2 H. & N. 465; *A.-G.* v. *Middleton* (*Lord*) (1858), 3 H. & N. 125; *Braybrooke* (*Lord*) v. *A.-G.* (1861), 9 H. L. Cas. 150, *per* Lord CAMPBELL, L.C., at p. 165; *Lord Advocate* v. *Constable's Trustees* (1880), 17 Sc. L. R. 611; *Wolverton* (*Baron*) v. *A.-G.*, [1898] A. C. 535, *per* Lord HERSCHELL, at p. 547.

(*e*) *A.-G.* v. *Gell* (1865), 3 H. & C. 615 (death, during a period of accumulation, of a person who, if he had survived, would have succeeded as tenant for life); *Ring* v. *Jarman* (1872), L. R. 14 Eq. 357 (ditto, where deceased person would have succeeded as absolute owner).

(*f*) *Re Jenkinson* (1857), 24 Beav. 64 (arrangement between life tenant and remainderman by which a sum was secured to a third person to be raised out of the settled property at the life tenant's death); *A.-G.* v. *Yelverton* (1861), 7 H. & N. 306 (ditto, where the sum was not raisable until the death of the survivor of the life tenant and a succeeding life tenant); *A.-G.* v. *Gardner* (1863), 1 H. & C. 639 (devise to a third person of a reversionary interest expectant on the death of a tenant for life under a deed of settlement).

of it (*g*), the succession upon the death of the tenant for life, whether consisting of the property itself (*h*) or of charges upon it (*i*), is deemed to be conferred by such instrument as a new disposition.

SUB-SECT. 3.—*Successions through Devolution by Law.*

What constitutes a succession through devolution by law.

365. Every devolution (*k*) by law (*l*) of any beneficial interest in property, or the income thereof, upon the death of any person to any other person, is deemed to confer on such other person a succession (*m*).

SUB-SECT. 4.—*The Successor.*

Meaning of "successor."

366. The "successor" is the person entitled to the succession (*n*), and may be a body corporate, a company, or a society (*o*).

Where an expectant succession is alienated.

If any succession, or a part of it (*p*), before the successor becomes entitled to it, or to the income of it, in possession, becomes vested by alienation—that is, by transfer *inter vivos*, whether for value or not (*q*)—or by any title (*r*) not conferring a new succession (*s*), in any other person, and such other person becomes

(*g*) A succession once established, no manipulation of the parties afterwards can get rid of it (*Northumberland* (*Duke*) v. *A.-G.*, [1905] A. C. 406, *per* Lord HALSBURY, L.C., at p. 409), nor can another succession, by the act of the successor, be substituted for it (*Wolverton* (*Baron*) v. *A.-G.*, [1898] A. C. 535, *per* Lord HERSCHELL, at p. 548). There is no warrant in the statute for a new succession duty being leviable upon the same property where no new death has created the right to such succession (*ibid.*, *per* Lord HALSBURY, L.C., at p. 544); see also *A.-G.* v. *Floyer* (1862), 9 H. L. Cas. 477, *per* Lord CRANWORTH, at pp. 490, 491 (portions are in substance a part of the inheritance, and the circumstance of their arising under a power can make no difference).

(*h*) *Braybrooke* (*Lord*) v. *A.-G.* (1861), 9 H. L. Cas. 150, 168.

(*i*) *A.-G.* v. *Cecil* (1870), 39 L. J. (EX.) 201; explained, *Wolverton* (*Baron*) v. *A.-G.*, *supra*, *per* Lord HERSCHELL, at p. 556.

(*k*) Property devolves when it passes from a person dying to a person living (*Parr* v. *Parr* (1833), 1 My. & K. 647, *per* LEACH, M.R., at p. 648).

(*l*) Devolution by law applies to the case where the property would devolve on the party by the ordinary rules of legal succession or of right if the law were left to its own course uncontrolled (*Saltoun* (*Lord*) v. *Advocate-General* (1860), 3 Macq. 659, H. L., *per* the Lord President (MCNEILL), at p. 670); see also *Zetland* (*Earl*) v. *Lord Advocate* (1878), 3 App. Cas. 505, *per* Lord SELBORNE, at p. 520; and title DESCENT AND DISTRIBUTION, Vol. XI., p. 4.

(*m*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 2.

(*n*) *Ibid.* The person who in terms of a disposition would have taken on the death of a tenant for life, but who dies before him, and transmits the succession, is, in a certain limited sense, a successor (*A.-G.* v. *Littledale* (1871), L. R. 5 H. L. 290, *per* Lord WESTBURY, at p. 301).

(*o*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 1.

(*p*) *Wolverton* (*Baron*) v. *A.-G.*, *supra*.

(*q*) *Northumberland* (*Duke*) v. *A.-G.*, [1905] A. C. 406, *per* Lord DAVEY, at p. 417. Such a transfer is not a "new succession" (*Wolverton* (*Baron*) v. *A.-G.*, *supra*). If, however, the transferor is a remainderman in tail who has disentailed, and he dies in the lifetime of the tenant for life, *semble*, the case is one of new succession and not of alienation (*A.-G.* v. *Cecil*, *supra*; explained, *Wolverton* (*Baron*) v. *A.-G.*, *supra*, *per* Lord HERSCHELL, at p. 556).

(*r*) *E.g.*, an assignment in bankruptcy (*Wolverton* (*Baron*) v. *A.-G.*, *supra*, *per* Lord HERSCHELL, at p. 555); see also *Northumberland* (*Duke*) v. *A.-G.*, *supra*, *per* Lord DAVEY, at p. 417.

(*s*) A new succession can only be conferred by a new disposition or devolution

SECT. 2. The Succession.

entitled in possession, he, and not the person originally entitled, is, to the extent to which the succession is alienated, the "successor" (*t*).

Where tenant for life and remainderman join to transfer settled real property in possession.

Where tenant for life and remainderman, by any form of conveyancing (*a*), join in an *inter vivos* transfer of settled real property, as an estate in possession, there is an alienation of the remainderman's expectant succession, and, on the death of the original life tenant, the alienee is the successor (*b*). If the alienee in the meantime creates a new succession, as, *e.g.*, by himself dying possessed of the property, the person upon whom it is so conferred, if he is in beneficial possession at the death of the original life tenant, is also the successor upon whom the original succession is conferred (*c*).

SUB-SECT. 5.—*The Predecessor.*

Meaning of (1) "Predecessor;"

367. The "predecessor" (*d*) is the settlor (*e*), disponer, testator, obligor, ancestor (*f*), or other person (*g*), from whom the interest of the successor is derived (*h*), and, as in the case of the successor, may be a body corporate, a company, or a society (*i*).

(2) "Joint predecessors."

Where a succession is derived from more than one predecessor (*k*), and the proportional interest derived from each of them is not distinguishable, the successor is to be deemed to have derived his succession in equal proportions from each predecessor, unless the Commissioners agree with the successor as to the duty payable (*l*).

by law to take effect on death, and, conversely, every derivative title by reason of death confers a new succession (*Northumberland (Duke)* v. *A.-G.*, [1905] A. C. 406, *per* Lord DAVEY, at p. 417). If an alienee were to die before becoming entitled in possession, his devisee or heir would be a person holding by a title conferring a new succession (*ibid.*).

(*t*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 15; *Northumberland (Duke)* v. *A.-G.*, *supra*, *per* Lord MACNAGHTEN, at p. 413; *Wolverton (Baron)* v. *A.-G.*, [1898] A. C. 535.

(*a*) *Northumberland (Duke)* v. *A.-G.*, *supra*, *per* Lord DAVEY, at p. 416.

(*b*) *Ibid.*, *per* Lord MACNAGHTEN, at p. 413.

(*c*) *Northumberland (Duke)* v. *A.-G.*, *supra*.

(*d*) There must be a predecessor (*A.-G.* v. *Abdy* (1862), 1 H. & C. 266, *per* POLLOCK, C.B., at p. 294).

(*e*) The "settlor" must be a settlor out of whose estate the succession is derived (*A.-G.* v. *Floyer* (1862), 9 H. L. Cas. 477, *per* Lord CRANWORTH, at p. 492).

(*f*) The word "ancestor" does not mean, even technically, a lineal ancestor only (*Zetland (Earl)* v. *Lord Advocate* (1878), 3 App. Cas. 505, *per* Lord SELBORNE, at p. 520), but is properly assignable to the person who really preceded in the estate (*ibid.*, *per* Lord HATHERLEY, at p. 518).

(*g*) The words "or other person" seem to have been put into the Act only *ex abundanti cautelâ* (*ibid.*, *per* Lord SELBORNE, at p. 520); see also *Saltoun (Lord)* v. *Advocate-General* (1860), 3 Macq. 659, H. L., *per* Lord WENSLEYDALE, at p. 684.

(*h*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 2. The word "derive" is here used in the sense of "having its source or origin from" (*Saltoun (Lord)* v. *Advocate-General*, *supra*, *per* Lord CHELMSFORD, at p. 688).

(*i*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 1.

(*k*) See note (*r*), p. 269, *post*.

(*l*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 13; and compare *A.-G.* v. *Baker* (1859), 4 H. & N. 19; *Braybrooke (Lord)* v. *A.-G.* (1861), 9 H. L. Ca.

Under a disposition the person who had the right to dispose is predecessor.

368. Where the succession is conferred by a disposition, the person who had the right to dispose of the property is the predecessor (*m*).

It is immaterial what motives or valuable considerations moved him to make the disposition (*n*).

If, however, the disposition can be treated as of money for which a person is creditor on the estate of another person, the creditor, and not the owner of the estate, is the predecessor, even if the owner joins in the settlement (*o*).

Where a person buys property for valuable consideration in money or money's worth, and, instead of taking a conveyance to himself direct, takes a conveyance by way of settlement on persons in succession, the purchaser, from whom the title is derived, and not the vendor, is the predecessor from whom the succession on the life tenant's death is derived (*p*).

The predecessor, therefore, is not necessarily the person by whom on its face a settlement may be regarded as made (*q*).

The right of disposition may have been acquired in consideration of the release of a claim of right (*r*), or as

150; *A.-G.* v. *Floyer* (1862), 9 H. L. Cas. 477; *A.-G.* v. *Riall*, [1906] 2 I. R. 122. It is essential to the application of s. 13 that the persons should be predecessors (*A.-G.* v. *Riall*, *supra*, *per* PALLES, C.B., at p. 130).

(*m*) The "predecessor" is the person who provides the property, and who is the instrument of settling it (*A.-G.* v. *Biggs*, [1907] 2 I. R. 400, *per* KENNY, J., at p. 415).

(*n*) *Re Ramsay's Settlement* (1861), 30 Beav. 75 (settlement by husband (predecessor) in favour of step-children, in consideration of marriage and of life interest in wife's property; see *per* ROMILLY, M.R., at p. 84).

(*o*) *Re Jenkinson* (1857), 24 Beav. 64 (see note (*f*), p. 266, *ante*); explained, *A.-G.* v. *Floyer*, *supra*, *per* Lord CRANWORTH, at p. 491; *A.-G.* v. *Yelverton* (1861), 7 H. & N. 306 (see note (*f*), p. 266, *ante*); *A.-G.* v. *Deane* (1861), 5 L. T. 122. *Semble*, *secus*, where no consideration whatever is paid to the owner of the estate (*Re Jenkinson*, *supra*, *per* ROMILLY, M.R., at p. 72). A tenant for life is not purchaser of the right to appoint portions under a power given to him by the remainderman in tail, merely by reason that, on a re-settlement, the remainderman became entitled to an annuity during the life tenant's lifetime (*A.-G.* v. *Floyer*, *supra*, at p. 491).

(*p*) *A.-G.* v. *Floyer*, *supra*, *per* Lord CRANWORTH, at p. 489; *Fryer* v. *Morland* (1876), 3 Ch. D. 675, *per* JESSEL, M.R., at p. 684.

(*q*) *A.-G.* v. *Baker* (1859), 4 H. & N. 19 (settlement, by releasee of sum payable, to direction of releasor (predecessor), in consideration of release of a claim of right); *A.-G.* v. *Maule* (1886), 56 L. T. 611 (marriage settlement of a "gift" to be settled, paid by father (predecessor) to the trustees, on terms of repayment if the marriage did not take place); *A.-G.* v. *Biggs*, [1907] 2 I. R. 400 (marriage settlement of "portion" paid by step-father (predecessor) to the trustees, without express reservation of his estate until the marriage—a dedication to the trusts of the settlement, *per* KENNY, J., at p. 415). Compare, *contrà*, *A.-G.* v. *Riall*, *supra* (the settlor of a policy was held to be the predecessor, although the subsequent premiums were paid by a third person; a policy is liable to succession duty by reason of its disposition or devolution, and not by its being kept up for the benefit of another, *per* PALLES, C.B., at p. 134); and, *semble*, if a person makes an absolute gift to another person, and leaves him to settle it, although the gift was made with a view to its being settled, the settlor, and not the donor, is the predecessor (*A.-G.* v. *Maule*, *supra*, *per* HAWKINS, J., at p. 615).

(*r*) *A.-G.* v. *Baker*, *supra*. Where it is doubtful which of two claimants is entitled to property, and both concur in settling it, they are joint predecessors

SECT. 2. The Succession.

part of a family arrangement in substitution for a precarious interest (*s*).

Powers of appointment.

369. A person who exercises a general power of appointment over property, taking effect upon a death after the 18th May, 1853, is the predecessor from whom the interest of the appointee upon any subsequent death is derived (*t*).

Where, however, the power is limited, whenever it took effect, the person creating the power is the predecessor (*a*).

Re-settlement of entailed property.

370. In the case of entailed property, where tenant for life and remainderman join in a disentailing assurance and re-settle the property, the remainderman is predecessor under the new disposition, both as to his own succession on the life tenant's death (*b*) and as to the interests of all the persons coming after him in the re-settlement (*c*), whether such persons succeed directly on the life tenant's death, the remainderman having previously died (*d*), or on the remainderman's subsequent death, he having survived the life tenant (*e*). And the same rule holds good with regard to charges upon the property by way, *e.g.*, of jointure or portion (*f*).

The remainderman in tail is also the predecessor where the re-settlement is made under a joint general power of appointment conferred by a disentailing assurance upon the tenant for life and a third person (*g*), and not the less so if such substituted general power takes effect upon death (*h*).

Devolution by law.

Where the succession is conferred through devolution by law, it is derived, in the case of an estate in fee simple in possession from the last owner of the fee (*i*), even where such owner took by descent (*k*), and in the case of an estate tail from the last preceding

(see p. 268, *ante*), but where one or the other is entitled only one is predecessor (*ibid.*, *per* POLLOCK, C.B., at p. 30).

(*s*) *A.-G.* v. *Dowling* (1880), 6 Q. B. D. 177, C. A.; see title FAMILY ARRANGEMENTS.

(*t*) *A.-G.* v. *Upton* (1866), L. R. 1 Exch. 224: *secus*, where the power took effect upon a death on or before the 18th May, 1853 (*Re Barker* (1861), 1 H. & N. 109; *A.-G.* v. *Mitchell* (1881), 6 Q. B. D. 548), in which case the person creating the power is predecessor. See also note (*g*), p. 272, *post*.

(*a*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 4.

(*b*) *A.-G.* v. *Sibthorp* (1858), 3 H. & N. 424; *Braybrooke* (*Lord*) v. *A.-G.* (1861), 9 H. L. Cas. 150; *A.-G.* v. *Floyer* (1862), 9 H. L. Cas. 477.

(*c*) *A.-G.* v. *Floyer* (1862), 9 H. L. Cas. 477, *per* Lord CRANWORTH, at p. 489.

(*d*) *A.-G.* v. *Smythe* (1862), 9 H. L. Cas. 497.

(*e*) *A.-G.* v. *Floyer*, *supra*.

(*f*) *A.-G.* v. *Floyer*, *supra*; *A.-G.* v. *Cecil* (1870), 39 L. J. (EX.) 201, explained, *Wolverton* (*Baron*) v. *A.-G.*, [1898] A. C. 535, *per* Lord HERSCHELL, at p. 556.

(*g*) *Charlton* v. *A.-G.* (1879), 4 App. Cas. 427.

(*h*) *Ibid.*, *per* Lord CAIRNS, L.C., at p. 439 (a joint power in a family settlement is not equivalent in substance to joint property in the two donees).

(*i*) *Zetland* (*Earl*) v. *Lord Advocate* (1878), 3 App. Cas. 505, *per* Lord BLACKBURN, at p. 523. *Quære*, whether the result is not the same where the estate in fee simple was not in possession.

(*k*) If the last owner was seised in fee, it does not matter how he became so (*Re de Lancey* (1869), L. R. 4 Exch. 345, *per* CLEASBY, B., at p. 351).

heir in possession under the entail (*l*), and equally so if such owner or possessor was a minor, or for any other reason was incompetent to alienate the property (*m*).

The predecessor in the case of devolution by law is, therefore, not necessarily the person from whom descent as purchaser must be traced under the Inheritance Act, 1833 (*n*).

If by a disposition property is settled upon a person named or designated by description as first of a line of inheritance and his heirs in tail, and in default upon other persons named etc. and their heirs in tail, respectively, by way of substitution, the persons named etc. derive their interests from the maker of the disposition (*o*), the others by devolution from the last preceding heir in possession under the entail (*p*). Where, however, the person named etc. under the substitutive limitation dies before becoming entitled in possession, and his heir in tail becomes so entitled, such heir in tail derives his interest from the maker of the disposition as predecessor (*q*).

SUB-SECT. 6.—*Special Modes of conferring Successions.*

371. An *inter vivos* gift of a policy of insurance on the life of any person, unless the donee helps to create the property by continuing to pay the premiums after the assignment of the policy (*r*), confers, upon the assured's death, a succession on the donee in respect of the policy moneys derived from the donor as predecessor (*s*). *Inter vivos* gift of a policy.

Where a person who under a disposition is already life tenant in possession of personal property becomes entitled upon a death, by virtue of the same disposition, to an absolute interest in possession in the capital of the property, either the property itself (subject to an allowance of the value of the life interest (*a*)) or the increase of benefit (*b*) is a succession (*c*) derived from the maker of the disposition as predecessor. Enlargement of interest in property.

(*l*) *Zetland* (*Earl*) v. *Lord Advocate* (1878), 3 App. Cas. 505, at p. 521; see also *Saltoun* (*Lord*) v. *Advocate-General* (1860), 3 Macq. 659, H. L., *inter alia*, *per* Lord CAMPBELL, L.C., at p. 673; *Lord Advocate* v. *Graham* (1884), 22 Sc. L. R. 209.

(*m*) *Zetland* (*Earl*) v. *Lord Advocate*, *supra*, *per* Lord SELBORNE, at p. 519.

(*n*) 3 & 4 Will. 4, c. 106.

(*o*) *Saltoun* (*Lord*) v. *Advocate-General*, *supra* (person named); *Lord Advocate* v. *M'Culloch* (1895), 32 Sc. L. R. 266 (person designated etc.).

(*p*) *Lord Advocate* v. *Gordon* (1872), 10 Macph. (Ct. of Sess.) 1015; see also *Zetland* (*Earl*) v. *Lord Advocate*, *supra*.

(*q*) *Breadalbane* (*Earl*) v. *Lord Advocate* (1870), 8 Macph. (Ct. of Sess.) 835.

(*r*) *Lord Advocate* v. *Fleming*, [1897] A. C. 145; see also *A.-G.* v. *Riall*, [1906] 2 I. R. 122, *per* PALLES, C.B., at p. 131.

(*s*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), ss. 1, 2, 17.

(*a*) *A.-G.* v. *Robertson*, [1893] 1 Q. B. 293, C. A., *per* Lord ESHER, M.R., at p. 301. The allowance would be under the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 38, and would be not by way of indulgence, but in terms (*ibid.*); compare note (*e*), p. 291, *post*.

(*b*) *A.-G.* v. *Robertson*, *supra*, *per* LINDLEY, L.J., at p. 301.

(*c*) *Secus*, where the increase of benefit is due to something outside the

SECT. 2. The Succession.

Joint tenants taking by survivorship.

Where "property" is vested in persons jointly by any title not conferring on them a "succession," any beneficial interest in the property accruing to any of them by survivorship upon death is deemed to be a succession derived from the deceased person as predecessor (*d*).

Where, however, persons take a "succession" jointly, they are to pay the duty, if any is chargeable, in proportion to their respective interests in the succession, and any beneficial interest in such succession accruing to any of them by survivorship is deemed to be a new succession derived from the predecessor from whom the joint title was derived (*e*).

General powers of appointment taking effect upon death, if exercised.

Where under a disposition a person (*f*) has a general power of appointment over property taking effect (*g*) upon death, he is, in the event of his making any appointment, deemed to be entitled at the time of exercising such power to the property or interest thereby appointed as a succession derived from the donor of the power as predecessor (*h*).

Extinction of determinable charges.

Where any "property" is subject to a charge, estate, or interest (*i*), determinable by the death of any person, or at any period ascertainable only by reference to death, the increase of benefit accruing upon the extinction or determination of such charge etc. is deemed to be a succession accruing to the person or persons then entitled beneficially to the property, or the income of it, according to his or their respective estates or interests in it, or beneficial enjoyment of it, and the person from whom the successor or successors derive title to the property so charged is deemed to be the predecessor (*k*).

disposition, which has caused the acceleration of the succession before the time intended by the maker of the disposition (*A.-G.* v. *Robertson*, [1893] 1 Q. B. 293, C. A., *per* LOPES, L.J., at p. 303).

(*d*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 3.

(*e*) *Ibid.*

(*f*) Not two or more persons jointly, who, in a family settlement, are intended to be a check on one another, without the idea of any beneficial interest (*Charlton* v. *A.-G.* (1879), 4 App. Cas. 427, 439).

(*g*) *Semble*, the words "taking effect" refer to the words "general power," and not to "disposition of property," and to the power coming into operation, and not to the appointment under it taking effect (*Re Lovelace* (1859), 4 De G. & J. 340, C. A., *per* TURNER, L.J., at p. 351; see also *Re Barker* (1861), 7 H. & N. 109; *Re Wallop's Trust* (1864), 1 De G. J. & Sm. 656, C. A.; *A.-G.* v. *Upton* (1866), L. R. 1 Exch. 224; *A.-G.* v. *Mitchell* (1881), 6 Q. B. D. 548; compare *Charlton* v. *A.-G.*, *supra*, *per* Lord SELBORNE, at pp. 445, 447); see also note (*t*), p. 270, *ante*.

(*h*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 4.

(*i*) *E.g.*, dower (*Harding* v. *Harding* (1861), 2 Giff. 597), widow's jointure, rentcharges, and annuities (*Lord Advocate* v. *Macdonald* (1862), 24 Dunl. (Ct. of Sess.) 1175).

(*k*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 5; *A.-G.* v. *Noyes* (1881), 8 Q. B. D. 125, C. A., *per* JESSEL, M.R., at p. 139. This section does not apply (1) where the charge etc. has been created by the successor himself upon or out of property in possession when the charge etc. was created, and (2) where a person was entitled as on the 19th May, 1853, to the immediate reversion in any real property expectant upon the determination of any lease for life or for years determinable on life, and the lease has determined in his lifetime (*ibid.*, s. 6).

Dispositions accompanied by reservation of benefit.

372. Where any disposition of property, not being a *bonâ fide* sale, and not conferring an interest expectant on death on the person in whose favour it is made, is accompanied by the reservation or assurance of, or contract for, any benefit to the grantor (*l*), or any other person, for any term of life, or for any period ascertainable only by reference to death, the disposition is deemed to confer, at the time appointed for the determination of the benefit, an increase in beneficial interest in the property, as a succession equal in annual value to the yearly amount or value of the benefit so reserved etc., on the person in whose favour the disposition is made (*m*).

Dispositions to evade duty.

Where any disposition of property purports to take effect presently, or under such circumstances as not to confer a succession, but, by the effect or in consequence of any engagement, secret trust, or arrangement, capable of being enforced in a court of law or equity, the beneficial ownership of the property does not *bonâ fide* pass according to the disposition, but in fact devolves to any person on or with reference to death, such person is deemed to acquire the property so passing as a succession derived from the person making the disposition (*n*).

If a disposition is declared by a court of competent jurisdiction to have been fraudulent and made for the purpose of evading the duty, the court may declare that a succession has been conferred on such person at such time and to such an extent as it thinks just, the succession being deemed to be derived from the maker of the disposition as predecessor (*o*).

SUB-SECT. 7.—*Domicil and Situs.*

Test of liability to the duty in relation to domicil and nationality, and to situation of the property.

373. In order that property may constitute a succession, it has been said that the successor must become entitled thereto by virtue of the laws of this country (*p*), and that this requirement will be regarded as having been satisfied where the property is found to be legally vested in a person subject to the jurisdiction of the British courts, and the title to the beneficial interest in the property is regulated and capable of being enforced by the laws of this country, even although the operation of the instrument creating the title may be to some extent governed by foreign law (*q*).

(*l*) *Lord Advocate* v. *M'Kersies* (1881), 19 Sc. L. R. 438; *A.-G.* v. *Johnson*, [1903] 1 K. B. 617, C. A.

(*m*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 7. The object of this section is to prevent a man conveying the fee, reserving a life interest (*Fryer* v. *Morland* (1876), 3 Ch. D. 675, *per* JESSEL, M.R., at p. 687).

(*n*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 8. A disposition of property reserving to the disponer an interest for life or a term of years is not within this section (*A.-G.* v. *Noyes* (1881), 8 Q. B. D. 125, C. A.; see p. 266, *ante*).

(*o*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 8.

(*p*) *Wallace* v. *A.-G.*, *Jeves* v. *Shadwell* (1865), 1 Ch. App. 1, *per* Lord CRANWORTH, L.C., at p. 9.

(*q*) *A.-G.* v. *Jewish Colonization Association*, [1901] 1 K. B. 123, C. A., *per* STIRLING, L.J., at p. 142. An alternative test, embodying, however, the same principle, is a manifestation of intention on the part of the settlor, gathered from all the circumstances, that the property is to be brought under the protection of British law (*ibid.*, *per* COLLINS, L.J., at pp. 136, 137). It is immaterial where the property is physically situated (*ibid.*, *per* COLLINS, L.J., at p. 137).

SECT. 2. The Succession.

British real property.

374. Real property in this country which devolves upon death is liable to succession duty, irrespective of the domicil of the deceased owner (*r*); but foreign immovable property, devolving as such, does not, in any circumstances, fall within the charge of the duty (*s*).

Foreign immovable property to be sold, and British settlement of proceeds.

Where, however, the owner of immovable property situate abroad vests such property in trustees, in circumstances which create a British settlement (*t*), with an absolute direction to the trustees to convert the property into money and to hold the proceeds arising from the sale upon trusts, under which such proceeds devolve upon death, the settlement is of equitable personal property, and a succession consisting of a British *chose in action* is conferred, even where, at the time of the life tenant's death, the immovable property, by virtue of a power to postpone the sale of it, remains unsold (*a*).

British personal property owned by foreigner.

375. The personal property of a person domiciled abroad which is locally situate in this country is not, any more than the personal property locally situate abroad of which he dies possessed, liable to succession duty upon his death (*b*), any more than it is to legacy duty (*c*).

British settlement thereof under will.

Where, however, a person so domiciled by his will directs the creation of a British settlement (*d*) of personal property,

The courts of equity in England have always been accustomed to compel the performance of contracts and trusts as to subjects which are not either locally or *ratione domicilii* within their jurisdiction (*A.-G.* v. *Johnson*, [1907] 2 K. B. 885, *per* BRAY, J., at p. 894, on the authority of Lord SELBORNE, L.C., in *Ewing* v. *Orr Ewing* (1883), 9 App. Cas. 34, at p. 40); see title CONFLICT OF LAWS, Vol. VI., p. 218, *et passim*.

(*r*) *Re Wallop's Trust* (1864), 1 De G. J. & Sm. 656, C. A., *per* TURNER, L.J., at p. 671. And it is so, also, with regard to legacies thereout (*Advocate-General* v. *Grant* (1825), Scotch Exchequer, cited 12 Cl. & Fin. at p. 16).

(*s*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 1.

(*t*) See note (*d*), *infra*.

(*a*) *A.-G.* v. *Johnson*, *supra*, at p. 895, following *A.-G.* v. *Sudeley* (*Lord*), [1896] 1 Q. B. 354, C. A., *per* LOPES, L.J., at p. 363; and *Re Smyth, Leach* v. *Leach*, [1898] 1 Ch. 89, *per* ROMER, J., at p. 94. The settlement in this case was created under a direction in the will of a testator domiciled in this country, but *semble* (see note (*d*), *infra*), the result would be the same however the settlement, if British, was created.

(*b*) *Wallace* v. *A.-G.*, *Jeves* v. *Shadwell* (1865), 1 Ch. App. 1, overruling *Re Capdevielle* (1864), 2 H. & C. 985.

(*c*) See p. 238, *ante*.

(*d*) If a person taking a distributive part of a foreign estate comes to this country and invests it upon trusts, it assumes the character of a British settlement and British property; and that settlement, so made, undoubtedly becomes subject to the rules of British law, under which the property is held, by virtue of which it is enjoyed, and under which it will be ultimately administered (*A.-G.* v. *Campbell* (1872), L. R. 5 H. L. 524, *per* Lord WESTBURY, at pp. 530, 531).

Where property is in the hands of a British trustee the presumption is that it is British, and the burden lies on those who say it is not (*A.-G.* v. *Jewish Colonization Association*, [1901] 1 K. B. 123, C. A., *per* COLLINS, L.J., at p. 134). In the various reported cases on this subject, the instrument, whether directing the creation of the settlement or creating it, and whether will or deed, seems to have been in British form, and in the English language, although

whether at the time of his death it is locally situate in this country (*e*) or abroad (*f*), and the testator's directions are actually complied with (*g*), succession duty becomes chargeable in respect of such property upon the death of a life tenant under the settlement (*h*).

British settlement of personal property under deed.

376. Where a person, whether domiciled in this country (*i*) or abroad (*j*), by an *inter vivos* disposition creates a British settlement (*k*) of personal property, whether locally situate in this

in some cases such form and language were also the form and language of the place of the settlor's domicil abroad.

Where, however, a person claims under an instrument which has to be construed by the law of a foreign country, it may be that he is to be considered as not claiming under the law of this country (*Wallace* v. *A.-G., Jeves* v. *Shadwell* (1865), 1 Ch. App. 1, by inference from the remarks of Lord CRANWORTH, L.C., at p. 9, approving *Re Lovelace* (1859), 4 De G. & J. 340, C. A., and *Re Wallop's Trust* (1864), 1 De G. J. & Sm. 656, C. A.; *A.-G.* v. *Jewish Colonization Association*, [1901] 1 K. B. 123, C. A., *per* STIRLING, L.J., at p. 139).

Where a will is expressed in the technical terms of the law of a country where the testator is not domiciled, the will is to be construed with reference to the law of that country (Dicey, Conflict of Laws, 2nd ed. (1908), p. 679; approved, *A.-G.* v. *Jewish Colonization Association*, *supra*, *per* STIRLING, L.J., at p. 142).

The trustees, or a majority of them, in the various reported cases, were resident, although not invariably shown to be domiciled, in this country.

In *A.-G.* v. *Jewish Colonization Association*, *supra*, the trustee was a British registered company, the administrative council of which held its meetings and carried on its operations abroad, but which, nevertheless, was a *persona* incapable of existence except as a creature of British law (*ibid.*, *per* COLLINS, L.J., at p. 136), and which, while it might acquire a foreign residence and domicil, so as to be capable of being sued in a foreign country, must be capable, as long as it existed, of being sued in the country of its origin (*ibid.*, *per* STIRLING, L.J., at p. 144).

(*e*) *Duncan's Trustee* v. *M'Cracken* (1888), 25 Sc. L. R. 551; see also *Re Smith's Trusts* (1864), 10 L. T. 598; *Re Badart's Trusts* (1870), L. R. 10 Eq. 288.

(*f*) *A.-G.* v. *Campbell* (1872), L. R. 5 H. L. 524 (direction, by will of testator domiciled abroad, to British trustees to invest in British securities); *Thompson* v. *Birch*, [1876] W. N. 177, reversed, *ibid.*, 278, C. A. (British trustees, with no such direction to them, but fund paid into court in this country; *per* BACON, V.-C., if the testator had been domiciled abroad (which, on appeal, he was held not to be) the duty would have been payable). It has been said, moreover, that where there is any fund standing in this country in the names of trustees, in Consols or other property which has a *quasi*-local settlement, as Consols undoubtedly have, all the dividends having to be received in this country, and the persons who have to be dealt with in respect of it being persons residing in this country, that fund is subject to the duty (*A.-G.* v. *Campbell*, *supra*, *per* Lord HATHERLEY, L.C., at p. 528).

(*g*) *Lyall* v. *Lyall* (1872), L. R. 15 Eq. 1 (at the time of the life tenant's death the foreign property had not been remitted by the foreign executors to the British trustees, and the duty was held not to be payable); see also *Re Smith's Trusts*, *supra*, *per* STUART, V.-C., at p. 599 (there is a difference where the trustees of the fund are other than the trustees of the foreign will).

(*h*) *Semble*, the duty is payable even if the property is locally situate abroad at the time of the life tenant's death, provided that the British settlement has been actually created.

(*i*) *Re Cigala's Settlement Trusts* (1878), 7 Ch. D. 351.

(*j*) *Lyall* v. *Lyall*, *supra*; *Lord Advocate* v. *Gibson* (1882), 20 Sc. L. R. 161; *A.-G.* v. *Felce* (1894), 10 T. L. R. 337; *A.-G.* v. *Jewish Colonization Association*, *supra*.

(*k*) See note (*d*), p. 274, *ante*.

SECT. 2. The Succession.

country (*l*) or abroad (*m*), succession duty is chargeable upon the death of a life tenant under the settlement, even though the property may then be locally situate abroad (*m*).

Exercise by person domiciled abroad of general testamentary power over personal property subject to British settlement.

377. Where a person domiciled abroad has not an absolute interest in, but merely a general testamentary power of appointment over, personal property forming the subject of a British settlement (*n*), whether created by *inter vivos* disposition (*o*) or under a direction in a will (*p*), and the power is exercised, the property is chargeable with succession duty upon the appointor's death, when the appointees become beneficially entitled in possession.

Domicil of person entitled, and nationality of him or settlor.

378. It is immaterial, whatever the other circumstances, whether the person entitled upon the death is domiciled in this country or abroad (*q*), and whether he or the settlor was a British subject or an alien (*r*).

SECT. 3.—*Exceptions from the Charge of Duty.*

SUB-SECT. 1.—*Interests surrendered, destroyed, or transmitted.*

Interest surrendered, destroyed, or transmitted.

379. No person is chargeable with succession duty in respect of any interest surrendered by him, or extinguished, before the 19th May, 1853 (*s*).

(*l*) See cases cited in note (*j*), p. 275, *ante*.

(*m*) *Re Cigala's Settlement Trusts* (1878), 7 Ch. D. 351; *A.-G.* v. *Jewish Colonization Association*, [1901] 1 K. B. 123, C. A.

(*n*) See note (*d*), p. 274, *ante*. *Semble*, the duty is payable whether the property is locally situate in this country or abroad at the time of the appointor's death.

(*o*) *Re Lovelace* (1859), 4 De G. & J. 340, C. A.; approved, *Wallace* v. *A.-G.*, *Jeves* v. *Shadwell* (1865), 1 Ch. App. 1, *per* Lord CRANWORTH, L.C., at p. 9.

(*p*) *Re Wallop's Trust* (1864), 1 De G. J. & Sm. 656, C. A.; approved, *Wallace* v. *A.-G.*, *Jeves* v. *Shadwell*, *supra*, *per* Lord CRANWORTH, L.C., at p. 9. The result is the same notwithstanding that the general power of appointment has taken effect upon a death after the 18th May, 1853, so that on making the appointment, the appointor is, under the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 4, deemed to be entitled, at the time of exercising such power, to the property appointed (*Re Wallop's Trust*, *supra*).

(*q*) *Re Lovelace*, *supra*; *Re Badart's Trusts* (1870), L. R. 10 Eq. 288; *Lyall* v. *Lyall* (1872), L. R. 15 Eq. 1; *Re Cigala's Settlement Trusts*, *supra*; *Lord Advocate* v. *Gibson* (1882), 20 Sc. L. R. 161; *A.-G.* v. *Felce* (1894), 10 T. L. R. 337; *A.-G.* v. *Jewish Colonization Association*, *supra*.

(*r*) Where a person, whether a British subject or an alien, becomes entitled to property under a British settlement, vested in British trustees, he is liable to pay succession duty, whether the settlement was made by a British subject or an alien, whether it was made by deed or will, and wherever the property is locally situate (*Lyall* v. *Lyall*, *supra*, *per* ROMILLY, M.R., at p. 10, stating the effect of the decision of the H. L. in *A.-G.* v. *Campbell* (1872), L. R. 5 H. L. 524); see also *Re Lovelace*, *supra*, *per* TURNER, L.J., at p. 352; *Lord Advocate* v. *Gibson*, *supra*, *per* the Lord Ordinary (M'LAREN), at p. 162. In the following cases the settlor was an alien:—*Re Badart's Trusts*, *supra* (long resident, however, in this country); *A.-G.* v. *Felce*, *supra*; *A.-G.* v. *Jewish Colonization Association*, *supra*.

(*s*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 18.

SECT. 3. Exceptions from the Charge of Duty.

Where, under a paramount power, the title to property is divested and destroyed, any presumptive claim to succession duty under the title so destroyed is defeated also (*t*).

Where the interest of a successor in personal property has, before it has fallen into possession, passed by reason of death to another successor or successors, only one duty is payable in respect of the interest when it falls into possession (*a*).

SUB-SECT. 2.—*Where the Successor is also the Predecessor.*

Succession in certain cases derived from the successor himself.

380. A successor is not chargeable with duty upon a succession taken under a disposition made by himself, provided that the property was in possession when the disposition was made; and no person is to be charged with duty upon the termination of any charge, estate, or interest created by himself provided that the property was in possession when the charge etc. was created (*b*).

SUB-SECT. 3.—*Where Money Consideration given.*

Possession on death under contract for value in money etc.

381. There is no succession, as between vendor and purchaser, in respect of property the right to possess which arises upon death under a contract *bonâ fide* made for valuable consideration in money or money's worth (*c*).

(*t*) *A.-G.* v. *Selborne* (*Earl*), [1902] 1 K. B. 388, 401, C. A. (a joint general power of appointment which enabled the donees to create estates which could not be derived from those vested in them by default of appointment). If the estates that can be created under the power, and those limited in default of appointment are co-extensive, *quære*, an acceleration within the meaning of the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 15 (*ibid.*, *per* COLLINS, M.R., at p. 397). There may be cases in which a power of appointment ought to be regarded as a superadded mode of disposition of the property which is subject to the power (*ibid.*, *per* STIRLING, L.J., at p. 400). Compare also *Re Warner's Settled Estates, Warner to Steel* (1881), 17 Ch. D. 711, *per* JESSEL, M.R., at p. 713; and see p. 294, *post*.

(*a*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 14. As to a legacy charged upon etc. real estate, which, in the case of a person dying on or after the 1st July, 1888, is chargeable with succession duty as a succession to personal property (Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), s. 21 (2)), compare *A.-G.* v. *Cleave* (1873), 31 L. T. 86, where, at p. 90, BRAMWELL, B., expressed great doubt whether, even supposing the legacy before the court could be dealt with as a succession under s. 14, the Crown would not be entitled to two duties.

(*b*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 12.

(*c*) *Floyer* v. *Bankes* (1863), 3 De G. J. & Sm. 306, *per* Lord WESTBURY, L.C., at p. 311; *Fryer* v. *Morland* (1876), 3 Ch. D. 675, 682; *Lord Advocate* v. *Fife* (*Earl*) (1883), 21 Sc. L. R. 151. As to what is not a sale conferring exception from duty, see *Floyer* v. *Bankes*, *supra* (release of possible future dower out of non-existing estates; *secus*, *semble*, where the right was presently existing (*Lord Advocate* v. *Sidgwick* (1877), 14 Sc. L. R. 522, *per* the Lord President (INGLIS), at p. 526)); *De Rechberg* v. *Beeton* (1888), 38 Ch. D. 192 (purchase of reversionary property by trustees of will out of trust estate); *A.-G.* v. *Johnson*, [1903] 1 K. B. 617, C. A. (payment of sum to a charity in consideration of life annuity of 5 per cent. to payer, and to his wife if she survived him). See also Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 17 (bonds or contracts made *bonâ fide* for valuable consideration in money etc. for payment of money etc. upon the death of any other person, and moneys payable under policies of life insurance to assured or his assignees, do not confer successions; but *secus* as to any disposition or devolution thereof, if otherwise such as to confer a succession). The exception from duty in s. 17 does not apply only to cases in which the

SECT. 3. Exceptions from the Charge of Duty.

The valuable consideration need not represent the exact value which the subsequent casualty of an early death may show the right to the property to have had (*d*).

Where the consideration is partial, and becomes payable upon the death, the succession is diminished by the amount of the consideration so payable (*e*).

The exception is excluded altogether where the valuable consideration given does not consist solely of money or money's worth (*f*).

Marriage.

Marriage, although a valuable consideration, is not a consideration in money or money's worth, and property the right to possess which upon death arises under a contract in consideration of marriage is not excepted from duty, even in favour of persons coming directly within that consideration (*g*). The result is the same where, on a marriage, mutual obligations for the payment of money upon death are entered into (*h*).

Leases at rack rent.

382. No succession duty is payable in respect of the increase accruing to a successor upon the determination of a lease, provided that, at its date (*i*), it purported to be a lease at rack rent (*k*). If anything more than the rent reserved by the lease, beyond what is ordinarily involved in the relation of landlord and tenant, is contracted to be given, unless it can be shown on the face of the lease that such additional contract could not be a burden on the lessee, the lease does not purport to be at a rack rent (*l*).

SUB-SECT. 4.—*Where other Death Duty chargeable and exempted.*

Where the principal value of estate does not exceed £1,000.

383. Succession duty is not chargeable under the will or intestacy of a deceased person, where the net principal value of the property, real and personal, in respect of which estate duty is payable on his death, exclusive of property settled otherwise than

relation of debtor and creditor subsists (*Oldfield* v. *Preston* (1862), 3 De G. F. & J. 398, C. A., *per* TURNER, L.J., at p. 419), but no duty can attach in respect of what arises simply and merely from the contract (*ibid.*, at p. 418), as, *e.g.*, the benefit under a tontine (*ibid.*). Where a father subscribes to a tontine in the name of his son, there is an immediate advancement, and no succession is created (*ibid.*, at p. 419). As to the essential requisites of a contract which is not to create a succession, see *Floyer* v. *Bankes* (1863), 3 De G. J. & Sm. 306, *per* Lord WESTBURY, L.C., at p. 313. It has been said that s. 17 was enacted *ex cautelâ* (*Fryer* v. *Morland* (1876), 3 Ch. D. 675, *per* JESSEL, M.R., at pp. 685, 686).

(*d*) *Lord Advocate* v. *Fife* (*Earl*) (1883), 21 Sc. L. R. 151, *per* the Lord Ordinary (FRASER), at p. 156.

(*e*) *Brown* v. *A.-G.* (1898), 79 L. T. 572, H. L.

(*f*) *A.-G.* v. *Rathdonnell* (1893), 32 L. R. Ir. 574, *per* PALLES, C.B., at p. 593.

(*g*) *Floyer* v. *Bankes*, *supra*, *per* Lord WESTBURY, L.C., at p. 312.

(*h*) *Lord Advocate* v. *Sidgwick* (1877), 14 Sc. L. R. 522; *A.-G.* v. *Rathdonnell*, *supra*.

(*i*) *Semble*, leases in which rents are reserved to commence from a future date are excluded from the exception (*A.-G.* v. *Longford*, [1909] 2 I. R. 436, *per* PALLES, C.B., at p. 442).

(*k*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 20. A rack rent is a rent of the full value of the tenement or near it (2 Bl. Com. 43).

(*l*) *A.-G.* v. *Longford*, *supra*, *per* PALLES, C.B., at p. 443.

by his will, does not exceed £1,000, and estate duty has been paid upon such value (*m*).

SECT. 3. **Exceptions from the Charge of Duty.**

384. In the case of successors, whose succession arises through devolution by law before the 30th April, 1909, or, if it arises under a disposition, where the first succession under the disposition arises before that date (*n*), and who are lineal ancestors or lineal issue of the predecessor, or husbands or wives of persons so related, the exemption from succession duty where estate duty has been paid applies generally, without regard to the value of the estate, and whether the property is settled or not (*o*), and, in the case of such successors, where the property is settled, and the estate duty has been paid in respect of it since the date of the settlement, the exemption continues to apply until the death of a person on whose death estate duty would be again payable if the property then passed (*p*).

Exemption from the 1 per cent. or 1½ per cent. rate of succession duty where estate duty paid (1) upon the property itself;

In the case of any such successor, who dies before becoming entitled in possession, the payment of estate duty in his estate upon the value of his expectant interest in property comprised in a settlement (*q*) satisfies the claim for succession duty under the settlement upon the subsequent death of the life tenant in respect of such interest (*r*).

(2) in the dead reversioner's estate.

385. In cases where, although succession duty under the Succession Duty Act, 1853 (*s*), is payable, notwithstanding that estate duty is also chargeable, the additional succession duty imposed by the Customs and Inland Revenue Act, 1888 (*t*), is not payable (*u*).

Other cases.

No person charged with the duties on legacies and shares

(*m*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 16 (3). The payment of the fixed duty of 30*s*. on the affidavit or inventory in conformity with the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 33 (*i.e.*, in the case of persons dying before 2nd August, 1894), is to be deemed to be in full satisfaction of any claim to succession duty in respect of the estate or effects (*e.g.*, leaseholds) to which such affidavit etc. relates (Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 36).

(*n*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 58 (2), (4).

(*o*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 1, and Sched. I. (3), (5).

(*p*) *Ibid.*, s. 5 (2); as amended by Finance Act, 1898 (61 & 62 Vict. c. 10), s. 13.

(*q*) See p. 197, *ante*.

(*r*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 1, and Sched. I. (5). If the estate duty is not paid upon the full value of the reversioner's interest in consequence of the deduction of debts etc. in his estate, *semble*, the proportionate claim for succession duty under the settlement revives accordingly (compare *Lord Advocate* v. *Mackenzie's Trustees* (1905), 42 Sc. L. R. 584). Where the reversioner under the settlement died prior to the 2nd August, 1894, the payment of probate duty, under the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), in his estate, in respect of his interest in the personal property, including leasehold property, comprised in such settlement, satisfies the claim for succession duty at 1 or 1½ per cent. under the settlement, upon the life tenant's death, in respect of such interest (*ibid.*, ss. 36, 41; *Re Haygarth's Trusts* (1883), 22 Ch. D. 545).

(*s*) 16 & 17 Vict. c. 51, s. 10.

(*t*) 51 & 52 Vict. c. 8, s. 21 (1).

(*u*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 1, and Sched. I. (3).

SECT. 3. **Exceptions from the Charge of Duty.**

of personal estate (*a*) under the Legacy Duty Acts in force on the 19th May, 1853 (*b*), is chargeable with succession duty in respect of the same acquisition of the same property (*c*).

Succession duty is not payable by any person in respect of a succession who, if it were a legacy bequeathed to him by the predecessor, would be expressly (*d*) exempted from the payment of duty in respect of it under the Legacy Duty Acts in force on the 19th May, 1853 (*e*).

SUB-SECT. 5.—*Small Successions.*

Whole succession under £100 in value.

386. Where the whole succession or successions derived from the same predecessor and passing upon any death to any person or persons do not amount in money or principal value to £100, no succession duty is payable in respect of any portion thereof (*f*).

SUB-SECT. 6.—*Property not yielding Income.*

Plate etc. while enjoyed in kind.

387. Where a succession comprises any articles of plate, furniture or other things, not yielding any income, and given to or for the benefit of, or so that they are enjoyed by, different persons in succession, no succession duty is payable while they are so enjoyed in kind only by any person or persons not having any power of selling or disposing of them, so as to convert them into money or other property yielding an income (*g*).

(*a*) Where the death of the testator occurred before the 1st July, 1888, such duties would extend to legacies out of real property, or to the proceeds of the sale of real property arising under a trust for, or power of, conversion in his will (Stamp Act, 1815 (55 Geo. 3, c. 184), Sched., Part III.; Revenue Act, 1845 (8 & 9 Vict. c. 76), s. 4).

(*b*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 1.

(*c*) *Ibid.*, s. 18. Accordingly, where, upon the death of a life tenant under a settlement, the property comprised therein, or some portion thereof, passes to the legatees or next of kin of the person originally entitled under the settlement, or his assignee, and there is, therefore, a presumptive claim for succession duty under the settlement and a claim for legacy duty under the dead person's will or intestacy, in respect of the same property, the claim for succession duty on such property is displaced by the claim for legacy duty (*A.-G.* v. *Littledale* (1871), L. R. 5 H. L. 290, 301; *Wolverton* (*Baron*) v. *A.-G.*, [1898] A. C. 535). If the legacy duty is not paid upon the full value of the dead person's interest in consequence of the deduction of debts etc. in his estate, *semble*, the proportionate claim for succession duty under the settlement revives accordingly (compare *Lord Advocate* v. *Mackenzie's Trustees* (1905), 42 Sc. L. R. 584). If the beneficiary is not expressly "charged" with legacy duty, *semble*, the claim for succession duty is unaffected. As to what is not the same acquisition of the same property, see *A.-G.* v. *Mitchell* (1881), 6 Q. B. D. 548 (legacy duty paid on death of testator before 1853, and succession duty payable on death, after 1853, of donee of general power exercised by deed).

(*d*) *A.-G.* v. *Fitzjohn* (1857), 2 H. & N. 465, 475.

(*e*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 18; see Stamp Act, 1815 (55 Geo. 3, c. 184), Sched., Part III.; Legacy Duty Act, 1799 (39 Geo. 3, c. 73), s. 1; and pp. 239—242, *ante*.

(*f*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 18. Where the death occurred prior to the 1st June, 1889, and the whole of the property comprised in such succession etc. amounted to £100 or upwards in principal value, any individual succession forming part thereof, the taxable value of which was less than £20, was not liable to succession duty (*ibid.*). The exemption was withdrawn by the Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 10 (2).

(*g*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 14, incorporated in Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 32.

SECT. 3. Exceptions from the Charge of Duty.

In the case of objects which appear to the Treasury to be of national, scientific, historic, or artistic interest, the duty is only chargeable when the property is sold, and then only in respect of the last death on which the property passed (*h*).

Advowsons until disposed of.

No succession duty is payable in respect of an advowson or church patronage comprised in a succession until the same, or some right of presentation, or some other interest in or out of the advowson etc., is disposed of by the successor or in concert with him for money or money's worth (*i*).

Growing timber.

No succession duty is payable in respect of timber, trees, or wood growing on land comprised in an estate in respect of which estate duty is payable on the death of a person dying after the 29th April, 1910, until sold (*j*).

Timber sales, where annual sale less than £10 net.

Nor, in cases not governed by this provision, is any succession duty payable in respect of the proceeds of the sale of timber etc. comprised in a succession (in cases where the duty is payable annually upon sale moneys) where the sales, after deduction of all necessary outgoings of the year, do not exceed in value £10 net in any one year (*k*).

SUB-SECT. 7.—*Money applied to Payment of Duty.*

Money applied to payment of duty.

388. Succession duty is not payable upon money applied to the payment of duty on a succession according to a trust for that purpose (*l*).

SUB-SECT. 8.—*Early Cesser of Limited Interest.*

Real property.

389. In the case of a successor to real property, of which he is not competent to dispose, who dies within four and a half years of

(*h*) Finance Act, 1896 (59 & 60 Vict. c. 28), s. 20; Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 63; see also note (*m*), p. 202, *ante*.

(*i*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 24. A right of presentation cannot now be transferred (Benefices Act, 1898 (61 & 62 Vict. c. 48), s. 1 (1) (b)).

(*j*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 61 (5).

(*k*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 23. Where the successor is competent to dispose of the property, see note (*k*), p. 288, *post*.

(*l*) *Ibid.*, s. 18. A direction in a will to pay all legacies free of legacy duty does not cover succession duty in respect of a bequest of leaseholds (*Re Johnston, Cockerell* v. *Essex (Earl)* (1884), 26 Ch. D. 538, 554). A direction to pay out of residue all legacy duty and succession duty in respect of "legacies" and "annuities" does not cover the succession duty in respect of a life interest in real estate (*Re King's Trusts* (1892), 29 L. R. Ir. 401). A direction to pay rent-charges "without any deductions except for legacy duty and income tax" does not cover succession duty where that duty and not legacy duty is chargeable (*Re Rayer, Rayer* v. *Rayer*, [1903] 1 Ch. 685). A direction to pay a jointure "without any deduction or abatement whatsoever" for "taxes" etc. entitles the jointress to receive the jointure without deduction for succession duty (*Floyer* v. *Bunkes* (1863), 3 De G. J. & Sm. 306, 316). A direction to raise a "net" sum means that the succession duty chargeable in respect of such sum is to be provided out of another part of the appointed property (*Re Saunders, Saunders* v. *Gore*, [1898] 1 Ch. 17, C. A.). A direction by a testator to pay out of a particular fund the succession duty payable "in consequence of his death" covers the succession duty chargeable on property of which he was tenant for life (*Poulett (Earl)* v. *Hood* (1866), 35 Beav. 234, 243). See also note (*f*), p. 296, *post*; and p. 240, *ante*.

SECT. 3. Exceptions from the Charge of Duty.

becoming entitled to the beneficial enjoyment of the property, so much of the duty as, at the time of his death, has not become payable ceases to be payable (*m*).

Personal property.

It is so, also, in the case of a successor to an annuity out of, or life interest (chargeable by way of annuity) in, personal property, whose interest ceases by the death of any person before four years' payments of the annuity or income have become due and payable (*n*).

SECT. 4.—*Rates of Duty.*

How rate determined.

390. The degree of relationship subsisting between the "successor" and the "predecessor" determines the rate of duty chargeable in respect of the succession (*o*).

Rates and relationship.

391. The rates of succession duty in respect of successions arising through devolution by law before the 30th April, 1909, and in respect of successions arising under dispositions, where the first succession under the disposition arises before that date (*p*), and where the property is chargeable with estate duty, are as follows (*q*) :—

Where succession arises through devolution by law before 30th April, 1909, or if under a disposition, the first succession

In the case of lineal issue, or of a lineal ancestor, of the predecessor, there is no succession duty (*r*). In the case of a brother or sister, or of a descendant of a brother or sister, of the predecessor, the rate of succession duty is 3 per cent. In the case of a brother or sister of the father or mother or of a descendant of a brother or sister of the father or mother of the predecessor, the rate is 5 per cent. In the case of a brother or sister of a grandfather or grandmother, or of a descendant of a brother or sister of a grandfather or grandmother, of the predecessor, the rate is 6 per cent. In the case of a

(*m*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 21. Where the succession is upon a death occurring before the 2nd August, 1894, and the successor is competent, *i.e.*, in point of quantity of interest (*A.-G.* v. *Hallett* (1857), 2 H. & N. 368), to dispose by will of a continuing interest in the real property, the instalments unpaid at his death do not cease to be payable, but constitute a continuing charge on his interest in the property in exoneration of his other property, and are payable by the owner for the time being of that interest (Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 21; Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), s. 22 (3) (a)). A successor is competent to dispose etc. if the interest to which he succeeds has in it a potentiality which ripens into a power to dispose by will (*Lilford* (*Lord*) v. *A.-G.* (1867), L. R. 2 H. L. 63, 71 (a tenant in tail who disentailed and owned the fee simple at his death)).

(*n*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 32, embodying Legacy Duty Act, 1796 (36 Geo. 3, c. 52), ss. 8, 12 ; see p. 242, *ante*.

(*o*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 10.

(*p*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 58 (4).

(*q*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 10; Finance Act, 1894 (57 & 58 Vict. c. 30), s. 1, and Sched. I. (3).

(*r*) One per cent. duty is imposed by the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 10, but it is not payable under the will or intestacy of the deceased, or under his disposition or any devolution from him under which respectively estate duty has been paid, or under any other disposition under which estate duty has been paid (Finance Act, 1894 (57 & 58 Vict. c. 30), s. 1, and Sched. I. (5)). And the one per cent. duty is not payable in respect of any succession to property (*e.g.*, leaseholds) according to the value whereof (*i.e.*, in the case of persons dying before the 2nd August, 1894) duty has been paid on the affidavit, or inventory, or account, in conformity with the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12) (*ibid.*, s. 41).

person in any other degree of collateral consanguinity to the predecessor, or in the case of a stranger in blood (*s*) to him, the rate is 10 per cent.

Where, however, the property is not chargeable with estate duty, succession duty at 1 per cent., with an additional ½ per cent., making 1½ per cent. together, is chargeable in the case of lineal issue, or of a lineal ancestor, of the predecessor, and in the case of a person more distantly related to the predecessor, or in the case of a stranger in blood to him, an additional 1½ per cent. is chargeable over and above the rates set out in the last paragraph (*t*).

thereunder arises before that date.

392. Where the succession arises through devolution by law on or after the 30th April, 1909, or, if it arises under a disposition,

After 30th April, 1909.

(*s*) Natural children, not legitimated, even if acknowledged by the father, are chargeable with duty as strangers in blood (*Atkinson* v. *Anderson* (1882), 21 Ch. D. 100). *Secus, semble*, if legitimated according to the law of the father's domicil (*Re Grey's Trusts, Grey* v. *Stamford*, [1892] 3 Ch. 88). See also, on this point, note (*d*), p. 243, *ante*. Prior to the Deceased Wife's Sister's Marriage Act, 1907 (7 Edw. 7, c. 47), this rate was operative in the case of the sister of a deceased wife, with whom the husband had gone through the form of marriage, unless there was such a blood relationship between the successor and the predecessor as to lead to the payment of a lower rate.

(*t*) The additional duties at the rates of ½ per cent. and 1½ per cent. respectively were imposed by the Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), s. 21 (1), in respect of every succession referred to in the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 10, and in respect of every legacy which, under s. 21 (2) of the Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), is a succession to personal property, upon the death of any person dying on or after the 1st July, 1888. The additional duty, however, is not payable upon the interest of a successor in leaseholds passing to him by will or devolution by law, or in property included in an account according to the value whereof duty is payable under the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12) (proviso to s. 21 (1) of the Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8)), and gifts for charitable purposes were not subject thereto (Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 16; *Lord Advocate* v. *Marshall* (1893), 30 Sc. L. R. 599). In the case of successions upon deaths occurring on or after the 1st June, 1889, and before the 1st June, 1896, where estate duty under the Finance Act, 1894 (57 & 58 Vict. c. 30), is not chargeable (compare *ibid.*, s. 1, and Sched. I. (4)), temporary estate duty is payable in addition to the succession duty (Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 6 (4), (7))—(A) where the value of any succession, chargeable with succession duty, exceeds £10,000, and (B) where the value of any succession to real property under the will or intestacy of any person so dying, chargeable with succession duty, does not exceed £10,000, but such value, together with the value of any other benefit taken by the successor under such will etc., exceeds £10,000 (*ibid.*, s. 6 (1)). The temporary estate duty, however, is not payable as an addition to the succession duty upon the value of leaseholds passing by will or devolution by law, or of property in respect of which temporary estate duty has been paid as an addition to account duty (Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 6 (3)). In the case of a succession conferred upon a person for life, and afterwards upon others liable to the same rate of succession duty, the temporary estate duty is payable, if the succession exceeds £10,000 in value, notwithstanding that the respective interests of the beneficiaries, taken separately, may not exceed that value respectively (*A.-G.* v. *Aberdare* (*Lord*), [1892] 2 Q. B. 684, 693). The rate of the temporary estate duty is £1 for every full sum of £100, and for any fraction of £100 over any multiple of £100, of the value of the succession (Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 6 (2)). As to temporary estate duty, generally, see Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), ss. 6—9.

SECT. 4. Rates of Duty.

where the first succession under the disposition arises on or after that date, the rate of duty in the case of lineals is 1 per cent. (*u*); and it is so also in the case of the husband or wife of the predecessor (*u*) (who, prior to that date, were specifically excepted from the duty (*v*)). In the case of other persons, 5 per cent. is substituted for 3 per cent., and 10 per cent. for 5 per cent. and 6 per cent. (*w*).

Exceptions to 1 per cent. duty.

The 1 per cent. duty last referred to is not, however, levied: (1) Where the principal value of the property passing on the death of the deceased (*i.e.*, in the case of a succession arising through devolution by law, the person on whose death the succession arises, and in the case of a succession arising under a disposition, the person on whose death the first succession thereunder arises (*a*)), in respect of which estate duty is payable (other than property in which the deceased never had an interest, and property of which the deceased never was competent to dispose, and which on his death passes to persons other than the husband or wife, or a lineal ancestor or descendant of the deceased) does not exceed £15,000, whatever may be the value of the succession (*b*); or (2) where the amount or value of the succession or legacy, together with any other successions, legacies, residue, or share thereof (*c*), derived by the same person from the predecessor, testator, or intestate, does not exceed £1,000, whatever may be the principal value of such property (*d*); or (3) where the person taking the succession is the widow, or a child under twenty-one, of the predecessor, and the amount etc. of the succession etc., together with etc., does not exceed £2,000, whatever etc. (*e*).

Provision as to married successors.

393. Any successor who has been married to a person of nearer consanguinity to the predecessor pays the same rate of duty only as such person would have been chargeable with (*f*).

Property subject to trusts for charitable or public purposes.

Where property becomes subject to a trust for any charitable or public purposes under any disposition which, if made in favour of an individual, would confer on him a succession, duty at the rate of 10 per cent. (*g*) is payable in respect of the property (*h*).

(*u*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 58 (2), (4). The duty is to be paid notwithstanding any repeal effected by or anything contained in the Finance Act, 1894 (57 & 58 Vict. c. 30) (except s. 16 (3) thereof), or any other Act (Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 58 (2)). The provision saving *bonâ fide* purchasers and mortgagees, for value in money or money's worth, of an interest in expectancy, before the 30th April, 1909, which obtains in the case of the increased estate duty under the Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 64 (see p. 205, *ante*), obtains also in the case of the increased succession duty (*ibid.*, s. 64).

(*v*) See note (*c*), p. 280, and note (*t*), p. 242, *ante*.

(*w*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 58 (1), (4). As to purchasers and mortgagees, see note (*u*), *supra*.

(*a*) *Ibid.*, s. 58 (3).

(*b*) *Ibid.*, s. 58 (2) (proviso) (a).

(*c*) *Ibid.*, s. 58 (3).

(*d*) *Ibid.*, s. 58 (2) (proviso) (b).

(*e*) *Ibid.*, s. 58 (2) (proviso) (c).

(*f*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 11.

(*g*) See note (*t*), p. 283, *ante*.

(*h*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 16. See titles CHARITIES, Vol. IV., p. 205; CORPORATIONS, Vol. VIII., p. 378.

Where any person takes a succession under a disposition made by himself, then, if at the date of the disposition he was entitled to the property comprised in the succession expectantly on the death of any person dying after the 18th May, 1853, and such person dies during the continuance of the disposition, he is chargeable with duty on his succession at the same rate as he would have been chargeable with if no such disposition had been made (*i*). Where the successor is also predecessor.

394. Where the interest of any successor in any personal property has, before he has become entitled to it in possession, passed by reason of death to any other successor or successors, the duty is to be at the highest rate which, if every such successor had been subject to duty, would have been payable by any one of them (*j*). Transmitted successions in personal property.

If any succession has, before the successor has become entitled to it, or to the income of it, in possession, become vested by alienation, or by any title not conferring a new succession, in any other person, then the duty payable in respect of the succession is to be paid at the same rate as it would have been payable at if no such alienation had been made or derivative title created (*k*). Transferred interests.

Where the title to any succession is accelerated by the surrender or extinction of any prior interest, then the duty on the succession is payable in the same manner as it would have been payable if no such acceleration had taken place (*l*). Succession accelerated.

If under conflicting titles there are rival claimants to a deceased person's real property, and the claimants agree to a compromise, the liability to succession duty does not follow the compromise, but depends upon the rights of the parties under the title which is permitted to stand (*m*). Compromise of conflicting claims.

(*i*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 12; and see *A.-G.* v. *Sibthorp* (1858), 3 H. & N. 424; *Braybrooke* (*Lord*) v. *A.-G.* (1861), 9 H. L. Cas. 150; *A.-G.* v. *Floyer* (1862), 9 H. L. Cas. 477; and compare *Lord Advocate* v. *Constable's Trustees* (1880), 17 Sc. L. R. 611 (substituted security by new disposition).

(*j*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 14. The claim to succession duty under the original title may, however, be defeated by a claim to legacy duty under a derivative title (see note (*c*), p. 280, *ante*).

(*k*) *Ibid.*, s. 15. The time of the alienation fixes the rate (*S.-G.* v. *Law Reversionary Interest Society* (1873), L. R. 8 Exch. 233, *per* CLEASBY, B., at p. 239). Where on the 19th May, 1853, any reversionary "property" expectant on death was vested, by alienation or other derivative title, in any other person than the person who was originally entitled thereto under a disposition or devolution by law, the person in whom such property was vested is chargeable with duty in respect thereof as a succession at the same time and at the same rate as the person originally entitled would have been chargeable with if no such alienation had been made or derivative title created (Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 15). Compare *A.-G.* v. *Rushton* (1864), 2 H. & C. 812 (an heir-at-law treated as alienee of his ancestor in respect of real property expectant on the death of a life tenant; but compare Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 5). If the person originally entitled would not have been chargeable with duty, this part of the section is not applicable (*Re Jenkinson* (1857), 24 Beav. 64; *A.-G.* v. *Yelverton* (1861), 7 H. & N. 306; *A.-G.* v. *Gardner* (1863), 1 H. & C. 639).

(*l*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 15.

(*m*) *Lord Advocate* v. *Gordon* (1895), 32 Sc. L. R. 532; *Lord Advocate* v. *Christie's Trustees* (1905), 12 Scots Law Times, 690. In both cases, a disputed will was, on a compromise with the heir, which was sanctioned by the court,

SECT. 5.
Value Chargeable.

SECT. 5.—*Value Chargeable.*

SUB-SECT. 1.—*Gross Value.*

Real property upon deaths after 1st August, 1894, of which the successor is competent to dispose.

395. The value (*n*) for the purpose of succession duty of a succession to real property arising on the death of a person dying after the 1st August, 1894, is, where the successor is competent to dispose of the property within the meaning of the Finance Act, 1894 (*o*), the principal value of the property (*p*), ascertained in the same manner as it would be under the provisions of that Act for the purpose of estate duty (*q*), after deducting the estate duty payable in respect of it on the death, and the expenses (if any) properly incurred of raising and paying the duty (*r*).

Real property taken by corporations etc.

Where any body corporate, company, or society become entitled as successors to any real property, the duty in respect of the property is to be assessed upon its principal value (*s*).

Succession for charitable or public purposes.

Where property becomes subject to a trust for any charitable or public purposes under a disposition which, if made in favour of an individual, would confer on him a succession, the amount or principal value of the property is the value chargeable with duty (*t*).

Where the duty is chargeable for the successor's life, or for a less period.

396. Subject as above and to the exceptions stated later (*u*), the interest of every successor in real property is to be considered to be of the value of an annuity equal to the annual value (*w*) of

allowed to stand. In the first case, the action was against the heir who got the property, and in the second case, against the trustees of the will who parted with it. Ss. 37 and 39 of the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), do not apply, although it would be otherwise as to s. 37, where the duty was paid and the will was afterwards set aside (*Lord Advocate* v. *Christie's Trustees* (1905), 12 Scots Law Times, *per* the Lord Ordinary (STORMONTH DARLING), at p. 693). If the property is personal, and the succession is compounded for etc., the Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 23, incorporated in the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 32, applies; see pp. 244, 249, *ante*.

(*n*) The principle underlying the whole statute is that when a person comes into possession of property on a death, the beneficial interest in it which then accrues to him, or the increase of benefit which then accrues to him, is the whole property which he so comes into possession of, and not the difference in value between that property and the value of an estate or interest he may have had in it before he came into possession of it (*A.-G.* v. *Noyes* (1881), 8 Q. B. D. 125, C. A., *per* LINDLEY, J., at p. 132).

(*o*) See p. 185, *ante*.

(*p*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 18 (1).

(*q*) *Ibid.*, s. 18 (2); see p. 207, *ante*.

(*r*) *Ibid.*, s. 18 (1).

(*s*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 27. And it is so, also, where the corporation is successor by alienation (*S.-G.* v. *Law Reversionary Interest Society* (1873), L. R. 8 Exch. 233, 239).

(*t*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 16.

(*u*) See pp. 287—289, *post*.

(*w*) The value must be ascertained at the time of the accruer of the succession, and when the property is at that time yielding or capable of yielding annual income the full present actual yearly value of the property in its existing state or mode of enjoyment is the subject of assessment (*A.-G.* v. *Sefton* (*Earl*) (1865), 11 H. L. Cas. 257, *per* Lord WESTBURY, L.C., at p. 268). If the succession at the time of accruer neither yields nor is capable of yielding in its existing state any annual income, but yet is saleable, *quære* whether the property which forms the succession has not an annual value within the meaning of the Act, namely, a value equal to interest at 3 per cent. on the sum that might have been

such property, after making such allowances as are hereinafter mentioned (*x*), and payable from the date of his becoming entitled to it in possession, or to the receipt of the income or profits of it, during the residue of his life, or for any less period during which he is entitled to it (*y*), valued according to the tables provided for that purpose (*z*).

Where interest in expectancy sold etc. before 2nd August, 1894.

This rule applies equally to a purchaser or mortgagee to whom, before the 2nd August, 1894, an interest in expectancy, within the meaning of the Finance Act, 1894 (*a*), in real property, was *bonâ fide* sold or mortgaged for full consideration in money or money's worth (*b*), notwithstanding that he may become beneficially entitled in possession upon a death after that date, and may be competent to dispose of the property (*c*).

Annual value of purely agricultural property.

397. Where a successor, upon a death after the 1st August, 1894, succeeds to agricultural property, within the meaning of the Finance Act, 1894 (*d*), where there is no expectation of an increased income from the property, its annual value for the purpose of succession duty is to be arrived at in the same manner (*e*) as, under the provisions of that Act, for the purpose of estate duty (*f*).

Advowsons and church patronage.

Where an advowson or church patronage is comprised in a succession, and it, or some right of presentation, or some other interest in or out of it, is disposed of by or in concert with the successor for money or money's worth, the successor is chargeable with duty upon the amount or value of the money etc. (*g*).

Rule as to timber.

Where an estate in respect of which estate duty is payable on the death of a person dying after the 28th April, 1910, comprises land on which timber, trees, or wood are growing, succession duty is payable on the sale moneys (if any) of such timber etc. as in the case of estate duty (*h*).

realised if the property had been sold at the time of the accruing of the succession (*ibid.*); so, also, *per* Lord CHELMSFORD (*ibid.*, at pp. 278, 279). See also *Lord Advocate* v. *Buccleuch* (*Duke*) (1888), 25 Sc. L. R. 249 (unlet shootings have an annual value).

(*x*) See p. 289, *post*.

(*y*) The successor, although entitled in fee simple, is, in such cases, charged only on an annuity commensurate with his personal enjoyment (*Northumberland* (*Duke*) v. *A.-G.*, [1905] A. C. 406, *per* Lord DAVEY, at p. 416).

(*z*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), ss. 21, 31, and Sched. This rule applies also where the successor is competent to dispose of the property, if the succession arose on a death before the 2nd August, 1894.

(*a*) See p. 186, *ante*.

(*b*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 21 (3); see p. 196, *ante*.

(*c*) The age of such purchaser or mortgagee at the date when he becomes entitled in possession forms the basis for calculating the life interest value (*Northumberland* (*Duke*) v. *A.-G.*, [1905] A. C. 406, *per* Lord DAVEY, at p. 419).

(*d*) Finance Act, 1894 (57 & 58 Vict. c. 30); see p. 208, *ante*.

(*e*) See p. 208, *ante*.

(*f*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 18 (2).

(*g*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 24. *Semble*, the duty is only chargeable in the event of a sale, even where the succession arose on a death after the 1st August, 1894, and the successor is competent to dispose of it, within the meaning of the Finance Act, 1894 (57 & 58 Vict. c. 30); see pp. 202, 281, *ante*.

(*h*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 61 (5); see p. 213, *ante*.

SECT. 5. Value Chargeable.

Subject to the above, where growing (*i*) timber, trees or wood, not being coppice of underwood (*j*), are comprised in a succession (*k*), duty is to be paid upon the successor's interest in the net moneys received from any sales (*l*) of it in those cases in which, after deducting all necessary outgoings (*m*) for the year, the net moneys exceed the sum of £10 in any one year (*n*).

The rateable value to the poor of the land itself is not separately chargeable with duty as forming part of the annual value of the succession (*o*). But where there is any rent or value derived from the land, other than that which arises from the sale of wood, it is liable to duty as part of the annual value of the succession (*p*).

Fine received upon renewal of lease.

Where a successor, entitled to any real property subject to any lease by reason whereof he is not presently entitled to the full enjoyment of it, has not paid duty in respect of the full yearly value of the property, he is chargeable with duty upon his interest in any fine or other consideration received during his life for the renewal of any such lease or the grant of any reversionary lease of the property (*q*).

Property producing yearly fluctuating income.

The yearly value of any manor, opened (*r*) mine, or other real property of a fluctuating yearly income, is either to be calculated upon the average profits or income derived from it, after deducting all necessary outgoings, during such a number of preceding years as shall be agreed upon for this purpose between the Commissioners and the successor, before the first payment of duty on the succession becomes due, or, if no such period is agreed upon, then the principal value of the property is to be ascertained, and its annual value is to be considered to be equal to interest calculated at the rate of 3 per cent. per annum on the amount of the principal value (*s*).

Real property subject to a trust for

In the case of moneys to arise from the sale of real property

(*i*) *H. M. Advocate* v. *Ailsa* (*Marquis*) (1881), 19 Sc. L. R. 28, *per* the Lord Ordinary (CURRIEHILL), at p. 29.

(*j*) Coppice of underwood is capable of being regularly cut, and of yielding an income not necessarily fluctuating (*ibid.*).

(*k*) *Semble*, if the duty is chargeable upon the principal value of the property comprised in the succession, the value of any timber, trees or wood growing on the property would be included in such value, and further claims for duty on the sales of timber would not arise.

(*l*) The duty on timber is, however, imposed from the death, and not upon the happening of the contingency of a sale (*Re Leconfield, Wyndham* v. *Leconfield* (1904), 90 L. T. 399, 402, C. A.).

(*m*) The amount of the outgoings is a matter of fact (*H. M. Advocate* v. *Ailsa* (*Marquis*), *supra*, *per* the Lord Ordinary (CURRIEHILL), at p. 30).

(*n*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 23.

(*o*) *H. M. Advocate* v. *Ailsa* (*Marquis*), *supra*.

(*p*) *Ibid.*, *per* the Lord President (INGLIS), at p. 32, and *per* Lord SHAND, at p. 33.

(*q*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 25. *Semble*, this provision does not apply where duty is chargeable upon the principal value of the property.

(*r*) Unopened mines are excepted from the operation of the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 26 (*A.-G.* v. *Sefton* (*Earl*) (1865), 11 H. L. Cas. 257, *per* Lord WESTBURY, L.C., at p. 268).

(*s*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 26.

which, in the circumstances previously stated (*t*), are deemed to be real property, each successor's interest therein is considered to be of the value of an annuity, payable during his life, or for any less period during which he is entitled, equal in amount to the annual produce of the actual trust property at the time of his becoming entitled in possession, whether it is then the real property subject to the trust or direction for sale, or any property purchased in substitution for it, or any intermediate investment of the produce of the sale of the original property (*a*).

Conversion and reinvestment of proceeds in purchase of other real property.

The same rule is to be observed in the case of personal property which, in the circumstances likewise previously stated (*b*), is chargeable with succession duty as real property, whether the actual trust property is the real property directed to be purchased, or any intermediate investment of the personal property directed to be invested in such purchase (*c*).

Personal property subject to a trust for investment in real property.

Where personal property is comprised in a succession, certain provisions in the Legacy Duty Act, 1796 (*d*), are, where they have any application (*e*) to such personal property, to be applied as if it were a legacy bequeathed by the predecessor to the successor, and were subject to the provisions in question (*f*).

Succession to personal property to be assessed as if it were a legacy.

The value of an annuity, or of any interest chargeable with duty as an annuity, is to be calculated according to the tables provided for that purpose (*g*).

How annuities to be valued.

Where any disposition of property which is accompanied by the reservation etc. of a benefit to the grantor etc. is deemed to confer a succession (*h*), the increase of beneficial interest in the property is deemed to be equal in annual value to the yearly amount or yearly value of the benefit reserved etc. (*i*).

Disposition of property with reservation of benefit.

SUB-SECT. 2.—*Deductions.*

398. In estimating the annual value of lands used for agricultural purposes, houses, buildings, tithes, teinds, rentcharges, and other property yielding or capable of yielding income not of a

Necessary outgoings.

(*t*) See p. 265, *ante*.
(*a*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 29.
(*b*) See p. 265, *ante*.
(*c*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 30.
(*d*) 36 Geo. 3, c. 52, ss. 8, 10, 11, 12, 14, 23; see pp. 245 *et seq.*, *ante*.
(*e*) *A.-G.* v. *Noyes* (1881), 8 Q. B. D. 125, C. A., *per* JESSEL, M.R., at p. 138.
(*f*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 32; compare *Cuddon* v. *Cuddon* (1876), 4 Ch. D. 583, 585 (succession to persons successively all liable to the same rate of duty).
(*g*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), ss. 31, 32, and Sched. The tables state the value of an annuity of £100 for a single life of various ages from birth to ninety-five years (Table I.); for the joint continuance of two such lives (Table II.); and for any number of years not exceeding ninety-five (Table III.). There are also rules for inferring the value of such an annuity held on the longest of two lives; on the joint continuance of three lives; and on the longest of three lives. And there is a further rule for valuing annuities for more than three lives; and for a longer term of years than ninety-five, or in perpetuity.
(*h*) See p. 273, *ante*.
(*i*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 7. In the case of personal property, the duty, *semble*, is assessable upon the capital (*A.-G.* v. *Johnson*, [1902] 1 K. B. 416, *per* PHILLIMORE, J., at p. 427; the decision was reversed, [1903] 1 K. B. 617, C. A.); compare p. 286, *ante*.

SECT. 5. Value Chargeable.

fluctuating character, an allowance is to be made of all necessary outgoings (*k*), that is, of permanent charges which are made on the occupier of the land, or falling entirely on the land (*l*), and which are intrinsically necessary (*m*).

Incumbrances.

399. In estimating the value of a succession, no allowance (*n*) is to be made in respect of any incumbrance (*o*) upon it created or incurred (*p*) by the successor, not made in execution of a prior special power of appointment (*q*).

Mortgage by tenant for life and remainderman.

A mortgage created under a joint general power of appointment in a disentailing assurance executed by tenant for life in possession and remainderman in tail, is an incumbrance created by the successor, the tenant in tail, out of his own interest, and, as such, is incapable of being deducted against the succession (*r*). Allowance is, however, to be made in respect of all other incumbrances, and also in respect of any moneys which the successor may, previously to his possession, have laid out in substantial repairs or permanent improvement of real property comprised in his succession (*s*).

Where there is a prior principal charge.

Upon any successor becoming entitled to real property, of which he is not competent to dispose, within the meaning of the Finance Act, 1894 (*t*), and the property is subject to any prior principal charge, an allowance is to be made to him in respect only of the yearly sums payable by him, by way of interest or otherwise, on the charge as reducing the annual value *pro tanto* of the real property (*a*).

(*k*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 22.

(*l*) *E.g.*, repairs, poor rates, highway, sewer and county rates, town rates, drainage rates, and the like (*Re Elwes* (1858), 3 H. & N. 719, *per* WATSON, B., at p. 726), *i.e.*, if in fact payable by the successor.

(*m*) *Re Cowley* (*Earl*) (1866), L. R. 1 Exch. 288, *per* BRAMWELL, B., at p. 294. Income tax is not a "necessary outgoing" (*Re Elwes, supra; A.-G.* v. *Lorton* (*Lord*) (1861), 11 I. C. L. R. 429); nor is fire insurance (*A. G.* v. *Lorton* (*Lord*), *supra*); nor are the expenses of an agent (*Re Elwes, supra; A.-G.* v. *Lorton* (*Lord*), *supra*); and the intervention of trustees creates no difference (*Re Cowley* (*Earl*), *supra*). In cases, however, governed by the Finance Act, 1894 (57 & 58 Vict. c. 30), ss. 7 (5) (proviso), and 18 (2), a limited allowance for expenses of management is to be made.

(*n*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 34. As to an allowance which may be made, see *Re O'Neill* (*Lord*) (1886), 20 L. R. Ir. 73 (payments to sinking fund, out of income of settled real property, suspended during lifetime of life tenant, and allowance made on his death for arrears).

(*o*) Portions are a part of the inheritance (*A.-G.* v. *Floyer* (1862), 9 H. L. Cas. 477, *per* Lord CRANWORTH, at p. 490). As to an allowance for a jointure treated as a new succession, see *Re Peyton* (1861), 7 H. & N. 265, but see *per* MARTIN, B., at p. 305.

(*p*) *Semble*, the word "incurred" was used to embrace charges caused otherwise than by the direct act of the owner (*Re O'Neill* (*Lord*), *supra*, *per* PALLES, C.B., at p. 89).

(*q*) *I.e.*, a power existing prior to the disposition made by the successor (*Re Peyton, supra, per* MARTIN, B., at p. 305).

(*r*) *Ibid.; A.-G.* v. *Lorton* (*Lord*) (1861), 11 I. C. L. R. 429; see also *Re Hamilton's Estate* (1905), 39 I. L. T. 272.

(*s*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 34.

(*t*) See p. 185, *ante*. If the death was before the 2nd August, 1894, it is immaterial whether the successor was competent to dispose or not; compare note (*y*), p. 287, *ante*.

(*a*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 34.

Contingent incumbrances.

400. No allowance is to be made in respect of any contingent incumbrance on the succession, but in the event of the incumbrance taking effect as an actual burden on the successor's interest, he is entitled to a return of a proportionate amount of the duty so paid by him in respect of the amount or value of the incumbrance when taking effect (*b*).

Contingencies on which the property may pass to another person.

Nor is any allowance to be made in respect of any contingency upon the happening of which the property may pass to some other person, but, in the event of the property so passing, the successor is entitled to a return of so much of the duty paid by him as will reduce it to the amount which would have been payable by him if the duty had been assessed in respect of the actual duration or extent of his interest (*c*).

Fines etc. payable upon admission to copyholds etc.

401. If a successor, or any person on his behalf, upon becoming entitled to any copyhold or other real property, is subject to any fines, casualties of superiority, compositions, reliefs, or charges incident to the tenure of the property, and due in respect of his succession, the amount of the fines etc. is to be allowed to him as a deduction from the assessable value of his interest in the property (*d*).

Relinquished property.

Where any successor, upon taking a succession, is bound to relinquish or be deprived of any other property, which he may have acquired by any title not conferring a succession on him, and which passes from him to some other person, such allowance as may be just is to be made to him, upon the computation of the assessable value of his succession, in respect of the value of such property (*e*).

Exercise of general powers.

402. Where the donee of a general power of appointment becomes chargeable with duty in respect of the property appointed

(*b*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 35.
(*c*) *Ibid.*, s. 36, and see Table III. in the Schedule.
(*d*) *Ibid.*, s. 28.
(*e*) *Ibid.*, s. 38, amended by Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 10 (1). For examples of deductions allowable under the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 38, where the succession was conferred upon a death occurring prior to the 1st June, 1889, see *Re Micklethwait* (1855), 11 Exch. 452 (cesser of annuity under personal covenant, on successor becoming entitled to real property under another title); *Braybrooke (Lord)* v. *A.-G.* (1861), 9 H. L. Cas. 150 (cesser of annuity secured to remainderman, on a disentail before 1853, during joint lives of himself and the life tenant); *Inland Revenue Commissioners* v. *Harrison* (1874), L. R. 7 H. L. 1 (ditto, after 1853); *Le Marchant* v. *Inland Revenue Commissioners* (1875), L. R. 10 Exch. 292 (ditto, but income to remainderman, during joint lives, of capital sum raisable at life tenant's death); *A.-G. for Ireland* v. *Kenmare (Lord)* (1881), referred to in Trevor's Taxes on Succession, 4th ed., p. 202 (annuity to life tenant, and rents, subject thereto, to remainderman, during the joint lives); *A. G.* v. *Robertson*, [1893] 1 Q. B. 293, C. A. (enlargement of life interest into absolute interest, *per* Lord ESHER, M.R., at p. 301; but compare, *per* LINDLEY, L.J., at p. 301, *semble*, the succession is the increase of benefit); compare, *contra*, *Lord-Advocate* v. *Glasgow (Earl)* (1875), 12 Sc. L. R. 215 (cesser of annuity not secured on the property, which would have ceased although the annuitant had not succeeded, and might have continued although he had succeeded); *Re Cooper and Allen's Contract for Sale to Harlech* (1876), 4 Ch. D. 802 (cesser of life interest, where life tenant and remainderman had sold property as an interest in possession).

SECT. 5. Value Chargeable.

by him under the power, he is allowed to deduct from the duty so payable any duty he has already paid in respect of any limited interest taken by him in the property (*f*).

SECT. 6.—*Collection of the Duty.*

SUB-SECT. 1.—*The Duty.*

The duty is a stamp duty.

403. Succession duty is to be considered as a stamp duty, and the Commissioners are to provide proper stamps for denoting the rate per cent. (*g*).

Payment in kind.

Land may be transferred in satisfaction of succession duty (*h*), as in the case of estate duty (*i*).

Duty to be entered in a book and a stamped receipt to be given.

Whenever any payment of succession duty is made, it is to be entered in a book to be kept by the Commissioners for this purpose, and the officer appointed by the Commissioners is to give a receipt for it in such form as they think fit, and stamped with the proper stamp for denoting the rate of duty (*j*).

Certificates of payment of duty to be issued.

A certificate of the payment of duty, in such form as they may think fit (*k*), is to be delivered by the Commissioners to any person interested in any property affected by the duty, on applying for it for any reasonable purpose approved by the Commissioners (*l*).

SUB-SECT. 2.—*When the Duty is payable.*

Duty to be paid upon the successor becoming entitled in possession.

404. The duty is to be paid at the time when the successor, or any person in his right or on his behalf, becomes entitled in possession to his succession, or to the receipt of the income and profits of it, except that in the case of an annuity, or property made chargeable as an annuity, the duty is payable by instalments (*m*).

Duty on personalty.

Where personal property is comprised in a succession, the duty upon it is to be paid as if it were subject to certain provisions of the Legacy Duty Act, 1796 (*n*).

Duty on realty.

405. Where a succession to real property arises (*o*) on the death of a person dying after the 1st August, 1894, and the successor is

(*f*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 33.

(*g*) *Ibid.*, s. 9.

(*h*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 56 (1).

(*i*) See p. 212, *ante*.

(*j*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 51.

(*k*) The Commissioners cannot be compelled to give a certificate in any particular form (*Howe (Earl)* v. *Lichfield (Earl)* (1866), L. R. 1 Eq. 641, *per* Lord ROMILLY, M.R., at p. 647; affirmed (1867), 2 Ch. App. 155).

(*l*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 51.

(*m*) *Ibid.*, s. 20; Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), s. 21 (2); Finance Act, 1894 (57 & 58 Vict. c. 30), s. 18 (1). In the case of objects which appear to the Treasury to be of national, scientific, historic, or artistic interest, the rule as to estate duty applies also to succession duty; see p. 214, *ante*.

(*n*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 32, and see p. 289, and note (*d*) thereon, *ante*. As to a succession conferred upon persons in succession all chargeable with the same rate of duty, see *Cuddon* v. *Cuddon* (1876), 4 Ch. D. 583, 585.

(*o*) A succession arises when the death occurs (*A.-G.* v. *Robertson*, [1893] 1 Q. B. 293, C. A., *per* Lord ESHER, M.R., at p. 299); although the creation o

competent to dispose of the property, the duty is payable by eight equal yearly or sixteen half-yearly instalments, with interest at the rate of 3 per cent. per annum, and the first instalment is payable, and the interest begins to run, at the expiration of twelve months after the date on which the successor became entitled in possession to his succession or to the receipt of the income and profits of it (*p*).

Successor (1) competent to dispose; (2) not competent to dispose.

Where, however, the successor is not so competent to dispose, the duty is to be paid (1) by eight equal half-yearly instalments, the first of which is to be paid at the expiration of twelve months next after the successor becomes entitled to the beneficial (*q*) enjoyment of the real property in respect of which the duty is payable, and the seven following instalments at intervals of six months each to be computed from that date (*r*); or (2), at the option of the successor (*s*), by two equal moieties, of which the first moiety (*t*) is to be paid by four equal yearly instalments, the first of the instalments to be paid at the expiration of twelve months next after the successor becomes entitled to the beneficial enjoyment of the real property in respect of which the duty is payable, and the three following instalments at yearly intervals to be computed from that date; and the second moiety is to be paid on the day for payment of the last instalment of the first moiety, or, if not so paid, is to be paid by four equal yearly instalments, with interest at the rate of 3 (*u*) per cent. per annum from such last-mentioned day on so much of the second moiety as for the time being remains unpaid, and the first of the instalments, with the interest, is to be paid at the expiration of twelve months from that day (*a*).

Charitable or public purposes.

406. Where property becomes subject to a trust for any charitable or public purposes in such a manner as to confer a succession, the duty chargeable upon it is payable upon the property becoming subject to the trusts (*b*).

Timber.

Where duty is chargeable in respect of the proceeds of the

the succession on a life tenant's death is not postponed until the death (*Wolverton* (*Baron*) v. *A.-G.*, [1898] A. C. 535, *per* Lord HERSCHELL, at p. 547).

(*p*) Finance Act, 1894 (57 & 58 Vict. c. 30), ss. 6 (8), 18 (1). After the expiration of the period of twelve months, the provisions with respect to discount (see p. 295, *post*) do not apply (*ibid.*, s. 18 (1)).

(*q*) *I.e.*, not as a trustee (*A.-G.* v. *Sefton* (*Earl*) (1865), 11 H. L. Cas. 257, *per* Lord WENSLEYDALE, at p. 271, and *per* Lord CHELMSFORD, at p. 276); see also note (*p*), p. 265, *ante*.

(*r*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 21. This rule applies also where the successor is competent to dispose of the property, if the succession arose on a death before the 2nd August, 1894.

(*s*) This option applies where the successor becomes entitled to his succession upon a death after the 30th June, 1888 (Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), s. 22 (1)).

(*t*) In the event of the successor availing himself of the option, he is entitled to tender the duty in advance and receive discount thereon at such rate and subject to such regulations as the Treasury may prescribe (*ibid.*, sub-s. (2)); see p. 295, *post*.

(*u*) Finance Act, 1896 (59 & 60 Vict. c. 28), s. 18 (2). Before the 1st July, 1896, the rate of interest was 4 per cent. (Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), s. 22 (1) (b)).

(*a*) Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), s. 22 (1) (b).

(*b*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 16. *Semble*, the whole of the duty is payable in a lump sum, and not by instalments.

SECT. 6. Collection of the Duty.

sale of timber, trees or wood, comprised in an estate in respect of which estate duty is payable on the death of a person dying after the 28th April, 1910, it is to be accounted for and paid as and when the moneys are received (*c*). In other cases, it is to be accounted for and paid yearly (*d*).

Advowson or church patronage.

If an advowson or church patronage is comprised in a succession, and it, or some right of presentation or some other interest in or out of it, is disposed of so as to become liable to duty, the duty becomes payable at the time of the disposal (*e*).

Prior charge, estate, or interest not created by successor himself.

407. If there is any prior charge, estate, or interest, not created by the successor himself, upon or in the succession, by reason of which the successor is not presently (*f*) entitled to the full enjoyment or value of it, the duty in respect of the increased value accruing upon the determination of the charge etc., if not previously paid, compounded for, or commuted, is to be paid (*g*) at the time of the determination (*h*).

Where successor not in possession of whole succession.

If a successor has not obtained the whole of his succession at the time when the duty becomes payable, he is chargeable only with duty on the value of the property or benefit from time to time obtained by him (*i*).

Where succession alienated.

408. If any succession, before the successor becomes entitled to it, or to the income of it in possession, has become vested by alienation or by any title not conferring a new succession in any other person, then the duty payable in respect of the succession is to be paid at the same time that it would have been payable if no alienation had been made or derivative title created (*j*).

Where succession accelerated.

Where the title (*k*) to any succession has been accelerated by the surrender or extinction of any prior interest, the duty on the succession is payable at the same time and in the same manner (*l*) that it would have been payable if no acceleration had taken place (*m*).

An advance is an acceleration.

An advance to an expectant successor, under a power or otherwise, during the lifetime and with the consent of the tenant for life, amounts to an acceleration (*n*).

(*c*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 61 (5).
(*d*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 23.
(*e*) *Ibid.*, s. 24; see note (*i*), p. 281, *ante*.
(*f*) *I.e.*, at the date when the original succession is conferred (compare *A.-G.* v. *Robertson*, [1893] 1 Q. B. 293, 300, C. A.).
(*g*) *I.e.*, becomes due (*A.-G.* v. *Sefton* (*Earl*) (1865), 11 H. L. Cas. 257, *per* Lord CHELMSFORD, at p. 276).
(*h*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 20. This section refers to a particular charge created (*Re Elwes* (1858), 3 H. & N. 719, *per* WATSON, B., at p. 729).
(*i*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 37.
(*j*) *Ibid.*, s. 15.
(*k*) Possession may be accelerated although the title is not (*A.-G.* v. *Robertson*, *supra*, *per* LINDLEY, L.J., at p. 302).
(*l*) Compare *Northumberland* (*Duke*) v. *A.-G.*, [1905] A. C. 406, *per* Lord DAVEY, at p. 418.
(*m*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 15.
(*n*) *Re Drury Lowe's Marriage Settlement, Ex parte Sitwell* (1888), 21 Q. B. D. 466; compare note (*t*), p. 277, *ante*.

There is no acceleration where tenant for life in possession and remainderman in tail disentail and re-settle, and an immediate annuity out of the property is secured to the remainderman (*o*).

SECT. 6. **Collection of the Duty.**

409. The Commissioners have power, in any special cases in which they may think it expedient so to do, to enlarge the time for payment of any duty (*p*).

Duty deferred, or received in advance.

The Commissioners also have power to receive any duty tendered to them in advance, and to allow discount thereon at such rate as may from time to time be directed by the Treasury (*q*).

SUB-SECT. 3.—*By whom the Duty is payable.*

(1) *The Accountable Persons.*

410. Succession duty is a debt due to the Sovereign from the successor (*r*).

Crown debtor.

Where the interest of any successor in any personal property has, before he has become entitled to it in possession, passed by reason of death to another successor or successors, and only one duty is payable in respect of the interest, the duty is due from the successor who first becomes entitled to the succession in possession (*s*).

Liability on transmitted successions in personal property.

The following persons, besides the successor, are personally accountable to the Sovereign for the duty payable in respect of any succession, but to the extent only of the property or funds actually received or disposed of by them respectively—that is to say, every trustee, guardian, committee, tutor or curator, or husband in whom respectively any property, or its management, subject to such duty, is vested, and every person in whom it is vested by alienation or other derivative title at the time of the succession becoming an interest in possession (*t*).

What persons, besides the successor, are accountable for the duty.

All such persons are authorised to compound or pay in advance or commute any duty (*a*).

Advance payment.

In the event of the non-payment of the duty, every accountable person is a debtor to the Sovereign in the amount of the unpaid duty for which he is so accountable (*b*).

Liability of accountable persons.

Any liability of any successor or accountable person is not lessened or affected by the provisions conferring, in certain cases (*c*), relief upon purchasers for valuable consideration and mortgagees (*d*).

The term "trustee" includes an executor and administrator, and

Definition of trustee.

(*o*) *Inland Revenue Commissioners* v. *Harrison* (1874), L. R. 7 H. L. 1; see, also, *A.-G.* v. *Robertson*, [1893] 1 Q. B. 293, C. A., *per* LOPES, L.J., at p. 303.

(*p*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 39.

(*q*) *Ibid.*, s. 40. The rate is 3 per cent. per annum.

(*r*) *Ibid.*, s. 42.

(*s*) *Ibid.*, s. 14.

(*t*) *Ibid.*, s. 44.

(*a*) *Ibid.*

(*b*) *Ibid.*

(*c*) See p. 301, *post.*

(*d*) Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 12 (3).

SECT. 6. Collection of the Duty.

any person having or taking on himself the administration of property affected by an express or implied trust (*e*).

Executor who satisfies covenant debt.

Where an executor, in pursuance of a covenant, satisfies a covenant debt, he is not, in his capacity as such executor, accountable to the Sovereign for any succession duty which may be payable in connection with the death of the covenantor in respect thereof (*f*).

Extrinsic circumstances of which purchaser had no notice.

No *bonâ fide* purchaser of property for valuable consideration under a title not appearing to confer a succession is subject to any succession duty with which the property may be chargeable by reason of any extrinsic circumstances of which he had not had notice at the time of such purchase (*g*).

Legacies out of real estate.

The succession duty in respect of a legacy charged upon or made payable out of any real estate, or out of any moneys to arise by the sale of any real estate, is to be accounted for and paid by the trustee to whom the real estate, out of which the legacy is paid or satisfied, is devised, or, if there is no trustee, by the person entitled to the real estate (*h*), or by the person empowered or required to pay or satisfy the legacy (*i*).

Notice of succession to be given, and a return of property to be made.

411. Persons accountable for the payment of duty in respect of any succession, or some of them, are to give notice to the Commissioners, or their officers, of their liability to the duty, and are, at the same time, to deliver to the Commissioners etc. a full and true account of the property for the duty whereon they are respectively accountable—(1) in the case of personal property, at the time of the first payment, delivery, retainer, satisfaction, or other discharge of it, or any part of it, to or for the successor or any person in his right; and (2) in the case of real property, when any duty in respect of it first becomes payable (*k*).

The account is to disclose the value of the property described in it, and of the deductions claimed, together with the names of the successor and predecessor, and their relation to each other, and all such other particulars as are necessary or proper for enabling the Commissioners fully and correctly to ascertain the duties due (*l*).

Account to be verified by production of books and documents.

Every accountable person who delivers any account or estimate of the property comprised in any succession is, if required by the Commissioners, to produce before them such books and documents

(*e*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 1.

(*f*) In such a case any duty falls to be accounted for by the covenantee, *e.g.*, the trustee of a settlement, out of the fund itself, even though the covenant was to pay a definite sum "free from all deductions whatsoever" (*Re Higgins, Day* v. *Turnell* (1885), 31 Ch. D. 142, 146, C. A.).

(*g*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 52.

(*h*) *A.-G.* v. *Jackson* (1831), 2 Cr. & J. 101 (rentcharge); *Stow* v. *Davenport* (1833), 5 B. & Ad. 359 (ditto, free of duty).

(*i*) Compare Legacy Duty Act, 1805 (45 Geo. 3, c. 28), ss. 5, 7.

(*k*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 45. Trustees' costs of preparing and rendering the account of the succession of a tenant for life of settled real estate are payable by the tenant for life (*Cowley (Earl)* v. *Wellesley* (1866), 35 Beav. 635, 642).

(*l*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 45.

in his custody or control, so far as the same relate to such account or estimate, as may be capable of affording any necessary information for the purpose of ascertaining the property and the duty payable upon it (*m*). The Commissioners may also, without payment of any fee, inspect and take copies of any public book (*m*). All such information, however, is to be deemed confidential, and the Commissioners are not to disclose it, or the contents of any document or book, to any person, except for the purpose of the Succession Duty Act, 1853 (*m*).

Duty to be assessed by the Commissioners.

If the Commissioners are satisfied with the account or estimate as originally delivered, or with any amendments that may be made in it upon their requisition, they may assess the duty on the footing of the account or estimate (*n*).

Separate assessments may be made for separate properties.

The Commissioners are also, at the request of any successor, or of any person claiming in his right, to accept or cause to be made so many separate assessments of the duty payable in respect of the interest of the successor in any separate properties, or in defined portions of the same property, as shall be reasonably required (*o*).

Procedure by Commissioners where account unsatisfactory.

If, however, the Commissioners are dissatisfied with the account or estimate as delivered, they are empowered, subject to appeal, to assess the duty on the footing of the account and upon such estimate as they may place thereon (*p*), or to cause an account or estimate to be taken by any person or persons to be appointed by themselves for that purpose, and to assess the duty on the footing of such last-mentioned account or estimate, subject to appeal (*q*).

Commissioners' expenses in taking fresh account may be charged upon the interest of the successor.

If the duty so assessed exceeds the duty assessable according to the return which has been made to the Commissioners, and with which they have been dissatisfied, and if there is no appeal against the assessment, the Commissioners may, at their discretion, having regard to the merits of each case, charge the whole or any part of the expenses incident to the taking of the last-mentioned account or estimate on the interest of the successor in respect of which the duty is due, in increase of the duty, and recover such duty so increased forthwith accordingly (*q*).

(2) *Limitation of Personal Liability.*

Relief after lapse of time from settlement of account, (1) where representation obtained;

412. The limitation of personal liability to duty, under a testamentary document admitted to probate, or under letters of administration, after a specified lapse of time from the date of the settlement of the account in respect of which duty is payable, which, in certain circumstances, obtains in the case of legacy duty (*r*), obtains also in the case of succession duty (*s*).

(*m*) 16 & 17 Vict. c. 51, s. 49.
(*n*) *Ibid.*, s. 45.
(*o*) *Ibid.*, s. 43.
(*p*) Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 10 (3).
(*q*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 45.
(*r*) See p. 256, *ante*.
(*s*) Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 14.

SECT. 6. Collection of the Duty.

(2) under a document not admitted to probate.

Any person, moreover, may cause an attested copy (*a*) of any document, other than a testamentary document admitted to probate, which creates a liability for payment of any succession duty, to be deposited with the Commissioners at their principal office in London, Edinburgh, or Dublin, as the case may require (*b*), and thereafter no person is liable for payment of any succession duty under the document after the expiration of six years from the date of notice (*c*), in writing, to the Commissioners, in such form as they prescribe, of the fact which gives rise to an immediate claim to such duty (*d*).

Certificate of discharge prior to distribution of fund.

A trustee etc. (*e*) before distribution of a fund can, in certain circumstances, as already stated in the case of legacy duty (*e*), obtain a certificate discharging him from his liability to any duty in respect of the fund (*f*).

SUB-SECT. 4.—*Out of what Property the Duty is payable.*

(1) *The Property.*

Personal property.

413. The duty is a first charge on the interest of the successor in the personal property in respect of which the duty is assessed while the same remains in his ownership or control, or in that of any trustee for him, or of his guardian or committee or tutor or curator, or of the husband of any wife who is the successor (*g*).

Real property.

Where a succession to real property arises on the death of a person dying after the 1st August, 1894, and the successor is competent to dispose of it, the succession duty payable in respect of his succession is a charge on the property itself (*h*).

If the successor, however, is not competent to dispose of the property, the duty is a first charge on his interest, and on the

(*a*) The copy is exempt from stamp duty (Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 13 (1)).

(*b*) The copy is to be received at that office, and the officer of the Commissioners receiving it is, on request of the person making the deposit, and either by indorsement on the original document or otherwise, to give a receipt in writing under his hand for the copy (*ibid.*, s. 13 (2)). The costs of depositing the copy and of obtaining the receipt are costs duly incurred by any person in the execution of his duties under the document (*ibid.*, s. 13 (4)).

(*c*) *Ibid.*, s. 15. It is to be delivered or sent in duplicate, and an acknowledgment of its receipt by or on behalf of the Commissioners, upon the duplicate, is to be forthwith returned to the person by whom it was delivered or sent (*ibid.*).

(*d*) *Ibid.*, s. 13 (3).

(*e*) See p. 256, *ante*.

(*f*) Customs and Inland Revenue Act, 1880 (43 Vict. c. 14), s. 12.

(*g*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 42. In the case of a legacy charged upon real estate and given free of duty, the duty is to be paid out of the real estate, and not out of the testator's personal estate (*Noel* v. *Henley* (*Lord*) (1819), 7 Price, 241). And in the case of a jointure given free of duty, the succession duty is likewise payable out of the real estate upon which the jointure is charged (*Floyer* v. *Bankes* (1863), 3 De G. J. & Sm. 306, 316).

(*h*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 18 (1); see also *Re Hpl* *Davies* v. *Davies* (1905), 119 L. T. Jo. 222.

interest of all persons (*i*) claiming in his right, in all the real property in respect of which the duty is assessed (*k*).

The duty, in the case of real property comprised in any succession, has priority over all charges and interests created by the successor, but does not charge or affect any other of his real property (*l*).

Where successor dies before all duty paid.

If the successor has availed himself of the option of paying the duty in moieties, and has died before all the duty, with the interest (if any), has been fully paid, the unpaid part of the duty, with the interest (if any), is a debt due to the Sovereign, and is payable out of the successor's estate, either in advance, or at the same time or times, and in the same manner, as the amount unpaid would have been payable by him if he had not died (*m*).

Legacies out of real estate.

414. The succession duty in respect of any legacy charged upon or made payable out of any real estate, or out of any moneys to arise from the sale of any real estate, is to be retained by the person paying or satisfying the legacy as if it were a legacy out of personal estate (*n*).

Liability of accountable person other than a purchaser or mortgagee.

The provisions limiting the liability for duty, in certain circumstances (*o*), of real property, or of any estate or interest therein, as against a purchaser for valuable consideration or a mortgagee, do not lessen or affect any liability of any successor or accountable person, other than the purchaser or mortgagee, to payment of duty,

(*i*) See *A.-G.* v. *Mander* (1896), 44 W. R. 413 (the purchaser of real estate subject to a lease is not a successor, but is liable for what the vendor would have been liable for, and the duty must accordingly be calculated on the basis of the vendor's life). As between vendor and purchaser, and apart from express stipulation, the purchaser of a reversion must pay the succession duty on the death of the life tenant (*Cooper* v. *Trewby* (1860), 28 Beav. 194), and so must the purchaser of a mere *spes successionis*, if and when it ripens into an interest in possession (*Re Langham's Contract* (1890), 39 W. R. 156, C. A.). Where a purchaser buys an estate in possession, even from tenant for life and remainderman, he is entitled to have it cleared from succession duty (*Re Kidd and Gibbon's Contract*, [1893] 1 Ch. 695, *per* KEKEWICH, J., at p. 698), and if the duty is not commuted, and the purchaser pays at the life tenant's death, *semble*, he has a remedy against the vendor (*Re Cooper and Allen's Contract for Sale to Harlech* (1876), 4 Ch. D. 802, *per* JESSEL, M.R., at p. 827). If the estate in possession is subject to a lease, on the termination of which further duty is payable, the purchaser is equally entitled to have the estate cleared from the duty (*Re Kidd and Gibbon's Contract*, *supra*), and he is not bound to accept an indemnity instead of the duty being commuted (*Re Weston and Thomas's Contract*, [1907] 1 Ch. 244); see also *Re Roche's Estate* (1889), 23 L. R. Ir. 230 (unpaid duty cannot be claimed out of a fund representing a middle incumbrance, where the property has been sold, the first and last incumbrances paid off, and the balance of the proceeds paid to the owner, who has since died insolvent).

(*k*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 42. And this rule obtains also where the successor is competent to dispose of the property, if the succession arose upon a death before the 2nd August, 1894.

(*l*) *Ibid.* The Land Transfer Act, 1897 (60 & 61 Vict. c. 65), does not affect any duty payable in respect of real estate (*ibid.*, s. 5).

(*m*) Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), s. 22 (3) (b).

(*n*) Legacy Duty Act, 1805 (45 Geo. 3, c. 28), ss. 5, 7; see p. 256, *ante*.

(*o*) See p. 301, *post*.

SECT. 6. Collection of the Duty.

whether out of money received on any sale or mortgage or otherwise (*p*).

The duty (if any) unpaid at the expiration of the period of six years, or of twelve years, as the case may be, referred to in such provisions, becomes charged substitutively upon any other estate or interest comprised in the succession of the successor remaining vested in him, or in any person in his right or on his behalf, other than the purchaser or mortgagee, and in case of a mortgage, upon the equity of redemption (*q*).

Shifting of charge, where (1) settled real property, subject to power of sale etc.;

415. Where any settled real property comprised in a succession is subject to any power of sale, exchange, or partition, exercisable with the consent of the successor, or by the successor with the consent of another person, he is not to be disqualified by the charge of duty on his succession from effectually authorising by his consent the exercise of the power, or exercising any power with proper consent, as the case may be, and in such case the duty is to be charged substitutively upon the successor's interest in all real property acquired in substitution for the real property before comprised in the succession, and in the meantime upon his interest also in all moneys (*r*) arising from the exercise of any such power, and in all investments of those moneys (*s*).

(2) separate assessments made for separate properties;

416. Where the Commissioners, at the request of any successor, or of any person claiming in his right, accept or cause to be made separate assessments of the duty payable in respect of the successor's interest in any separate properties, or in defined portions of the same property, the respective properties are chargeable only with the amount of duty separately assessed in respect of them (*t*).

(3) Commissioners certify that unpaid instalments are charged upon separate parts of the property.

The Commissioners are empowered, by their certificates, to be issued in such form as they think fit, from time to time to declare that any duties already assessed, whether collectively or distributively, in respect of any succession, shall thenceforth be charged, as to any unpaid instalments, according to any further distribution thereof, upon separate parts only of the property in respect of which such assessment has been made, in which case the charge of such duties shall be thenceforth limited according to such further distribution (*a*).

(2) *Powers to raise the Duty.*

Trusts for charitable or public purposes.

417. Where property is chargeable with duty on becoming subject to a trust for any charitable or public purposes, the trustee of any such property may raise the amount of any duty due in respect of it, with all reasonable expenses, upon the security of the

(*p*) Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 12 (3).
(*q*) *Ibid.*, s. 12 (2).
(*r*) *Dugdale* v. *Meadows* (1870), 6 Ch. App. 501; see also *Re Warner's Settled Estates, Warner to Steel* (1881), 17 Ch. D. 711 (a sale under the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 22), *per* JESSEL, M.R., at p. 713.
(*s*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 42.
(*t*) *Ibid.*, s. 43.
(*a*) *Ibid.*

property, at interest, with power for him to give effectual discharges for the money so raised (*b*).

Real property taken by a corporation etc.

Any body corporate, company, or society which becomes entitled as successors to any real property, or any trustee of it, may raise the amount of any duty due in respect of their succession upon the security thereof, at interest, with power for them to give the like effectual discharges (*c*).

Power to accountable persons to raise the duty.

All persons, beside the successor, made accountable for the duty payable in respect of any succession, are authorised to retain out of the property subject to such duty the amount of it, or to raise the amount, and the expenses incident thereto, at interest, on the security of the property, with power to give effectual discharges for the same, and the security is to have priority over any charge or incumbrance created by the successor (*d*).

Court to provide for duty.

Whenever a suit is pending in any court for the administration of any property chargeable with succession duty, the court is to provide, out of any property which may be in its possession and control, for the payment of duty to the Commissioners (*e*).

(3) *Limitation of the Charge of Duty.*

Purchasers for valuable consideration and mortgagees of real property.

418. Notwithstanding any provisions contained in the Succession Duty Act, 1853 (*f*), real property, or any estate or interest in real property, does not, as against a purchaser for valuable consideration, including the consideration of marriage (*g*), or a mortgagee, remain charged with or liable to payment of any sum for succession duty after the expiration of (1) six years from the date of notice (*h*) to the Commissioners of the fact that the successor, or any person in his right or on his behalf, has become entitled in possession to his succession or to the receipt of the income and profits of it, or from the date of the first payment by the successor or person of any instalment or part of the duty in case the successor has not availed himself of the option of paying the duty in moieties, or after two years from the time for payment by the successor of the last instalment or part of the duty, if the successor has availed himself of the option, or, in the absence of any such notice or payment, after (2) twelve years from the happening of the event giving rise to an immediate claim to the duty (*i*).

A purchaser or mortgagee is not, for the purpose of obtaining the exemption conferred by the above provisions, bound to see that

(*b*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 16.
(*c*) *Ibid.*, s. 27.
(*d*) *Ibid.*, s. 44.
(*e*) *Ibid.*, s. 53; Supreme Court Fund Rules, 1905, rr. 20, 52 (b), 66 (duties generally); County Court Rules, 1903, Ord. 2, r. 14 (legacy duty, succession duty, and estate duty). As to the desirability of commuting duty instead of leaving a fund in court to await the claim, see *Bayley* v. *Tindal* (1853), 2 W. R. 129. As to the extent of the court's function, see *Ewing's Trustees* v. *Mathieson* (1906), 44 Sc. L. R. 12, cited, p. 254, *ante*.
(*f*) 16 & 17 Vict. c. 51, *e.g.*, s. 42.
(*g*) *Re Donelan's Estate*, [1902] 1 I. R. 109, C. A.; see also note (*n*), p. 220, *ante*.
(*h*) See p. 298, *ante*.
(*i*) Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 12 (1).

SECT. 6. **Collection of the Duty.**

the duty is discharged out of the money or other consideration paid or given as the consideration for the sale or mortgage (*k*).

Certificate of payment of duty to exonerate a purchaser.

419. Every receipt and certificate purporting to be in discharge of the whole duty payable for the time being in respect of any succession, or any part of it, exonerates a *bonâ fide* purchaser for valuable consideration and without notice from the duty, notwithstanding any suppression or misstatement in the account upon the footing of which the duty may have been assessed, or any insufficiency of the assessment (*l*).

SUB-SECT. 5.—*Remission of Duty and Interest.*

Power to remit.

420. The Commissioners and the Treasury respectively have, as already stated (*m*), certain powers to remit succession duty and interest thereon.

SUB-SECT. 6.—*Commutation of Duty and Composition of Claims.*

Commutations of future claims upon application of (1) the expectant successor;

421. Upon application made by any person entitled to a succession in expectancy, the Commissioners may commute the duty presumptively payable in respect of the succession for a certain sum to be presently paid, and for assessing the amount so payable they are to cause a present value to be set upon the presumptive duty, regard being had to the contingencies affecting the liability to the duty, and the interest of money involved in the calculation being reckoned at the rate of 3 per cent. (*n*), and upon receipt of the certain sum they are to give discharges to the successor accordingly (*o*).

(2) a trustee (or other accountable person) of personal property.

The Commissioners have a power in certain circumstances, as already stated in the case of legacy duty (*p*), to commute the duty presumptively payable in respect of personal property comprised in a succession, upon the application of the trustee or other person who would be accountable for the duty in respect of the interest in expectancy if it were in possession at the time of the application, and they are to give discharges for the duty upon receipt of the certain sum to be presently paid (*q*).

Commutation of the duty payable on a successor's interest in the proceeds of the sale of timber.

Where timber, trees, or wood, not being coppice of underwood, are comprised in a succession (whereon the duty is not payable upon principal value (*r*)), and the successor is desirous of commuting the duty payable upon his interest in the net moneys to be from time to time received from any sales, and delivers to the Commissioners an estimate of the net moneys obtainable by him from the sale of the timber etc. as may, in a prudent course of the management of the property, be felled by him during his life,

(*k*) Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 12 (3).
(*l*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 52.
(*m*) See p. 182, *ante*.
(*n*) *I.e.*, the rate of discount for the time being allowed by the Commissioners for duties paid in advance (Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 41).
(*o*) *Ibid.*
(*p*) See p. 258, *ante*.
(*q*) Customs and Inland Revenue Act, 1880 (43 Vict. c. 14), s. 11.
(*r*) See p. 288, *ante*.

SECT. 6. Collection of the Duty.

the Commissioners, if satisfied with the estimate, are to accept it and assess the duty accordingly (*s*).

Duty may be compounded where value is not easily ascertainable.

Where, in the opinion of the Commissioners, any succession is of such a nature, or so disposed or circumstanced, that its value is not fairly ascertainable under any of the directions in the Succession Duty Act, 1853 (*t*), or where, from the complication of circumstances affecting the value of a succession, or affecting the assessment or recovery of the duty upon it, the Commissioners think it expedient, they may compound the duty payable on the succession upon such terms as they think fit, and give discharges to the successor upon payment of duty according to such composition (*u*). This power is distinct from the Commissioners' power, already referred to (*a*), to compound for death duties generally.

SECT. 7.—*Interest, Penalties, and Proceedings.*

SUB-SECT. 1.—*Interest.*

Rate of interest.

422. The provision with regard to the payment of interest on estate duty, already stated (*b*), applies also to succession duty (*c*).

SUB-SECT. 2.—*Penalties.*

Penalty for not giving notice of succession.

423. If any person required, as before stated (*d*), to give notice of a succession or to deliver an account, wilfully neglects to do so at the prescribed period, he is liable to pay to the Sovereign a sum equal to 10 per cent. upon the amount of duty payable by him, or in the case of a succession chargeable with a higher rate of duty than 1 per cent., upon such less sum as the duty, if assessable at the rate of 1 per cent. upon the value of the succession, would amount to, and a like penalty for every month after the first month during which the neglect continues (*e*). And if any person liable to pay any duty, after the duty has been finally ascertained, wilfully neglects to do so within twenty-one days, he is liable to pay etc. a sum equal to 10 per cent. upon the amount of duty so unpaid, or upon such less sum etc. as above (*e*).

Waiver of penalties.

Acceptance or recovery by the Commissioners of arrears of duty, with interest, is an absolute waiver of any penalties which may have been incurred (*f*).

SUB-SECT. 3.—*Proceedings.*

Power to appeal.

424. Any accountable party resident in England (*g*) dissatisfied with the assessment of the Commissioners may appeal against it

(*s*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 23.
(*t*) 16 & 17 Vict. c. 51.
(*u*) *Ibid.*, s. 39.
(*a*) See p. 181, *ante*.
(*b*) See p. 225, *ante*.
(*c*) Finance Act, 1896 (59 & 60 Vict. c. 28), s. 18 (2). If a trustee mispays moneys comprised in a succession through mistake, and omits to pay the duty thereon, his estate is not liable to the successor, who pays the duty, for interest on the duty, although it might be to the Crown (*Brown* v. *Smith* (1875), 46 L. J. (CH.) 866).
(*d*) See p. 296, *ante*.
(*e*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 46.
(*f*) Inland Revenue Act, 1868 (31 & 32 Vict. c. 124), s. 9.
(*g*) If the appellant is resident in Scotland or Ireland, the petition is to the

SECT. 7. Interest, Penalties, and Proceedings.

by petition to the King's Bench Division, provided that he gives notice in writing to the Commissioners, within twenty-one days after the date of the assessment, of his intention to appeal, and furnishes a statement of the grounds of appeal within the further period of thirty days. The court, or any judge thereof sitting in chambers, has jurisdiction to hear and determine the matter of the appeal, and the costs, with power to direct, for the purposes of the appeal, any inquiry, valuation, or report, to be made by any officer of the court or other person, as the court or judge may think fit (*h*). If the Commissioners have caused an account and estimate to be taken by any person or persons appointed by them for that purpose, and have assessed the duty on the footing of it, the payment of the expenses is to be in the discretion of the court (*i*).

Appeal may be made to county court if the sum in dispute does not exceed £50.

If the sum in dispute in respect of duty on the assessment does not exceed £50, the accountable party may, upon due notice and delivery of a statement of the grounds on which he proceeds, appeal to the judge of a county court (*j*) for the district, county, or division in which the appellant resides or the property is situate, and every such judge has jurisdiction to hear and determine the matter of the appeal with the like power and authority as are given to a judge of the King's Bench Division (*k*).

Commissioners may sue out a writ of summons.

If any person accountable for or chargeable with succession duty, and required by the Commissioners to deliver an account, makes default in doing so, or if the Commissioners make an assessment of duty, and the duty is not paid, and there is no notice of appeal against the assessment, or of disputing the liability to assessment, the Commissioners may, as in the case of legacy duty (*l*), sue out of the King's Bench Division a writ of summons for an account or payment (*m*).

SECT. 8.—*Repayment of Overpaid Duty.*

Duty paid by mistake or not properly chargeable.

425. Where it is proved to the satisfaction of the Commissioners that any duty paid on account of any succession, not being due from the person paying it, was paid by mistake, or in respect of property which the successor has been unable to recover, or from or of which he has been evicted or deprived by any superior title, or that, for any other reason, the duty ought to be refunded, the Commissioners are thereupon to refund it to the person entitled to it (*n*).

Scottish or Irish court, as the case may be (Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 50).

(*h*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 50. The petitioner has the right to begin (*Re De Lancey's Succession* (1869), L. R. 4 Exch. 327, n.).

(*i*) *Ibid.*, s. 45.

(*j*) See title COUNTY COURTS, Vol. VIII., p. 687.

(*k*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 50.

(*l*) See p. 261, *ante*.

(*m*) Crown Suits etc. Act, 1865 (28 & 29 Vict. c. 104), ss. 55, 56, 58, 63, 64. See title CROWN PRACTICE, Vol. X., p. 19. The Crown has the right to begin (*Re Greenwood* (1869), L. R. 4 Exch. 327).

(*n*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 37. As to proceedings by petition of right under the Petitions of Right Act, 1860 (23 & 24 Vict. c. 34), if the Commissioners decline to repay, see title CROWN PRACTICE, Vol. X., p. 26.

SECT. 8. Repayment of Overpaid Duty.

A person who has paid duty in advance to the Commissioners is not, by reason of the payment, to be prejudiced in his right to be repaid any duty to which he may become entitled (*o*).

Part VI.—Probate Duty.

SECT. 1.—*The Imposition of the Duty.*

The extent of the charge.

426. Probate duty (*p*) is chargeable, save as expressly provided (*q*), in respect of the estate and effects of any deceased person for or in respect of which probate or letters of administration in this country (*r*) is or are, or ought (*s*) to be, granted (*t*).

(*o*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 40.

(*p*) Probate Duty Act, 1801 (41 Geo. 3, c. 86), s. 3; Probate and Legacy Duties Act, 1808 (48 Geo. 3, c. 149), ss. 35—37; Stamp Act, 1815 (55 Geo. 3, c. 184), ss. 2, 37, 38, 40—43, 45—51, Sched., Part III.; Railway Passenger Duty Act, 1842 (5 & 6 Vict. c. 79), s. 23; Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 92; Probate Duty Act, 1859 (22 & 23 Vict. c. 36), s. 1; Indian Securities Act, 1860 (23 & 24 Vict. c. 5), s. 1; Probate Duty Act, 1860 (23 & 24 Vict. c. 15), ss. 4, 5; Probate Duty Act, 1861 (24 & 25 Vict. c. 92), s. 3; Revenue Act, 1862 (25 & 26 Vict. c. 22), s. 39; Revenue (No. 2) Act, 1864 (27 & 28 Vict. c. 56), ss. 4, 5; Crown Suits etc. Act, 1865 (28 & 29 Vict. c. 104), Part V.; Inland Revenue Act, 1868 (31 & 32 Vict. c. 124), s. 7; Customs and Inland Revenue Act, 1880 (43 Vict. c. 14), ss. 9, 10, Sched.; Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), ss. 26—33, 35, 37, 40; Revenue Act, 1884 (47 & 48 Vict. c. 62), s. 11; Revenue Act, 1889 (52 & 53 Vict. c. 42), s. 19; Finance Act, 1894 (57 & 58 Vict. c. 30), ss. 1, 21 (2), 24, Sched. I. (1); Finance Act, 1896 (59 & 60 Vict. c. 28), s. 18 (1), (2).

The following further statutes deal with probate duty in Ireland:—Probate Duty (Ireland) Act, 1816 (56 Geo. 3, c. 56), ss. 115—117, 119—131; Stamp Duties (Ireland) Act, 1842 (5 & 6 Vict. c. 82), ss. 35, 36.

The following further statutes deal with inventory duty (which corresponds to probate duty) in Scotland:—Probate and Legacy Duties Act, 1808 (48 Geo. 3, c. 149), ss. 38—42; Stamp Act, 1853 (16 & 17 Vict. c. 59), s. 8; Probate Duty Act, 1860 (23 & 24 Vict. c. 15), s. 6; Heritable Securities (Scotland) Act, 1860 (23 & 24 Vict. c. 80), ss. 1—8.

(*q*) See p. 311, *post*.

(*r*) The production of a British grant of representation is necessary (except as stated at pp. 306, 311, *post*), to establish the right to recover or receive any part of the personal estate and effects of any deceased person situated in the United Kingdom (Revenue Act, 1884 (47 & 48 Vict. c. 62), s. 11). Probate duty must be paid to cover the sum to be recovered, where the title of the personal representative is put in issue (*A.-G.* v. *Brunning* (1860), 8 H. L. Cas. 243, *per* Lord WENSLEYDALE, at p. 262; following *Hunt* v. *Stevens* (1810), 3 Taunt. 113). See also *Thynne* v. *Protheroe* (1814), 2 M. & S. 553; *Rogers* v. *James* (1816), 2 Marsh. 425; *Harper* v. *Ravenhill* (1829), Taml. 144, 145; *Carr* v. *Roberts* (1831), 2 B. & Ad. 905; *Christian* v. *Devereux* (1841), 12 Sim. 264; *Jones* v. *Howells*, *Jones* v. *Godsall* (1843), 2 Hare, 342; *Howard* v. *Prince* (1847), 10 Beav. 312; *In the goods of Bell* (1871), 25 L. T. 163; *Cormack* v. *Barragry* (1876), 10 I. R. C. L. 147. The validity of a probate is, however, not affected by the insufficiency of the duty (*A.-G.* v. *Smith and Cocks*, [1892] 2 Q. B. 289, *per* HAWKINS, J., at p. 296).

(*s*) *New York Breweries Co.* v. *A.-G.*, [1899] A. C. 62; compare, also, *In the Goods of Gunn* (1884), 9 P. D. 242, *per* HANNEN, P., at p. 244 (where probate duty is payable, it follows that probate must be granted).

(*t*) Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 27.

SECT. 1. The Imposition of the Duty.

The death of the testator or intestate must, however, be before the 2nd August, 1894 (*u*), although the property may accrue to his estate on a death on or after that date.

SECT. 2.—*The Subject-matter of the Charge.*

SUB-SECT. 1.—"*Estate and Effects.*"

What is chargeable with probate duty.

427. All personal estate (*a*) which the personal representative recovers by virtue of the grant, whether legal or equitable assets, must be considered part of the deceased's estate and effects, and subject to probate duty accordingly (*b*); provided that the representative's office is prescribed, and the distribution of the estate regulated, by the general law for the administration of assets (*c*), and that the estate was at the time of the death within the jurisdiction of the court by which the grant was made (*d*).

Mortgage debts.

428. Mortgage debts are chargeable with the duty, even if received by the personal representative by the aid of a court of equity (*e*), or where secured on the deceased's own real estate (*f*).

Leaseholds for years.

Leasehold estates for years, whether absolute or determinable on lives, are also chargeable with the duty (*g*).

Personal property appointed by will under a general power.

The duty is payable in respect of all the personal estate which the deceased disposes of by will, under any authority enabling him to dispose of it as he thinks fit (*h*).

(*u*) Finance Act, 1894 (57 & 58 Vict. c. 30), ss. 1, 21 (2), 24, Sched. I. (1); compare *Winans* v. *A.-G.*, [1910] A. C. 27, 30, 37, 43, 47.

(*a*) *I.e.*, which is of that nature at the time of the death, or which by subsequent events becomes so (*Lord* v. *Colvin* (1867), L. R. 3 Eq. 737, *per* MALINS, V.-C., at p. 741).

(*b*) *A.-G.* v. *Brunning* (1860), 8 H. L. Cas. 243, *per* Lord CAMPBELL, L.C., at p. 256. Every item of property, however, which the executor has a right to recover *virtute officii* is legal assets (*ibid.*, *per* Lord CHELMSFORD, at p. 265; adopting *Cook* v. *Gregson* (1856), 3 Drew. 547, *per* KINDERSLEY, V.-C., at p. 550). In considering, for this purpose, whether assets are legal or equitable, the question is not whether the money is receivable through the agency of a court of equity or a court of law, but whether it is money which the personal representative is entitled to recover independently of any direction of the testator (*A.-G.* v. *Brunning*, *supra*, *per* Lord CRANWORTH, at p. 258).

(*c*) Compare *Herbert* v. *Hungerford* (1886), 20 L. R. Ir. 100, C. A., *per* FITZGIBBON, L.J., at p. 109. The duty, therefore, does not attach in respect of compensation moneys under the Prevention of Crime (Ireland) Act, 1882 (45 & 46 Vict. c. 25), s. 19 (*Herbert* v. *Hungerford*, *supra*); under the Grand Jury (Ireland) Act, 1836 (6 & 7 Will. 4, c. 116), s. 106 (*Re Martin* (1889), 23 L. R. Ir. 413); under the Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93), s. 2 (Lord Campbell's Act) (*Bulmer* v. *Bulmer* (1883), 25 Ch. D. 409; *A.-G.* v. *Brunning*, *supra*, *per* Lord CAMPBELL, L.C., at p. 256); see also p. 311, *post*.

(*d*) *A.-G.* v. *Bouwens* (1838), 4 M. & W. 171, *per* Lord ABINGER, C.B., at p. 191, on the authority of *A.-G.* v. *Dimond* (1831), 1 Cr. & J. 356, and *A.-G.* v. *Hope* (1834), 1 Cr. M. & R. 530, H. L.; see also *Winans* v. *A.-G.*, *supra*, at p. 40.

(*e*) *A.-G.* v. *Brunning*, *supra*, *per* Lord CAMPBELL, L.C., at p. 257; see also *per* Lord CRANWORTH, at p. 260.

(*f*) *Swabey* v. *Swabey* (1848), 15 Sim. 502; *Re Nunn's Estate*, [1894] 1 I. R. 252, 259; see also *A.-G.* v. *Darell* (1871), 6 I. R. C. L. 491.

(*g*) Compare Stamp Act, 1815 (55 Geo. 3, c. 184), s. 38.

(*h*) Probate Duty Act, 1860 (23 & 24 Vict. c. 15), s. 4, which relates to death on or after the 3rd April, 1860. Prior to that date, probate duty was not payable

SECT. 2. The Subject-matter of the Charge.

In what circumstances real estate is to be regarded as personal estate for the purpose of probate duty.

Real estate, as such, is not chargeable with probate duty (*i*), but where, by reason of the doctrine of equitable conversion, it is impressed with the character of personal estate in the lifetime of the deceased, the duty is payable (*k*).

The duty is payable, in connection with the owner's death, in respect of real estate which has been purchased by trustees, out of personal estate, without authority (*l*); or which has been purchased by order of the court sitting in lunacy (*m*), or in Chancery (*n*), subject to a direction, in either case, that the purchased real estate is to be treated as personal estate.

The duty is also payable in respect of the deceased's interest in moneys to arise from the sale of real estate under a trust for that purpose in a deed, or in the will of another person, notwithstanding that the real estate remains unsold (*o*).

Where real estate is contracted in the lifetime of the deceased to be sold, and there is a valid and binding agreement enforceable by the executor against the purchaser, the duty is payable (*p*), and whether the agreement is to be specifically performed in its original form, or with additional terms and conditions, is wholly immaterial (*q*). The fact of the contract being contingent does not

in respect of personal estate appointed by will under a general power (*Platt* v. *Routh* (1841), 3 Beav. 257, affirmed, *sub nom. Drake* v. *A.-G.* (1843), 10 Cl. & Fin. 257, 281, H. L., upholding *Vandiest* v. *Fynmore* (1834), 6 Sim. 570, but on other grounds, and overruling *Palmer* v. *Whitmore* (1832), 5 Sim. 178; *Nail* v. *Punter* (1832), 5 Sim. 555, 563; *A.-G.* v. *Staff* (1833), 2 Cr. & M. 124).

(*i*) Compare Customs and Inland Revenue Act, 1880 (43 Vict. c. 14), s. 10; *A.-G.* v. *Jones* (1849), 1 Mac. & G. 574. The profits of a lighthouse levied under a private Act of Parliament have been held to be real estate (*A.-G.* v. *Jones, supra*). Land tax redeemed or purchased under the Land Tax Perpetuation Act, 1798 (38 Geo. 3, c. 60), but not discharged by the Act, is personal estate (*ibid.*, s. 99; *Pigott* v. *Pigott* (1867), 37 L. J. (CH.) 116); *secus* under the Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116).

(*k*) *A.-G.* v. *Hubbuck* (1884), 13 Q. B. D. 275, C. A., *per* Lord COLERIDGE, C.J., at p. 280, on the authority of Lord CRANWORTH in *A.-G.* v. *Brunning* (1860), 8 H. L. Cas. 243, at p. 260. The rights of the Crown must depend upon what was the condition of the property, not by way of estoppel, but by way of equitable principles (*A.-G.* v. *Hubbuck, supra, per* BRETT, M.R., at p. 288); see also *A.-G.* v. *Dodd*, [1894] 2 Q. B. 150.

(*l*) *Advocate-General* v. *Anstruther* (1850), 13 Dunl. (Ct. of Sess.) 450 (savings from the real estate of an infant invested in real estate); *A.-G.* v. *Ailesbury* (*Marquis*) (1887), 12 App. Cas. 672, *per* Lord SELBORNE, at p. 681.

(*m*) *A.-G.* v. *Ailesbury* (*Marquis*), *supra.*

(*n*) *Ibid., per* Lord MACNAGHTEN, at p. 692.

(*o*) *A.-G.* v. *Lomas* (1873), L. R. 9 Exch. 29; *In the Goods of Gunn* (1884), 9 P. D. 242; *Re Richerson, Scales* v. *Heyhoe*, [1892] 1 Ch. 379, 384. If real estate remains unconverted at the time when the heir who takes an undisposed-of interest in it dies, and if there is nothing in the will making it necessary to convert it, it is taken as real estate, and devolves according to the rules governing the descent of real estate; but where there is a legal obligation to sell, and the proceeds are to form a portion of a joint and single fund for the purposes of the will, then, whatever may be the condition of the property at the time of the death of the heir taking the undisposed-of interest, it is, both for the purpose of distribution, and for the purpose of probate duty, to be considered as money (*A.-G.* v. *Lomas, supra, per* KELLY, C.B., at p. 34, on the authority of *A.-G.* v. *Brunning, supra*; see also *Re Richerson, Scales* v. *Heyhoe, supra*).

(*p*) *A.-G.* v. *Brunning, supra.*

(*q*) *Ibid., per* Lord CHELMSFORD, at p. 265.

SECT. 2. **The Subject-matter of the Charge.**

deprive the purchase-money of the character of personal estate when it is completed (*r*).

Lease of real estate with option to purchase.

Where a lease of real estate contains an option to purchase, which is exercised by the lessee after the lessor's death, the real estate is regarded as converted from the date of the lease, and the purchase-money forms part of the personal estate of the lessor (*s*), and is chargeable with probate duty (*t*); but it is otherwise where the period for the exercise of the option is extended by the lessor's will, and the option is exercised during the extended period (*a*).

Partnership real estate.

As real estate belonging to a partnership is impressed in equity with the character of personal estate, the share of a deceased partner therein is chargeable with probate duty (*b*), unless by a binding agreement, the performance of which would affect the property during the lifetime, the rule of law is superseded by the real estate being taken out of the partnership property (*c*). If the real estate was substantially involved in the business, it is immaterial how it was acquired by the partners, whether, *e.g.*, by descent or devise (*d*). The interest of a deceased person in a joint adventure in land is governed by similar considerations (*e*).

SUB-SECT. 2.—*Cumulative Duties.*

The duty is payable upon every grant in the chain of title.

429. Probate duty, subject to the exceptions stated later (*f*), is payable in connection with every grant which is necessary to establish the devolution of property (*g*), and it is immaterial that a person entitled to an expectant interest dies before the reversion falls into possession (*h*).

Where a bequest of personal estate takes effect, notwithstanding the death of the legatee in the testator's lifetime (*i*), the subject-

(*r*) *A.-G.* v. *Brunning* (1860), 8 H. L. Cas. 243, *per* Lord CHELMSFORD, at p. 266. If the duty is paid, and the contract goes off, there should be a return of duty (*ibid.*). If the purchaser dies before performance of the agreement, probate duty is payable on his personal estate, but on the contract being performed, a return of duty should be made under the Railway Passenger Duty Act, 1842 (5 & 6 Vict. c. 79), s. 23 (*ibid.*, at p. 267).

(*s*) *Collingwood* v. *Row* (1857), 3 Jur. (N. S.) 785.

(*t*) *Lord* v. *Colvin* (1867), L. R. 3 Eq. 737, *per* MALINS, V.-C., at p. 742.

(*a*) *Re Goodall, Goodall* v. *Goodall*, [1895] W. N. 136.

(*b*) *A.-G.* v. *Hubbuck* (1884), 13 Q. B. D. 275, 278, 289, C. A.; *Forbes* v. *Steven, Mackenzie* v. *Forbes* (1870), L. R. 10 Eq. 178; Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 22.

(*c*) *A.-G.* v. *Hubbuck, supra*, at pp. 278, 286. As to what will remit land to its original character, see *per* BOWEN, L.J., at p. 290. See also *Matson* v. *Swift* (1845), 8 Beav. 368, explained in *A.-G.* v. *Brunning, supra, per* Lord CRANWORTH, at p. 260; *Custance* v. *Bradshaw* (1845), 4 Hare, 315, explained in *A.-G.* v. *Brunning, supra, per* Lord CRANWORTH, at p. 259, in *Forbes* v. *Steven, Mackenzie* v. *Forbes, supra, per* JAMES, V.-C., at p. 191, and in *A.-G.* v. *Hubbuck, supra, per* Lord COLERIDGE, C.J., at p. 280.

(*d*) *Waterer* v. *Waterer* (1873), L. R. 15 Eq. 402, 406; *Re Cooper, Cooper* v. *Cooper* (1878), 26 W. R. 785.

(*e*) *Lord Advocate* v. *Macfarlane's Trustees* (1893), 31 Sc. L. R. 357; see also Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 20 (3).

(*f*) See p. 311, *post*.

(*g*) *Partington* v. *A.-G.* (1869), L. R. 4 H. L. 100.

(*h*) Compare *A.-G.* v. *Malkin* (1846), 2 Ph. 64; *A.-G.* v. *Maxwell* (1860), 10 I. C. L. R. 262.

(*i*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26); see p. 186, *ante*.

matter of the bequest forms part of the personal estate of the dead legatee, and is chargeable with probate duty (*k*). But it is otherwise where the bequest is to the pre-deceasing legatee's representatives to be applied as part of his estate (*l*).

SECT. 2. The Subject-matter of the Charge.

SUB-SECT. 3.—*Domicil and Situs.*

430. The personal estate and effects belonging to the deceased, in order to be liable to probate duty, must be locally situate within the jurisdiction of the British court at the time of the death, when the right to duty attaches (*m*), and it is immaterial that the grant has been eventually *de facto* made available to collect foreign funds (*n*).

The property must be situate within the jurisdiction of the British court.

431. The domicil of the deceased does not affect the liability to the duty (*o*).

The domicil of the owner is immaterial.

432. Furniture and such like things are assets for the purposes of jurisdiction where they are actually situate at the time of the death; leases are assets where the land lies (*p*); specialty debts owing from persons out of the United Kingdom (*q*) are assets where the instrument happens to be (*r*); simple contract debts, whether the title is evidenced or not by bills of exchange or promissory notes (*s*), and specialty debts owing from persons in the United Kingdom (*q*), are assets where the debtor resides at the time of the death (*a*). Foreign bonds or other securities situate in the United Kingdom, and transferable here by delivery, whether the dividends are payable here or abroad, are assets in this country (*b*), and it is

Situation of various descriptions of property.

(*k*) *Perry's Executors* v. *R.* (1868), L. R. 4 Exch. 27.

(*l*) *Lord Advocate* v. *Bogie*, [1894] A. C. 83; *A.-G.* v. *Loyd*, [1895] 1 Q. B. 496. *Quære* whether the duty would not be payable if the testator indicated that the bequest was to be in the same position under the statute as if it had in fact belonged to the legatee (*Lord Advocate* v. *Bogie*, *supra*, *per* Lord WATSON, at p. 95).

(*m*) *A.-G.* v. *Dimond* (1831), 1 Cr. & J. 356; *A.-G.* v. *Hope* (1834), 1 Cr. M. & R. 530, H. L.; *A.-G.* v. *Partington* (1862), 1 H. & C. 457, 474; *A.-G.* v. *Pratt* (1874), L. R. 9 Exch. 140, 143. In cases, however, where the fixed duty of 30*s.* is to be paid under the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 33, see p. 312, *post*. Compare *In the Goods of Henley* (1886), 11 P. D. 126.

(*n*) *A.-G.* v. *Dimond*, *supra*, at p. 371; *A.-G.* v. *Hope*, *supra*, at p. 560; *A.-G.* v. *Bouwens* (1838), 4 M. & W. 171, 190; *Pearse* v. *Pearse* (1838), 9 Sim. 430.

(*o*) *Partington* v. *A.-G.* (1869), L. R. 4 H. L. 100; see also *Winans* v. *A.-G.*, [1910] A. C. 27, 30, 33, 35.

(*p*) Compare *Gurney* v. *Rawlins* (1836), 2 M. & W. 87, *per* PARKE, B., at p. 91.

(*q*) Revenue Act, 1862 (25 & 26 Vict. c. 22), s. 39. A policy under seal is a specialty (*Gurney* v. *Rawlins*, *supra*).

(*r*) Compare *Stamps Commissioner* v. *Hope*, [1891] A. C. 476, P. C.

(*s*) It is immaterial that the bills of exchange have not reached maturity, been accepted, or even presented, or are on the high seas, if the person who becomes debtor was in the United Kingdom (*A.-G.* v. *Pratt* (1874), L. R. 9 Exch. 140). If the drawee refuses to accept, or does not pay at maturity, *quære* (*ibid.*, *per* KELLY, C.B., at p. 144). See also *In the Goods of Wyckoff* (1862), 3 Sw. & Tr. 20.

(*a*) *A.-G.* v. *Bouwens*, *supra*, *per* Lord ABINGER, C.B., at p. 191; see also *Winans* v. *A.-G.*, *supra*.

(*b*) *A.-G.* v. *Bouwens*, *supra*.

SECT. 2. The Subject-matter of the Charge.

immaterial that the document is not completely operative to pass the title (*c*).

Where, by statute, the evidence of title to shares is the register of shareholders, the property is located where the register is (*d*).

Registered shares.

In the case, however, of a member registered in a colonial register under the Companies (Colonial Registers) Act, 1883 (*e*), who dies domiciled in the United Kingdom (*f*), his share or other interest is deemed to be situate in the United Kingdom (*g*).

The locality of any share, stock, bond, or security, of any Indian railway company is the locality, whether in India or Great Britain, of the register in which it has been actually registered for the time being, except that as soon as notice has been given for the transfer from one register to another the share is deemed to be actually registered in the register to which it is to be transferred (*h*).

Indian Government promissory notes, and certificates issued, or stock created in lieu thereof, the interest on which is payable in London by drafts payable in India, and which are registered in the books of the Secretary of State in London, or in the books of the Bank of England, or enfaced in India for the purpose of registration before the death of the owner, also all Indian Government promissory notes, issued with coupons attached, in the same circumstances as to registration, and certificates issued or stock created in lieu thereof, are deemed to be personal estate in England (*i*).

British ships out of the United Kingdom.

A ship registered at any port in the United Kingdom, notwithstanding that at the time of the death it is at sea, or elsewhere out of the United Kingdom, is deemed to have been then in the port of registry (*k*).

Shares of other estates.

In the case of a deceased person's share in the unascertained residuary personal estate of another deceased person, the local character of the asset in the estate of the deceased legatee is fixed

(*c*) *Stern* v. *R.*, [1896] 1 Q. B. 211, 218.

(*d*) *A.-G.* v. *Higgins* (1857), 2 H. & N. 339; that is, it has been said, where the head office of the company is (*Laidlay* v. *Lord Advocate* (1890), 15 App. Cas. 468, *per* Lord HERSCHELL, at p. 483, following *In the Goods of Ewing* (1881), 6 P. D. 19, *per* HANNEN, P., at p. 23, on the authority of *A.-G.* v. *Higgins*, *supra*). See also *Fernandes' Executors' Case* (1870), 5 Ch. App. 314 (an English company with a branch in India, where the chief business of the company was carried on, was wound up, and the assets were remitted to the official liquidator in this country, and probate duty was held to be payable on a final dividend payable to the estate of an Indian testator, who died after the assets were so remitted).

(*e*) 46 & 47 Vict. c. 30.

(*f*) Revenue Act, 1889 (52 & 53 Vict. c. 42), s. 18.

(*g*) Companies (Colonial Registers) Act, 1883 (46 & 47 Vict. c. 30), s. 3 (7) (b).

(*h*) Indian Railway Companies Act, 1873 (36 & 37 Vict. c. 43), s. 6.

(*i*) Indian Securities Act, 1860 (23 & 24 Vict. c. 5), s. 1. English representation is sufficient with respect to such notes and moneys (*ibid.*).

(*k*) Revenue (No. 2) Act, 1864 (27 & 28 Vict. c. 56), s. 4. Personal estate on the high seas, belonging to a British subject, although not within any jurisdiction, is, it has been said, subject to probate duty in this country (*A.-G.* v. *Pratt* (1874), L. R. 9 Exch. 140, *per* KELLY, C.B., at p. 143, but AMPHLETT, B., *semble*, *dub.*, at p. 146). See also *A.-G.* v. *Hope* (1834), 1 Cr. M. & R. 530, H. L., where probate duty was paid in respect of personal estate on the high seas; and *In the Goods of Wyckoff* (1862), 3 Sw. & Tr. 20, where a grant was issued in respect, *semble*, *inter alia*, of cash in a British ship on the high seas belonging to a foreigner.

by the residence of the debtor-executor, and the situation of the assets in the original estate is immaterial (*l*); and a deceased person's share in a fund, the subject of a British settlement, representing the proceeds to arise from the sale of foreign real estate under a trust for that purpose, is an English equitable chose in action (*m*).

Foreign partnership business.

Where a partnership business is substantially foreign, although the major portion of the partners are resident in this country, and the business is financed by a financial house in this country, to whom the proceeds of the produce of the business are to be remitted, the interest of a deceased partner, where his executors have the right to dispose of his share, is not an asset in this country (*n*).

SECT 3.—*Exceptions from the Charge of Duty.*

Trust property.

433. Probate duty is not payable in respect of any personal estate and effects of which the deceased was possessed as a trustee and not beneficially (*o*).

Subsequent grants.

All second and subsequent grants of representation, in the same estate, are exempt from the payment of the duty, where the full duty has been paid upon the value of the estate in connection with a previous grant (*p*).

Where estate duty is chargeable.

Where (namely, in the case of persons dying on or after the 2nd August, 1894) estate duty is chargeable upon the principal value of property which passes on the death, probate duty is not payable (*q*).

The effects of any common seaman etc.

The effects of any common seaman (*r*), marine, or soldier, who is slain or dies in the service of the Sovereign, are exempt from probate duty (*s*).

Small estates

The duty is not payable where the whole estate and effects of a deceased person do not exceed £100 in value (*t*).

Policy of assurance effected by a person domiciled abroad.

Where a policy of life assurance has been effected with any insurance company by a person who dies domiciled out of the United Kingdom, the production of a British grant of representation is not necessary to establish the right to receive the money assured, and accordingly no probate duty is payable (*a*).

(*l*) *Sudeley* (*Lord*) v. *A.-G.*, [1897] A. C. 11. If the estate had been fully administered, *quære* whether it would have made any difference (*ibid.*, *per* Lord HERSCHELL, at p. 18); but if the executor had held the whole estate for one legatee, it might have done so (*ibid.*, *per* Lord SHAND, at p. 20).

(*m*) *Re Smyth*, *Leach* v. *Leach*, [1898] 1 Ch. 89.

(*n*) *Laidlay* v. *Lord Advocate* (1890), 15 App. Cas. 468.

(*o*) Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 27; see also Probate and Legacy Duties Act, 1808 (48 Geo. 3, c. 149), ss. 35—37; Stamp Act, 1815 (55 Geo. 3, c. 184), ss. 38, 50; *Carr* v. *Roberts* (1831), 2 B. & Ad. 905; *Hennell* v. *Strong* (1856), 25 L. J. (CH.) 407.

(*p*) Probate Duty Act, 1801 (41 Geo. 3, c. 86), s. 3.

(*q*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 1, Sched. I. (1).

(*r*) See p. 201, *ante*.

(*s*) Stamp Act, 1815 (55 Geo. 3, c. 184), Sched., Part III; see also note (*f*), p. 201, *ante*.

(*t*) Revenue (No. 2) Act, 1864 (27 & 28 Vict. c. 56), s. 5. The death must be after the 24th July, 1864 (*ibid.*). See also note (*g*), p. 201, *ante*.

(*a*) Revenue Act, 1889 (52 & 53 Vict. c. 42), s. 19.

SECT. 4. Rates of Duty.

SECT. 4.—*Rates of Duty.*

Rates of duty.

434. The rate of probate duty depends upon the value of the estate and effects, and the scale of rates is as follows (*b*) :—Where the value of the estate and effects is above £100 and not above £500, the rate is £1 for every full sum of £50, and for any fractional part of £50 over any multiple of £50. Where the value is above £500 and not above £1,000, the rate is £1 5*s.* for every full sum of £50, and for any fractional part of £50 over any multiple of £50. Where the value is above £1,000, the rate is £3 for every full sum of £100, and for any fractional part of £100 over any multiple of £100.

Fixed duty of 30*s.*

Where the value of the whole personal estate in or out of the United Kingdom of any person dying after the 31st May, 1881, without any deduction for debts and funeral expenses, exceeds £100 but does not exceed £300, a fixed duty of 30*s.* may be paid (*c*).

SECT. 5.—*Value Chargeable.*

SUB-SECT. 1.—*Gross Value.*

The general rule.

435. The duty is payable upon the principal value of the property chargeable therewith in respect of which the grant is obtained (*d*), and the affidavit (*e*) must accordingly include the property at its then value (*f*), with all accretions of interest since the death (*g*).

(*b*) Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 27. The rate of duty depends upon the law in force at the date of the grant (*Re Joy, Lalor* v. *Jones* (1880), 5 L. R. Ir. 282). For the duties on grants of representation prior to the 1st June, 1881, see stat. (1694) 5 & 6 Will. & Mar. c. 21; stat. (1698) 9 Will. 3, c. 25; stat. (1779) 19 Geo. 3, c. 66; stat. (1783) 23 Geo. 3, c. 58; stat. (1789) 29 Geo. 3, c. 51; stat. (1795) 35 Geo. 3, c. 30; stat. (1797) 37 Geo. 3, c. 90; Administration of Estates Act, 1798 (38 Geo. 3, c. 87); Probate Duty Act, 1801 (41 Geo. 3, c. 86); Stamp Act, 1804 (44 Geo. 3, c. 98); Stamp Act, 1815 (55 Geo. 3, c. 184), s. 2, Sched., Part III.; Probate Duty Act, 1859 (22 & 23 Vict. c. 36), s. 1; Revenue (No. 2) Act, 1864 (27 & 28 Vict. c. 56), s. 5; Customs and Inland Revenue Act, 1880 (43 Vict. c. 14), s. 9, Sched. Where, in the case of an application for an original grant on or after the 1st June, 1889, in the case of a person dying before the 2nd August, 1894, the value of the estate and effects exceeds £10,000, temporary estate duty is also payable. Where a further affidavit is to be delivered in respect of additional value, then if the original value exceeded £10,000, additional duty is payable in respect of the additional value, but if the original value did not exceed £10,000, although the whole value does, duty is payable in respect of the whole value. The rate of the duty is £1 for every full sum of £100, and for any fraction of £100 over any multiple of £100. As to the subject generally, see Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), ss. 5 (1), (3—7), 7—9.

(*c*) Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 33 (1), (5). The grant must be obtained under the provisions of the section. If it is afterwards discovered that the value exceeds £300, probate duty is payable in respect of the true value, and no allowance is made for the fixed duty paid (*ibid.*, s. 35).

(*d*) *Doe* d. *Richards* v. *Evans* (1847), 10 Q. B. 476 (leasehold property improved by building between the death and the grant). Scottish and Irish assets may be included for duty in the affidavit when the English grant is to be resealed in Scotland under the Confirmation of Executors (Scotland) Act, 1858 (21 & 22 Vict. c. 56), ss. 14, 15, and in Ireland under the Probates and Letters of Administration Act (Ireland), 1857 (20 & 21 Vict. c. 79), ss. 94, 95.

(*e*) See p. 314, *post*.

(*f*) *A.-G.* v. *Partington* (1862), 1 H. & C. 457, *per* BRAMWELL, B., at p. 474.

(*g*) *Partington* v. *A.-G.* (1869), L. R. 4 H. L. 100.

Stocks and shares are to be valued at their then market price (*h*).

If the duty in respect of a contingent reversionary interest is not paid when the grant is obtained, the duty when the interest falls into possession is to be paid upon the value actually realised (*i*). It is not sufficient to include such an interest at a nominal sum in the original affidavit, the Crown being entitled to duty upon the fair value of the expectancy (*k*).

Special cases.

Conjectural estimates are to be set right when the facts are ascertained (*l*).

Desperate and doubtful debts owing to the deceased may, in the judgment of the executor fairly and *bonâ fide* exercised, be omitted in the first instance (*m*), but if afterwards paid they become part of the estate (*n*).

SUB-SECT. 2.—*Deductions.*

Power to deduct debts and funeral expenses where the deceased died domiciled in the United Kingdom.

436. Where the deceased died domiciled in the United Kingdom, the person applying for the grant may state in his affidavit the fact of such domicil, and deliver a schedule of the debts due from the deceased to persons resident in the United Kingdom, and an account of the funeral expenses, and, for the purpose of the charge of duty, the aggregate amount of the debts and funeral expenses may be deducted from the value of the estate and effects specified in the account delivered with the affidavit (*o*).

What debts may be deducted.

437. Debts which may be so deducted are debts due and owing from the deceased which, in their own nature and character, apart from any direction in the deceased's will (*p*), are payable by law out of any part of the estate and effects comprised in the affidavit (*q*). They do not include voluntary debts expressed to be payable on the death of the deceased, or payable under any instrument which has not been *bonâ fide* delivered to the donee three months before the death (*r*), or debts in respect of which any real estate may be primarily liable (*s*), or in respect of which a

(*h*) *Wishart* v. *Lord Advocate* (1880), 18 Sc. L. R. 62.

(*i*) *Lord* v. *Colvin* (1867), L. R. 3 Eq. 737; *H. M. Advocate* v. *Findlay* (*Kennedy's Factor*) (1890), 28 Sc. L. R. 596. These cases are upon the Stamp Act, 1815 (55 Geo. 3, c. 184), s. 41. *Quære*, whether the position is the same under the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 32.

(*k*) *Lord Advocate* v. *Pringle* (1878), 15 Sc. L. R. 624.

(*l*) *Wishart* v. *Lord Advocate*, *supra*, *per* the Lord President (INGLIS), at p. 64.

(*m*) *Moses* v. *Crafter* (1831), 4 C. & P. 524, *per* Lord TENTERDEN, C.J., at p. 525; approved, *A.-G.* v. *Brunning* (1860), 8 H. L. Cas. 243, *per* Lord WENSLEYDALE, at p. 262; and *Perry's Executors* v. *R.* (1868), L. R. 4 Exch. 27, *per* BRAMWELL, B., at p. 31.

(*n*) *Perry's Executors* v. *R.*, *supra*, *per* BRAMWELL, B., at p. 31.

(*o*) Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 28.

(*p*) *Percival* v. *R.* (1864), 3 H. & C. 217, *per* MARTIN, B., at p. 230 (direction to pay out of mixed fund).

(*q*) Calls on shares paid by executors may be deducted, even where the shares have been transferred into their names, provided the calls are paid in the ordinary course of administration (*Wishart* v. *Lord Advocate*, *supra*).

(*r*) See also Probate Duty Act, 1861 (24 & 25 Vict. c. 92), s. 3.

(*s*) *Re Taylor's Estate* (1853), 8 Exch. 384; see also *Barham* v. *Thanet* (*Earl*) (1834), 3 My. & K. 607, *per* LEACH, M.R., at p. 624.

SECT. 5. Value Chargeable.

reimbursement may be capable of being claimed from any real estate of the deceased (*t*), or from any other estate or person (*a*).

Mortgage debts on leaseholds.

In any case where leasehold estates are the sole security by way of mortgage for any debts due and owing from the deceased, the amount of the mortgage debts may be deducted from the value of the leasehold estates (*b*).

Covenant debts in consideration of marriage.

Deduction may be made in respect of a specified sum of money covenanted by the deceased, in consideration of marriage, to be paid after his death (*c*), but not where the covenant was to bequeath a share (*d*), or the entirety (*e*), of his residuary estate.

Debts where deceased owned foreign personal estate.

Where the deceased owned property both in this country and abroad, and owed debts to persons resident in this country, the foreign property is not to be taken into consideration in estimating the deduction to be allowed in respect of such debts (*f*).

Funeral expenses.

438. Funeral expenses which may be deducted must be reasonable according to law (*g*).

SECT. 6.—*Collection of the Duty.*

SUB-SECT. 1.—*The Duty.*

Nature of the duty.

439. Probate duty is a stamp duty, and may be denoted by impressed or adhesive stamps, or partly by one and partly by the other, as the Commissioners (*h*) think proper (*i*).

How payable.

The duty is chargeable on the affidavit (*k*) to be required and received from the person applying for the grant (*l*), and the several provisions in force on the 1st June, 1881 (*m*), in relation to

(*t*) *E.g.*, a mortgage debt which is payable by the heir or devisee under the Real Estate Charges Acts, 1854, 1867, and 1877 (17 & 18 Vict. c. 113; 30 & 31 Vict. c. 69; 40 & 41 Vict. c. 34).

(*a*) Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 28.

(*b*) Inland Revenue Act, 1868 (31 & 32 Vict. c. 124), s. 7.

(*c*) *Lord Advocate of Scotland* v. *Hagart* (1872), L. R. 2 Sc. & Div. 217; see also *A.-G.* v. *Murray* (1887), 20 L. R. Ir. 124, 127, C. A.

(*d*) *Marshall* v. *Lord Advocate* (1874), 11 Sc. L. R. 392.

(*e*) *Moir's Trustees* v. *Lord Advocate* (1874), 11 Sc. L. R. 157; *A.-G.* v. *Murray* (1887), 20 L. R. Ir. 124, C. A.

(*f*) *R.* v. *Stamps and Taxes Commissioners* (1849), 18 L. J. (Q. B.) 201.

(*g*) Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 28. See note (*b*), p. 210, *ante*.

(*h*) See note (*h*), p. 249, *ante*.

(*i*) Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 26. An adhesive stamp is used for the fixed duty of 30s. under *ibid.*, s. 33, and impressed stamps for the other duties.

(*k*) The affidavit is to be in such form as may be prescribed (Customs and Inland Revenue Act, 1880 (43 Vict. c. 14), s. 10 (4); Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 29; and the Commissioners are to provide forms of affidavit stamped to denote the duties payable (Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 29).

(*l*) Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 27. Prior to the 1st June, 1881, the duty was chargeable upon the grant itself (Stamp Act, 1815 (55 Geo. 3, c. 184), s. 2, Sched., Part III.).

(*m*) *I.e.*, the date of the commencement of the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12).

the earlier probate duties are, so far as they are consistent, deemed to be applicable to the duty so chargeable (*n*).

SUB-SECT. 2.—*When the Duty is payable.*

When the duty is payable.

440. If any part of the estate is taken possession of, or in any manner administered, a grant must be obtained, and the probate duty paid, within six calendar months after the death of the deceased, or within two calendar months after the termination of any action or dispute respecting the will, or the right to letters of administration, if there is any such, that is not ended within four calendar months after the death (*o*).

When additional duty is payable.

If at any time it is discovered that the estate was, at the time of the grant, of greater value than that mentioned in the certificate on the grant of the officer of the court (*p*), or that any deduction for debts or funeral expenses was made erroneously, a further affidavit, with an account, is, within six months after the discovery, to be delivered to the Commissioners, duly stamped for the additional duty payable, with interest from the date of the grant, or from such subsequent date as the Commissioners may, in the circumstances, think proper (*q*).

SUB-SECT. 3.—*By whom the Duty is payable.*

By whom the duty is payable.

441. The duty is payable by the person applying for the grant (*r*), or by any person who takes possession of, or in any manner administers (*s*), any part of the personal estate (*t*).

Account to accompany affidavit on application for grant.

Together with the affidavit (*a*) to be required and received from the applicant for the grant, an account (*b*) is to be delivered of the particulars of the personal estate for or in respect of which the grant is to be made, and of the estimated value of the

(*n*) Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 26 (3); see also Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 92.

(*o*) Stamp Act, 1815 (55 Geo. 3, c. 184), s. 37; Crown Suits etc. Act, 1865 (28 & 29 Vict. c. 104), s. 57); Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 40. The Commissioners have power, in certain circumstances, and on certain conditions, to allow a grant to issue on credit (Stamp Act, 1815 (55 Geo. 3, c. 184), ss. 45—49; see *Doe* d. *Hanley* v. *Wood* (1819), 2 B. & Ald. 724, 733; *Howard* v. *Prince* (1847), 10 Beav. 312).

(*p*) See p. 316, *post*.

(*q*) Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 32. In the case of grants obtained before the 1st June, 1881, see Stamp Act, 1815 (55 Geo. 3, c. 184), ss. 41, 43.

(*r*) Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 27.

(*s*) Including a British company which transfers shares without production of a British grant (*New York Breweries Co.* v. *A.-G.*, [1899] A. C. 62).

(*t*) Stamp Act, 1815 (55 Geo. 3, c. 184), s. 37; Crown Suits etc. Act, 1865 (28 & 29 Vict. c. 104), s. 57; Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 40.

(*a*) Stamp Act, 1815 (55 Geo. 3, c. 184), s. 38. The affidavit may be made by some other competent person, and not necessarily by the executor (*In the Goods of Urruela* (1869), L. R. 1 P. & D. 598).

(*b*) As to the transmission of the account and other documents and particulars to the Commissioners by the Probate Registry, see Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 93; Customs and Inland Revenue Act, 1880 (43 Vict. c. 14), s. 10 (2).

SECT. 6. Collection of the Duty.

particulars (*c*). The affidavit is to extend to the verification of the account, or to the verification of such account and the schedule of debts and funeral expenses, as the case may be (*d*).

Grant to bear a certificate in lieu of a stamp.

Every grant is to bear a certificate in writing under the hand of the proper officer of the court, showing that the affidavit for the Commissioners has been delivered, and, if liable to duty, has been duly stamped, and stating the amount of the gross value of the estate and effects as shown by the account (*e*).

Power to require explanations and proof in support of affidavit.

The Commissioners may at any time, and from time to time, within three years after the grant, as they may think necessary, require the person acting in the administration (*f*) of the estate and effects to furnish such explanations, and to produce such documentary or other evidence respecting the contents of, or particulars verified by, the affidavit as the case may seem to them to require (*g*).

Where insufficient duty paid at first.

442. If a correction of the original estimate of value becomes necessary, it is to be made by the person acting in the administration of the estate (*h*), when the mistake is discovered (*i*), and if there is no such person, the estate having been fully administered, the Crown is without remedy (*k*).

The Commissioners upon receipt of a stamped further affidavit are to cause a certificate (*l*) to be written on the grant, by an authorised officer, setting forth the true value of the estate and effects as then ascertained, or, as the case may be, the corrected amount of the deductions, and such certificate is substituted for, and has the same force and effect as, the certificate of the officer of the court (*h*).

SUB-SECT. 4.—*Out of what Property the Duty is payable.*

The general rule.

443. Probate duty is, in general, payable out of the residuary personal estate (*m*).

Personal property appointed

In the case, however, of estate and effects which the deceased has disposed of by will under any authority enabling him to dispose of

(*c*) Customs and Inland Revenue Act, 1880 (43 Vict. c. 14), s. 10 (1).
(*d*) Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 29.
(*e*) *Ibid.*, s. 30.
(*f*) See note (*h*), *infra*.
(*g*) Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 37.
(*h*) *Ibid.*, s. 32. In the case of grants obtained before the 1st June, 1881, see Stamp Act, 1815 (55 Geo. 3, c. 184), ss. 41, 43.
(*i*) *A.-G.* v. *Smith*, [1893] 1 Q. B. 239, C. A.; *Re Nunn's Estate*, [1894] 1 I. R. 252, 257.
(*k*) *A.-G.* v. *Smith*, *supra*, *per* A. L. SMITH, L.J., at p. 244.
(*l*) In an administration case, the administrator must first give security to the court to cover the corrected gross assets. Periodical notifications of rectifications are to be given by the Commissioners to the court (Stamp Act, 1815 (55 Geo. 3, c. 184), s. 42).
(*m*) *Re Bourne*, *Martin* v. *Martin*, [1893] 1 Ch. 188. Where the residuary personal estate is insufficient, a specific bequest must exonerate real estate taken by the heir (*Shepheard* v. *Beetham* (1877), 6 Ch. D. 597; *secus* for estate duty (*Re Pullen*, *Parker* v. *Pullen*, [1910] 1 Ch. 564)). Probate duty is a testamentary expense (*Davies* v. *Fowler* (1873), L. R. 16 Eq. 308); but is not a disbursement within the Solicitors Act, 1843 (6 & 7 Vict. c. 73), s. 37 (*Re Kingdon and Wilson*, [1902] 2 Ch. 242, C. A., overruling *Re Lamb* (1889), 23 Q. B. D. 5).

it as he thinks fit, the probate duty payable in respect thereof (*n*) is a charge or burden upon the property so disposed of, and is to be paid out of it, by the trustees or owners, to the person for the time being lawfully having or taking the burden of the execution of the will or testamentary instrument, or of the administration or management of the personal estate of the deceased, for the benefit of the persons entitled thereto (*o*).

by will under a general power.

SECT. 7.—*Interest, Penalties, and Proceedings.*

SUB-SECT. 1.—*Interest.*

Rate of interest.

444. Simple interest at the rate of 3 per cent. per annum, without deduction for income tax, is payable upon duty in arrear, and is recoverable in the same manner as if it were part of the duty (*p*).

SUB-SECT. 2.—*Penalties.*

Double duty in case of default.

445. If any person who ought to obtain probate or letters of administration (*q*), or to deliver a further affidavit (*r*), neglects to do so within the prescribed period, he is liable to pay double the amount of duty chargeable, and the same is a debt due from him to the Sovereign, and is recoverable by any of the ways or means in force (*s*) for the recovery of probate, legacy, or succession duties (*t*).

SUB-SECT. 3.—*Proceedings.*

Summary proceedings for recovery of duty.

446. If any person takes possession of, or in any manner administers, any part of the personal estate of any person deceased, without obtaining a grant within the prescribed period, the Commissioners may sue out of the King's Bench Division a writ of

(*n*) *I.e.*, where the deceased died after the 3rd April, 1860 (Probate Duty Act, 1860 (23 & 24 Vict. c. 15), s. 5).

(*o*) *Ibid.*; *Re Lambert's Estate, Stanton* v. *Lambert* (1888), 39 Ch. D. 626, 635. Where a general power of appointment over a fund is exercised by will by way of appointing "the clear value" of specified sums of money, and "all the residue," the probate duty, apart from express direction (*Davies* v. *Fowler* (1873), L. R. 16 Eq. 308), is payable out of the part appointed as residue (*Re Currie, Bjorkman* v. *Kimberley* (*Lord*) (1888), 57 L. J. (CH.) 743).

(*p*) Finance Act, 1896 (59 & 60 Vict. c. 28), s. 18 (1), (2).

(*q*) Compare *New York Breweries Co.* v. *A.-G.*, [1899] A. C. 62, *per* Lord DAVEY, at p. 77. In *Re Ranking's Settlement Trusts* (1868), L. R. 6 Eq. 601, 605, the court, the Commissioners accepting the probate duty, dispensed with a grant where insistence on it would have involved such expense and delay as to render the order of the court practically useless.

(*r*) If the further affidavit is in a case where the fixed duty of 30*s.* under the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 33, has been paid, a sum equal to the probate duty in respect of the true value of the estate, without allowance for the 30*s.*, is a debt due to the Sovereign from the person acting in the administration of the estate (*ibid.*, s. 35).

(*s*) *I.e.*, in 1881.

(*t*) Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 40. Prior to the 1st June, 1881, see Stamp Act, 1815 (55 Geo. 3, c. 184), s. 37, for the penalty for not obtaining a grant within a given time, and *ibid.*, s. 43, for the penalty for not paying further duty in a given time after the discovery that insufficient duty has been paid. The penalty under s. 37 does not prevent the representatives from subsequently taking out a grant (*Bodger* v. *Arch* (1854), 10 Exch. 333, *per* PARKE, B., at p. 337). See also Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 15, as to the penalty on stamping probates more than six months after the true value of the estate has been discovered.

SECT. 7. Interest, Penalties, and Proceedings.

summons commanding him to deliver an account of the estate of the deceased, and of its value, and to pay the duty properly chargeable, and costs of the proceedings, or to show cause to the contrary, and on cause being shown, such order is to be made as seems just; and any such proceedings are to be a waiver of all relative penalties incurred by such person (*a*).

SECT. 8.—*Repayment of Overpaid Duty.*

Return of overpaid duty—
(1) Where original estimate of value excessive;
(2) where insufficient deduction in respect of debts and funeral expenses.

447. If at any time after the grant, and during the administration of the estate, the value mentioned in the certificate of the officer of the court is found to exceed the true value, or if at any time within three years after the grant, or within such further period as the Commissioners may allow, it appears that no amount, or an insufficient amount, was deducted on account of debts and funeral expenses, the Commissioners, upon proof of the facts to their satisfaction, may return the amount of duty overpaid, and cause a certificate by an authorised officer to be written on the grant stating the true value, or, as the case may be, the amount, or corrected amount, of the deductions, and this certificate is to be substituted for, and have the same force and effect as, the original certificate (*b*).

(*a*) Crown Suits etc. Act, 1865 (28 & 29 Vict. c. 104), s. 57; see title CROWN PRACTICE, Vol. X., p. 19.

(*b*) Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 31. As to grants on or after the 1st June, 1881, the alteration in the mode of dealing with debts effected by this Act is a mere change in the mode of collection, and does not in any way alter the imposition of the tax (*A.-G.* v. *Murray* (1887), 20 L. R. Ir. 124, C. A., *per* FITZGIBBON, L.J., at p. 147). In prior cases, see Stamp Act, 1815 (55 Geo. 3, c. 184), ss. 40, 51, and Railway Passenger Duty Act, 1842 (5 & 6 Vict. c. 79), s. 23, in which cases a return of duty can only be made where it is proved to the satisfaction of the Commissioners, by oath and proper vouchers, that the executor has paid the debts (Stamp Act, 1815 (55 Geo. 3, c. 184), s. 51; Railway Passenger Duty Act, 1842 (5 & 6 Vict. c. 79), s. 23). The power of the Commissioners to allow time beyond three years is where by reason of any proceeding at law or in equity the debts have not been ascertained and paid, or the effects of the deceased recovered and made available, and in consequence the executor has been prevented from claiming the return within three years (Railway Passenger Duty Act, 1842 (5 & 6 Vict. c. 79), s. 23). Where the duty has been repaid on a fraudulent application, *quære*, whether it can be again demanded (*Hicks* v. *Keat* (1840), 3 Beav. 141). As to petitions under the Petitions of Right Act, 1860 (23 & 24 Vict. c. 34), where the Commissioners decline to repay, see title CROWN PRACTICE, Vol. X., p. 27; *Percival* v. *R.* (1864), 3 H. & C. 217; *Perry's Executors* v. *R.* (1868), L. R. 4 Exch. 27; *Re Nathan* (1884), 12 Q. B. D. 461.

Semble, the Scots common law principle of *condictio indebiti* has no application to money paid as probate duty (*Alston's Trustees* v. *Lord Advocate* (1895), 33 Sc. L. R. 278, *per* the Lord Ordinary (MONCRIEFF), at p. 281).

ESTATE BY THE CURTESY.

See COPYHOLDS; HUSBAND AND WIFE; REAL PROPERTY AND CHATTELS REAL.

ESTATE FOR LIFE.

See REAL PROPERTY AND CHATTELS REAL; SETTLEMENTS.

ESTATE PUR AUTRE VIE.

See DESCENT AND DISTRIBUTION; REAL PROPERTY AND CHATTELS REAL.

ESTATE TAIL.

See DESCENT AND DISTRIBUTION; REAL PROPERTY AND CHATTELS REAL; SETTLEMENTS.

ESTATES OF THE REALM.

See CONSTITUTIONAL LAW; PARLIAMENT.

ESTOPPEL.

PAGE

PART I. DEFINITION, NATURE, AND CLASSIFICATION - - 322

SECT. 1. DEFINITION - - - - - - - - - - 322

SECT. 2. KINDS OF ESTOPPEL - - - - - - - 322

PART II. ESTOPPEL BY MATTER OF RECORD - - - - 325

SECT. 1. WHAT WILL CREATE ESTOPPEL BY RECORD - - - 325

Sub-sect. 1. In General - - - - - - - 325
Sub-sect. 2. Judgments *in rem* - - - - - - 327
Sub-sect. 3. Judgments *in personam* or *inter partes* - - 330
Sub-sect. 4. *Res Judicata* - - - - - - - 331
Sub-sect. 5. Judgment recovered - - - - - 334

SECT. 2. PARTIES ESTOPPED BY RECORD - - - - - 338

Sub-sect. 1. Parties estopped by Judgment *in rem* - - 338
Sub-sect. 2. Parties estopped by Judgment *inter partes* - 343

SECT. 3. WHO MAY TAKE ADVANTAGE OF ESTOPPEL - - - 349

Sub-sect. 1. In General - - - - - - - - 349
Sub-sect. 2. Necessity of pleading Estoppel - - - 350

SECT. 4. MATTERS PREVENTING EXISTENCE OF ESTOPPEL - - 351

Sub-sect. 1. In General - - - - - - - - 351
Sub-sect. 2. Fraud - - - - - - - - - 351
Sub-sect. 3. Lack of Jurisdiction - - - - - 353
Sub-sect. 4. Truth appearing in same Record - - - 354
Sub-sect. 5. Allegation not inconsistent with Record - - 354
Sub-sect. 6. Matter on Record not then in Issue - - - 355
Sub-sect. 7. Record of other than Final Judgment - - 359
Sub-sect. 8. Estoppel against Estoppel - - - - 361
Sub-sect. 9. Second Action begun before Judgment in First 361

PART III. ESTOPPEL QUASI OF RECORD - - - - - 362

SECT. 1. JUDGMENTS OF COURTS NOT OF RECORD - - - 362

SECT. 2. APPROBATION AND REPROBATION - - - - - 364

PART IV. ESTOPPEL BY DEED - - - - - - - - 365

SECT. 1. IN GENERAL - - - - - - - - - - 365

SECT. 2. UPON WHOM BINDING - - - - - - - - 368

SECT. 3. EXCEPTIONS - - - - - - - - - - 369

Sub-sect. 1. Fraud - - - - - - - - - 369
Sub-sect. 2. Mistake - - - - - - - - 370
Sub-sect. 3. Infants, Married Women, Corporations - - 370

SECT. 4. OPERATION OF DEEDS BY ESTOPPEL - - - - 371

PAGE

PART V. ESTOPPEL IN PAIS - - - - - - - 375

SECT. 1. ITS EARLY SIGNIFICATION - - - - - - 375

SECT. 2. ESTOPPEL BY REPRESENTATION - - - - - 376

Sub-sect. 1. In General - - - - - - - 376
Sub-sect. 2. Estoppel by Statement - - - - - 386
Sub-sect. 3. Estoppel by Conduct - - - - - 388
Sub-sect. 4. Estoppel by Negligence - - - - - 398

SECT. 3. ESTOPPEL BETWEEN PARTICULAR PERSONS - - - 402

Sub-sect. 1. Landlord and Tenant - - - - - 402
Sub-sect. 2. Bailor and Bailee - - - - - - 406
Sub-sect. 3. Companies and Holders of Certificates - - 408
Sub-sect. 4. Patentee and Licensee - - - - - 413

For Conclusiveness of Foreign Judgment - *See title* CONFLICT OF LAWS.
Conclusiveness of Judgment - - ,, JUDGMENTS AND ORDERS.
Documentary Evidence - - - ,, EVIDENCE.
Estoppel on Bailee - - - - ,, BAILMENT.
Estoppel on Principal or Agent - - ,, AGENCY.
Negotiable Instruments - - - ,, BILLS OF EXCHANGE ETC.

Part I.—Definition, Nature, and Classification.

SECT. 1.—*Definition.*

Definition.

448. There is said to be an estoppel where a party is not allowed to say that a certain statement of fact is untrue, whether in reality it be true or not (*a*). Estoppel, or "conclusion" as it is frequently called by the older authorities, may therefore be defined as a disability whereby a party is precluded (*b*) from alleging or proving in legal proceedings that a fact is otherwise than it has been made to appear by the matter giving rise to that disability. The law of estoppel is a branch of the law of evidence (*c*).

SECT. 2.—*Kinds of Estoppel.*

Classification.

449. Estoppel is of three kinds—estoppel by matter of record or *quasi* of record, estoppel by deed, and estoppel *in pais*.

(*a*) See Co. Litt. 352 a; "Estoppel is when one is concluded and forbidden in law to speak against his own act or deed, yea, though it be to say the truth" (Termes de la Ley, tit. Estoppel, cited in *Ashpitel* v. *Bryan* (1863), 3 B. & S. 474, 489); *Simm* v. *Anglo-American Telegraph Co.* (1879), 5 Q. B. D. 188, C. A., *per* BRAMWELL, L.J., at p. 202.

(*b*) In the older phraseology, "concluded."

(*c*) "Estoppel is only a rule of evidence: you cannot found an action upon estoppel" (*Low* v. *Bouverie*, [1891] 3 Ch. 82, C. A. *per* BOWEN, L.J., at p. 105; and see *per* LINDLEY, L.J., at p. 101, to same effect); *Re Ottos Kopje Diamond Mines, Ltd.*, [1893] 1 Ch. 618, C. A. *per* BOWEN, L.J., at p. 628; and see *Dickson* v. *Reuter's Telegram Co.* (1877), 3 C. P. D. 1; *Harriman* v. *Harriman*, [1909] P. 123, C. A., *per* FARWELL, L.J., at p. 144.

SECT. 2. Kinds of Estoppel.

Of record or *quasi* of record.

450. Estoppel of record or *quasi* of record arises (1) where an issue of fact has been judicially determined in a final manner between the parties by a tribunal having jurisdiction (*d*), concurrent or exclusive, in the matter, and the same issue comes directly in question in subsequent proceedings between the same parties; (2) where the first determination was by a court having exclusive jurisdiction, and the same issue comes incidentally in question in subsequent proceedings between the same parties (*e*); (3) in some cases (*f*) where an issue of fact affecting the status of a person or thing has been necessarily (*g*) determined in a final manner as a substantive part (*h*) of a judgment *in rem* (*i*) of a tribunal of competent jurisdiction to determine that status, and the same issue comes directly in question in subsequent civil proceedings between any parties whatever.

Where the earlier decision is that of a court of record the resulting estoppel is said to be "of record"; where it is that of any other tribunal, whether erected by agreement of the parties or otherwise, the estoppel is said to be "*quasi* of record."

By deed.

451. Where, in a deed made between parties and verified by their seals, there is a statement of fact an estoppel results, and is called "estoppel by deed" (*j*). If upon the true construction of the deed the statement is that of both or all the parties, the estoppel is binding on each party; if otherwise, it is only binding on the party making it (*k*). It seems that an estoppel also arises upon a deed poll, the mode of its execution being equally solemn with that of an indenture (*l*).

By matter *in pais*.

452. Where one has either by words or conduct made to another a representation of fact, either with knowledge of its falsehood or with the intention that it should be acted upon (*m*), or has so conducted himself that another would, as a reasonable man, understand that a certain representation of fact was intended to be acted on, and that other has acted on such representation and thereby

(*d*) Jurisdiction is essential; see p. 353, *post*.

(*e*) *Kingston's (Duchess) Case* (1776), 2 Smith, L. C., 11th ed., 731, *per* DE GREY, C.J., at p. 732; *Mackintosh* v. *Smith and Lowe* (1865), 4 Macq. 913, *per* Lord CHELMSFORD, at p. 924.

(*f*) See *Hill* v. *Clifford*, [1907] 2 Ch. 236, C. A., *per* GORELL BARNES, P., at p. 250.

(*g*) *R.* v. *Hartington Middle Quarter* (*Inhabitants*) (1855), 4 E. & B. 780; *Concha* v. *Concha* (1886), 11 App. Cas. 541, affirming *De Mora* v. *Concha* (1885), 29 Ch. D. 268, C. A. *R.* v. *Hartington Middle Quarter* (*Inhabitants*) *supra*, was doubted by Lord SELBORNE, L.C., in *R.* v. *Hutchings* (1881), 6 Q. B. D. 300, 303, but it appears to be well established; see *Wakefield Corporation* v. *Cooke*, [1903] 1 K. B. 417, 424, C. A.; affirmed [1904] A. C. 31.

(*h*) *R.* v. *Hartington Middle Quarter* (*Inhabitants*), *supra*; *Hobbs* v. *Henning* (1864), 17 C. B. (N. S.) 791 (foreign judgment *in rem*).

(*i*) For definition of judgment *in rem*, see p. 327, *post*.

(*j*) Co. Litt. 352 a; explained, 2 Smith, L. C., 11th ed., p. 746.

(*k*) *Stroughill* v. *Buck* (1850), 14 Q. B. 781; see p. 368, *post*.

(*l*) Bac. Abr. tit. Leases and Terms for Years, O. (ed. 1832), p. 852.

(*m*) *Freeman* v. *Cooke* (1848), 2 Exch. 654, *per* PARKE, B., at p. 663, explaining the word "wilfully" in the rule in *Pickard* v. *Sears* (1837), 6 Ad. & El. 469, 474; approved, *Citizens' Bank of Louisiana* v. *First National Bank of New Orleans* (1873), L. R. 6 H. L. 352, 360.

SECT. 2. Kinds of Estoppel.

altered his position to his prejudice, an estoppel arises against the party who made the representation, and he is not allowed to aver that the fact is otherwise than he represented it to be (*n*).

The conduct relied upon as amounting to a representation may be negligence, but this can only give rise to an estoppel where there is a duty to the person complaining to use due care; and it is also necessary that the neglect should be in the transaction itself which is in dispute, calculated to lead, and in fact leading, as its real (*o*) cause to the belief created (*p*).

The estoppel arising from conduct of the kinds here briefly referred to is one of the forms of estoppel by matter *in pais*, and is probably in modern times what is most usually meant by that expression. It is, however, properly, and was in old times more commonly, used to describe an estoppel arising from acts establishing certain relations of parties. Thus, the acceptance of rent on the one hand, and of an estate on the other, raise an estoppel between landlord and tenant (*q*), the former being precluded from denying the tenancy, the latter from denying his landlord's title. A similar estoppel ordinarily arises from the acceptance of a bailment (*r*). And the signatory of a bill of exchange or promissory note is precluded as against subsequent holders from denying the truth and genuineness of various matters appearing, expressly or by implication, upon the bill at the time of his signature (*s*).

Difference between "estoppel" and "conclusive evidence."

453. In some cases the courts have called attention to a distinction between an estoppel, which was pleadable as such, and prevented the issue sought to be raised from going to the jury, and conclusive evidence, which obliged them to find the issue in accordance with it (*t*). Estoppel *in pais* always belonged to the

(*n*) *Carr* v. *London and North Western Rail. Co.* (1875), L. R. 10 C. P. 307, *per* BRETT, J., at pp. 316, 317. The three propositions on these two pages, which it is here attempted to summarise, appear to be collected from *Pickard* v. *Sears* (1837), 6 Ad. & El. 469; *Freeman* v. *Cooke* (1848), 2 Exch. 654; *Swan* v. *North British Australasian Co.* (1862), 7 H. & N. 603 (first part of the rule laid down by WILDE, B., at p. 633); and *Cornish* v. *Abington* (1859), 4 H. & N. 549, 556. See also *Cairncross* v. *Lorimer* (1860), 3 Macq. 827, *per* Lord CAMPBELL, L.C., at p. 829.

(*o*) *Seton* v. *Lafone* (1887), 19 Q. B. D. 68, C. A., *per* Lord ESHER, M.R., at p. 71, reaffirming with the substitution of "real" for "proximate" the fourth proposition in *Carr* v. *London and North Western Rail. Co.*, *supra*.

(*p*) *Carr* v. *London and North Western Rail. Co.*, *supra*, at p. 318, founded on the second part of WILDE, B.'s, rule in *Swan* v. *North British Australasian Co.*, *supra*, with BLACKBURN, J.'s, correction ((1863), 2 H. & C. 175, Ex. Ch., at p. 182); and approved in *Coventry* v. *Great Eastern Rail. Co.* (1883), 11 Q. B. D. 776, C. A.

(*q*) Co. Litt. 352 a. In like manner a "surrender by operation of law" takes place by estoppel (*Lyon* v. *Reed* (1844), 13 M. & W. 285); see p. 375, *post*, and title LANDLORD AND TENANT.

(*r*) *Stonard* v. *Dunkin* (1810), 2 Camp. 344; *Gosling* v. *Birnie* (1831), 7 Bing. 339; *Biddle* v. *Bond* (1865), 6 B. & S. 225; *Henderson & Co.* v. *Williams*, [1895] 1 Q. B. 521, C. A.; see p. 406, *post*; and title BAILMENT, Vol. I., p. 562.

(*s*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), ss. 54 (2), 55 (1) (b), (2) (b), (c), 88 (2); and see *Nash* v. *De Fréville*, [1900] 2 Q. B. 72, 89, C. A., and p. 394, *post*; and title BILLS OF EXCHANGE, Vol. II., pp. 495, 517 *et seq.*

(*t*) *Conradi* v. *Conradi* (1868), L. R. 1 P. & D. 514, *per* Lord PENZANCE, at

latter category (*u*). The distinction, to which allusion will occasionally have to be made, is seldom referred to at the present time, and under the modern system of pleading seems to be of small importance.

"Estoppels ought to be mutual."

454. A maxim which is stated by the old writers as applicable to estoppels generally is that they "ought to be mutual" or "reciprocal" (*a*), which means that they must bind both parties, and that a stranger can neither take advantage of nor be bound by them. This maxim, as will be seen later, has an important bearing on the law of estoppel by record (*b*). Its application to estoppel by deed depends, in the case of an indenture, on the construction of the deed (*c*); and it is to some extent true of estoppel between landlord and tenant (*d*). As to estoppel by representation, arising as it does out of a unilateral act, while it is true that a stranger to the representation cannot take advantage of it (*e*), the maxim has no further application, until, at least, the party relying on the representation has elected to treat it as true, after which it would seem, upon the principle expressed by it, that he would be conclusively bound by his election (*f*). The case of estoppel by representation seems to present the same sort of exception as the estoppel which has been said to arise from a deed poll (*g*).

Part II.—Estoppel by Matter of Record.

SECT. 1.—*What will create Estoppel by Record.*

SUB-SECT. 1.—*In General.*

Matters of record:

Records of courts of law

455. A number of matters are enumerated by Lord Coke as matters of record giving rise to an estoppel, including, among others which are obsolete, letters patent, pleadings, and warrants of attorney (*h*); but for present purposes that which appears on the records of courts of law (*i*) need alone be considered.

p. 518; *Howard* v. *Hudson* (1853), 2 E. & B. 1, 10, 11; *Hobbs* v. *Henning* (1864), 17 C. B. (N. S.) 791, 824; *Flitters* v. *Allfrey* (1874), L. R. 10 C. P. 29, 41.

(*u*) *Freeman* v. *Cooke* (1848), 2 Exch. 654, 662; and see p. 350, *post*.

(*a*) Co. Litt. 352 a; Bac. Abr. tit. Leases and Terms for Years, O. (ed. 1832), p. 852, citing *James* v. *Landen* (1585) Cro. Eliz. 36.

(*b*) See p. 349, *post*.

(*c*) See p. 368, *post*.

(*d*) *Cadle* v. *Moody* (1861), 30 L. J. (EX.) 385, *per* BRAMWELL, B., at p. 387; see also *Hartcup & Co.* v. *Bell* (1883), Cab. & El. 19.

(*e*) *R.* v. *Ambergate etc. Rail. Co.* (1853), 1 E. & B. 372.

(*f*) *Scarf* v. *Jardine* (1882) 7 App. Cas. 345.

(*g*) Bac. Abr. tit. Leases and Terms for Years, O. (ed. 1832), p. 852; see p. 365, note (*a*), *post*.

(*h*) Co. Litt. 352 a.

(*i*) As to records and courts of record, see title COURTS, Vol. IX., pp. 9—11, *et passim*. See also as to the conclusiveness of such records, Co. Litt. 260 a, quoted by Lord TENTERDEN, C.J., in *R.* v. *Carlile* (1831), 2 B. & Ad. 362, at pp. 367, 368; 3 Bl. Com. (ed. 1770), p. 24; and as to courts of record and courts not of record, 3 Bl. Com. cc. 3 (p. 24), 4, 5; 4 Bl. Com. c. 19 (pp. 255 *et seq.*) (Criminal Courts).

SECT. 1. What will create Estoppel by Record.

The doctrine of estoppel by record thus limited finds expression in two legal maxims—*Interest reipublicæ ut sit finis litium*, and *Nemo debet bis vexari pro eâdem causâ*. It accords with the first of these maxims that a party relying on estoppel by record should be able to show that the matter has been determined by a judgment in its nature final (*k*). The word "final" is here used as opposed to "interlocutory" (*l*). A judgment which purports finally to determine rights is none the less effective for the purposes of creating an estoppel because it is liable to be reversed on appeal (*m*), or because an appeal is pending (*n*), or because for the purpose of working it out inquiries or accounts have to be taken (*a*).

Judgment essential.

456. But the proceedings must have resulted in a judgment or decree. A verdict, not followed by judgment, will not create an estoppel, the reason being that there is nothing to show that such verdict may not have been set aside, or that the court has not declined to act upon it (*b*). A verdict in divorce proceedings, followed by decree *nisi*, is, however, conclusive evidence in a subsequent suit between the same parties, although the decree has been set aside on the intervention of the King's Proctor, if this has been done on grounds *dehors* the verdict, and not affecting its correctness (*c*).

(*k*) *Langmead* v. *Maple* (1865), 18 C. B. (N. S.) 255; *Massam* v. *Thorley's Cattle Food Co.* (1880), 14 Ch. D. 748, 751, C. A.; *Badar Bee* v. *Habib Merican Noordin*, [1909] A. C. 615; and see *Pitt* v. *Hill and Broadway* (1674), Cas. *temp.* Finch, 70; *Temple* v. *Baltinglass* (*Viscountess*) (1677), Cas. *temp.* Finch, 275. It is on this principle that no action can be brought to recover money paid under a judgment which has not been set aside, or for maliciously and without probable cause setting the law in motion while a judgment against the party complaining stands unreversed; see *Huffer* v. *Allen* (1866), L. R. 2 Exch. 15; compare *Wildes* v. *Russell* (1866), L. R. 1 C. P. 722; *Bynoe* v. *Bank of England*, [1902] 1 K. B. 467, C. A., following *Basébé* v. *Matthews* (1867), L. R. 2 C. P. 684; *Vanderbergh* v. *Blake* (1661), Hard. 194; and *Castrique* v. *Behrens* (1861), 3 E. & E. 709, 721; applied in *Turley* v. *Daw* (1906), 94 L. T. 216; compare *Huddlestone* v. *Asbugg* (1675), Cas. *temp.* Finch, 204. So a decree for foreclosure is a bar to an action for redemption (*Mallock* v. *Galton* (1735), 1 Dick. 65; compare *Forde* v. *Tynte* (1864), 10 L. T. 93). For cases in which an interlocutory judgment intended finally to determine rights has been allowed to have the effect of a *res judicata*, see p. 334, *post*.

(*l*) *Huntly* (*Marchioness*) v. *Gaskell*, [1905] 2 Ch. 656, C. A., *per* COZENS-HARDY, L.J., at p. 667; and p. 334, *post*.

(*m*) *Doe* v. *Wright* (1839), 10 Ad. & El. 763; *Overton* v. *Harvey* (1850), 9 C. B. 324; *Huntly* (*Marchioness*) v. *Gaskell*, *supra*; compare *Horrocks* v. *Stubbs* (1896), 74 L. T. 58; *Uxbridge Union* v. *Winchester Union* (1904), 91 L. T. 533 (appeal failed, but not on merits); *Clanmorris* (*Lady*) v. *Clanmorris* (*Lord*) (1862), 14 I. Ch. R. 420; and, as to foreign judgments, *Scott* v. *Pilkington* (1862), 2 B. & S. 11; *Nouvion* v. *Freeman* (1889), 15 App. Cas. 1, 10, 11; see also title JUDGMENTS AND ORDERS.

(*n*) *Harris* v. *Willis* (1855), 15 C. B. 710.

(*a*) *Poulton* v. *Adjustable Cover and Boiler Block Co.*, [1908] 2 Ch. 430, C. A.

(*b*) *O'Connor* v. *Malone* (1839), 6 Cl. & Fin. 572, *per* Lord COTTENHAM, L.C., at p. 596 (verdict on an issue directed in a Chancery suit); *Bancroft* v. *Bancroft* (1864), 3 Sw. & Tr. 597, *per* Sir J. WILDE, at p. 599; compare *Robinson* v. *Dulcep Singh* (1879), 11 Ch. D. 798, C. A. See also *Kinsey* v. *Kinsey* (1754), 2 Ves. Sen. 577; *Joly* v. *Swift* (1847), 11 I. Eq. R. 410 (necessity for enrolment of decree), which, however, appear now to be obsolete, see *Pearse* v. *Dobinson* (1865), 35 L. J. (CH.) 110, 112.

(*c*) *Butler* v. *Butler*, [1894] P. 25, C. A., applying *Conradi* v. *Conradi* (1868),

SECT. 1. What will create Estoppel by Record.

457. A judgment which would be final if it resulted from judicial decision after a contest is not prevented from being so by the fact that it was obtained by consent (*d*) or default (*e*), or as the result of admissions (*f*), provided the party against whom it is set up was under no disability (*g*). But the efficacy of a judgment so obtained is somewhat strictly limited (*h*).

SUB-SECT. 2.—*Judgments in rem.*

Judgments classified.

458. Final judgments which will give rise to an estoppel are divided into two classes, namely, judgments *in rem* and judgments *in personam*. But, as many judgments which fall into the former class deal with the status of persons, and not of things, the term "judgments *inter partes*" seems a preferable description of the latter class (*i*).

Definition of judgment *in rem*.

459. A judgment *in rem* may be defined as the judgment of a court of competent jurisdiction determining the status of a person or thing, or the disposition of a thing (as distinct from the particular interest in it of a party to the litigation) (*k*). Apart from the application of the term to persons, it must affect the *res* in the way of condemnation, forfeiture, declaration of status or title, or order for sale or transfer (*l*).

L. R. 1 P. & D. 514; compare *Waters* v. *Waters* (1848), 2 De G. & Sm. 591, 615.

(*d*) *Re South American and Mexican Co., Ex parte Bank of England*, [1895] 1 Ch. 37, C. A.; *Allason* v. *Stark* (1838), 9 Ad. & El. 255; see also *Bowden* v. *Beauchamp* (1740), 2 Atk. 82; *Burke* v. *Crosbie* (1811), 1 Ball & B. 489, 503.

(*e*) *Huffer* v. *Allen* (1866), L. R. 2 Exch. 15; *Re South Essex Estuary Co., Ex parte Chorley* (1870), L. R. 11 Eq. 157, 162; *Williams* v. *St. George's Harbour Co.* (1858), 2 De G. & J. 547. But dismissal for want of prosecution is no bar to a fresh action, in the absence of any agreement to compromise (*Byrne* v. *Frere* (1828), 2 Mol. 157, 180); see *Magnus* v. *National Bank of Scotland* (1888), 57 L. J. (CH.) 902.

(*f*) See *Boileau* v. *Rutlin* (1848), 2 Exch. 665, 681; and p. 357, *post*.

(*g*) As to the power of a corporation to escape the necessity of a seal by an act of record, see *Thetford (Mayor) Case* (1703), 1 Salk. 192; but judgment by consent cannot give validity to the contract of a corporation which is *ultra vires*, where its legality has not been in dispute and its infirmity depends on facts which have not been disclosed (*Great North West Central Railway* v. *Charlebois*, [1899] A. C. 114, P. C.; *A.-G.* v. *Dublin Corporation* (1841), 1 Dr. & War. 545); compare *Canterbury Corporation* v. *Cooper* (1909), 100 L. T. 597, C. A. (deed). Nor can a married woman by consent or admission get rid of a restraint on anticipation; see *Bateman (Lady)* v. *Faber*, [1898] 1 Ch. 144, 149, 151, C. A. But even before the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), a married heiress-at-law, party to proceedings for probate, and not asking for an issue, was bound by the decree (*Turner* v. *Turner* (1852), 2 De G. M. & G. 28, C. A., *per* Lord CRANWORTH, L.J.).

(*h*) See pp. 342, 357, 358, *post*.

(*i*) This term is adopted by the author of the notes to Smith's Leading Cases, and is borrowed from that work.

(*k*) *Castrique* v. *Imrie* (1870), L. R. 4 H. L. 414, 428; compare *Warren* v. *Baring Bros. & Co., Ltd.* (1910), 54 Sol. Jo. 720.

(*l*) *Fracis Times & Co.* v. *Carr* (1900), 82 L. T. 698, 702, C. A. The decision was reversed on grounds not affecting the passage cited; see *Carr* v. *Fracis Times & Co.*, [1902] A. C. 176. As to declaration of the status of immovables (highway), see *Wakefield Corporation* v. *Cooke*, [1904] A. C. 31; *R.* v. *St. Pancras (Inhabitants)* (1794), Peake, 286 [219]; and see *The City of Mecca* (1881), 6 P. D. 106, C. A.

SECT. 1. **What will create Estoppel by Record.**

Examples of judgments *in rem*.

460. The following are examples of judgments *in rem*:— Condemnations in the old Court of Exchequer for breach of revenue laws (*m*), the judgments of a prize court condemning a vessel as prize (*n*), of an admiralty court establishing a lien (*o*), or condemning a vessel in an action (*e.g.*, for necessaries) where there was no lien before the commencement of proceedings (*p*), or disposing of the proceeds of a sale in enforcement of a lien (*q*), the judgment of a court of probate establishing a will, or creating the status of administrator (*r*), of a divorce court dissolving or establishing a marriage (*s*), or declaring the nullity of a marriage or affirming its existence (*t*); the judgment on a parliamentary election petition (*u*); the order of justices for removal of a pauper, establishing both the status of the pauper and the place of his settlement (*a*); a conviction for non-repair of a highway (*b*), and a determination of justices under the Private Street Works Act, 1892 (*c*), that a street is a highway repairable by the inhabitants at large, establishing in each case the status of a highway and the liability to repair; an order for revocation of a patent (*d*); a sentence or order of expulsion or rustication from a college (*e*), or deprivation of a living (*f*).

(*m*) *Scott* v. *Shearman* (1775), 2 Wm. Bl. 977; *R.* v. *Matthews* (1797), 5 Price, 202, n.; *Geyer* v. *Aguilar* (1798), 7 Term Rep. 681, 696; *Hart* v. *M'Namara* (1817), 4 Price, 154, n. As to acquittals, see *Cooke* v. *Sholl* (1793), 5 Term Rep. 255, 256; Buller's Nisi Prius, 241.

(*n*) *Hughes* v. *Cornelius* (1682), 2 Show. 232; 2 Smith, L. C., 11th ed., 741; *Castrique* v. *Imrie* (1870), L. R. 4 H. L. 414, 434.

(*o*) *Castrique* v. *Imrie*, *supra*, at p. 429; *Simpson* v. *Fogo* (1863), 1 Hem. & M. 195, 243; *Ballantyne* v. *Mackinnon*, [1896] 2 Q. B. 454, 462, C. A.; *aliter* of a judgment *in personam* enforceable against the ship (*The City of Mecca* (1881), 6 P. D. 106, C. A.).

(*p*) *The Cella* (1888), 13 P. D. 82, C. A.

(*q*) *Minna Craig Steamship Co.* v. *Chartered Mercantile Bank of India, London, and China*, [1897] 1 Q. B. 460, C. A.

(*r*) *Noel* v. *Wells* (1668), 1 Lev. 235; *Douglas* v. *Cooper* (1834), 3 My. & K. 378; *Beardsley* v. *Beardsley*, [1899] 1 Q. B. 746, approving the *dictum* of Sir C. CRESSWELL in *Emberley* v. *Trevanion* (1860), 4 Sw. & Tr. 197; *Concha* v. *Concha* (1886), 11 App. Cas. 541.

(*s*) *Bater* v. *Bater*, [1906] P. 209 C. A.; *Harvey* v. *Farnie* (1882), 8 App. Cas. 43.

(*t*) *Bunting* v. *Lepingwell* (1585), 4 Co. Rep. 29 a; *Kingston's* (*Duchess*) *Case* (1776), 2 Smith, L. C., 11th ed., 731, 734; see *Ogden* v. *Ogden*, [1908] P. 46, C. A.

(*u*) *Waygood* v. *James* (1869), L. R. 4 C. P. 361, at p. 372.

(*a*) *Uxbridge Union* v. *Winchester Union* (1904), 91 L. T. 533, following *R.* v. *Corsham* (*Inhabitants*) (1809), 11 East, 388, and *R.* v. *Catterall* (*Township*) (1817), 6 M. & S. 83; *R.* v. *Hartington Middle Quarter* (*Inhabitants*) (1855), 4 E. & B. 780. An order of sessions quashing an order of removal is conclusive only *inter partes* as to what it decides (*R.* v. *Wick St. Lawrence* (*Inhabitants*) (1833), 5 B. & Ad. 526, *per* PARKE, J., at p. 535).

(*b*) *R.* v. *St. Pancras* (*Inhabitants*) (1794), Peake, 286 [219]; *R.* v *Haughton* (*Inhabitants*) (1853), 1 E. & B. 501.

(*c*) 55 & 56 Vict. c. 57, ss. 7, 8; *Wakefield Corporation* v. *Cooke*, [1904] A. C. 31, distinguishing *R.* v. *Hutchings* (1881), 6 Q. B. D. 300, C. A.

(*d*) *Poulton* v. *Adjustable Cover and Boiler Block Co.*, [1908] 2 Ch. 430, C. A., *per* MOULTON, L.J., at p. 439.

(*e*) *R.* v. *Grundon* (1775), 1 Cowp. 315.

(*f*) *Phillips* v. *Bury* (1694), 1 Ld. Raym. 4,; compare *Hill* v. *Clifford*, [1907] 2 Ch. 236, C. A., as to the effect of an order of the General Medical Council removing the name of a practitioner from the register.

SECT. 1. What will create Estoppel by Record.

Upon the same principles it would seem that an adjudication or an order of discharge in bankruptcy (*g*), an order for the dissolution of a company, or declaring such a dissolution void (*h*), the finding upon an inquisition of lunacy until superseded (*i*), the certificate determining a building line of the superintending architect under the London Building Act, 1894 (*k*), are in the nature of judgments *in rem*.

Judgments which resemble, but are not judgments *in rem*.

461. But a judgment is not a judgment *in rem* because it has, in a suit *inter partes*, determined an issue concerning the status of a particular person or family (*l*); nor, it seems, is a judgment determining that a sale of personal property was valid according to the law of the country where it was made and that the property had passed to the purchaser (*m*).

The following have also been held not to be judgments *in rem*:—A conviction in the Exchequer for penalties (not being a condemnation of the goods) for adulteration (*n*); a judgment in a jactitation suit, where marriage is not pleaded, or where the defendant fails to prove a marriage (*o*); a verdict in the divorce court, followed by the dismissal of the suit, effecting no change of status (*p*); a conviction on an indictment for obstructing a highway (*q*); a finding of magistrates, on a summons for payment of expenses under s. 150 of the Public Health Act, 1875 (*r*), that the street in question was a highway repairable by the inhabitants at large (*s*); a winding-up order under the Companies Act, 1862 (*t*). A decree under the Legitimacy Declaration Act, 1858 (*u*), though it satisfies the conditions of a judgment *in rem*, is expressly deprived of its effect inasmuch as by s. 8 it is not to prejudice any person unless he, or the person under whom he claims, has been cited or made party to the proceedings.

(*g*) Bankruptcy Acts, 1883 (46 & 47 Vict. c. 52), s. 20; 1890 (53 & 54 Vict. c. 71), s. 8; compare *Re Bremner, Ex parte Harper* (1875), 10 Ch. App. 379.

(*h*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 172, 223.

(*i*) See *Hill* v. *Clifford*, [1907] 2 Ch. 236, 244, C. A.; and p. 342, *post*.

(*k*) 57 & 58 Vict. c. ccxiii., s. 22; *Lilley* v. *London County Council*, [1910] A. C. 1, affirming *Re Lilley, Lilley* v. *Skinner* (1907), 97 L. T. 306; 98 L. T. 110, C. A.

(*l*) *Katama Natchiar* v. *Shivagunga* (*Rajah*) (1863), 9 Moo. Ind. App. 539, 601.

(*m*) *Cammell* v. *Sewell* (1860), 5 H. & N. 728, Ex. Ch. The Court of Exchequer had held (S. C. (1858) 3 H. & N. 617) that the judgment of the Norwegian court was "in the nature of" a judgment *in rem*; but the Exchequer Chamber declined to concur in this view, while affirming the judgment on the ground that the sale was governed by Norwegian law and therefore valid.

(*n*) *Hart* v. *M'Namara* (1817), 4 Price, 154, n.

(*o*) *Kingston's* (*Duchess*) *Case* (1776), 2 Smith, L. C., 11th ed., 731, 738.

(*p*) *Needham* v. *Bremner* (1866), L. R. 1 C. P. 583; compare *R.* v. *Wick St. Lawrence* (*Inhabitants*) (1833), 5 B. & Ad. 526, 535 (quashing of order for removal of pauper).

(*q*) *Petrie* v. *Nuttall* (1856), 11 Exch. 569.

(*r*) 38 & 39 Vict. c. 55.

(*s*) *R.* v. *Hutchings* (1881), 6 Q. B. D. 300, C. A.; followed, *Scott* v. *Lowe* (1902), 86 L. T. 421; compare *A.-G. for Trinidad and Tobago* v. *Eriché*, [1893] A. C. 518, P. C..

(*t*) 25 & 26 Vict. c. 89 (replaced by Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69)); *Re Bowling and Welby's Contract*, [1895] 1 Ch. 663, C. A.

(*u*) 21 & 22 Vict. c. 93, s. 1.

SECT. 1. What will create Estoppel by Record.

SUB-SECT. 3.—*Judgments in personam or inter partes.*

All judgments which are not *in rem*.

462. Judgments *in personam* or *inter partes* are those which determine the rights of parties *inter se* to or in the subject-matter in dispute, whether it be corporeal property of any kind whatever or a liquidated or unliquidated demand, but do not affect the status of either persons or things, or make any disposition of property or declare or determine any interest in it except as between the parties litigant (*v*). They include all judgments which are not judgments *in rem*. Some examples have been given (*a*) of judgments which, though having some resemblance to judgments *in rem*, were only judgments *inter partes*. Judgments in actions for detention of chattels (*b*) and recovery of land may also be mentioned, which determine rights of possession, and may (as does also the judgment on an interpleader issue) decide questions of title as between the parties; but none of them at all affect any interests which third parties may have in the subject-matter. It may be added that as a judgment *inter partes*, though binding between them, does not affect the rights of third parties, so neither does a sale by way of execution for giving effect to that judgment: it is only a disposition of the particular interest (*c*).

Estoppel and *res judicata*.

463. The most usual manner in which questions of estoppel have arisen on judgments *inter partes* has been where the defendant in an action raised a defence of *res judicata*, which he could do where former proceedings for the same cause of action by the same plaintiff had resulted in the defendant's favour, by pleading the former judgment by way of estoppel (*d*). In order to support that defence it was necessary to show that the subject-matter in dispute was the same (that is to say, that everything that was in controversy in the second suit as the foundation of the claim for relief was also in controversy in the first suit) (*e*), that it came in question before a court of competent jurisdiction (*f*), and that the result was conclusive so as to bind every other court (*g*).

But, provided a matter in issue is determined with certainty by the judgment (*h*), an estoppel may arise where a plea of *res judicata*

(*v*) *Castrique* v. *Imrie* (1870), L. R. 4 H. L. 414, 427, 441; *Simpson* v. *Fogo* (1863), 1 Hem. & M. 195, 244.

(*a*) See p. 329, *ante*.

(*b*) See *Brinsmead* v. *Harrison* (1871), L. R. 6 C. P. 584, *per* WILLES, J., at p. 588; affirmed, 7 C. P. 547, Ex. Ch.

(*c*) See *Castrique* v. *Imrie* (1870), L. R. 4 H. L. 414, *per* BLACKBURN, J., at pp. 427, 428.

(*d*) Bullen and Leake, Precedents of Pleadings, 3rd ed., p. 575.

(*e*) *Moss* v. *Anglo-Egyptian Navigation Co.* (1865), 1 Ch. App. 108, explaining (p. 115) *Brandlyn* v. *Ord* (1738), 1 Atk. 571; *Behrens* v. *Sieveking* (1837), 2 My. & Cr. 602; perhaps it would be more correct to say "open to controversy" (see *Re Hilton, Ex parte March* (1892), 67 L. T. 594; *Worman* v. *Worman* (1889), 43 Ch. D. 296, 306, following *Henderson* v. *Henderson* (1843), 3 Hare, 100, 115; *Humphries* v. *Humphries*, [1910] 1 K. B. 796; affirmed [1910] 2 K. B. 531, C. A.

(*f*) A judgment of a court which has no jurisdiction to pronounce it is void and cannot give rise to estoppel (*Dublin (Archbishop)* v. *Trimleston (Lord)* (1849), 12 I. Eq. R. 251).

(*g*) *Behrens* v. *Sieveking*, *supra*, at p. 603.

(*h*) An estoppel must be "certain to every intent" (Co. Litt. 352 b).

could never be established; as where the same cause of action has never been put in suit. A party is precluded from contending the contrary of any precise point which, having been once distinctly put in issue, has been solemnly found against him (*i*). Though the objects of the first and second actions are different, the finding on a matter which came directly (not collaterally or incidentally) in issue in the first action is conclusive in a second action between the same parties (*k*). And this principle has been applied when the point involved in the earlier decision, and as to which the parties were estopped, was one rather of law than of fact (*l*).

SUB-SECT. 4.—*Res Judicata.*

Meaning of *res judicata.*

464. Where *res judicata* is pleaded by way of estoppel to an entire cause of action it amounts to an allegation that the whole legal rights and obligations of the parties are concluded by the earlier judgment, which may have involved the determination of questions of law as well as findings of fact (*m*). But although the judgment was pleadable by way of estoppel, it is perhaps not strictly correct to regard its determination of legal rights as a question of estoppel. The parties are estopped by the findings of fact involved in the judgment; as to the determination of questions

(*i*) *Outram* v. *Morewood* (1803), 3 East, 346 (successive actions for different trespasses to the same close; defendant estopped from alleging the same title as was found against his wife, in whose right he claimed, in the first action); *Strutt* v. *Bovingdon* (1803), 5 Esp. 56, 58; *Hancock* v. *Welsh* (1816), 1 Stark. 347 (finding of tenancy in action of replevin conclusive in action for rent); *Flitters* v. *Allfrey* (1874), L. R. 10 C. P. 29, following *Routledge* v. *Hislop* (1860), 2 E. & E. 549 (defendant in first action plaintiff in second action); *Re Bank of Hindustan, China, and Japan, Alison's Case* (1873), 9 Ch. App. 1, 25 (liquidator barred by finding in action for calls that respondent was not a shareholder).

(*k*) *Priestman* v. *Thomas* (1884), 9 P. D. 210, C. A. (first action to set aside compromise, second action to revoke probate founded on the same compromise); *Barrs* v. *Jackson* (1845), 1 Ph. 582 (first suit for grant of letters administration; second suit for distribution of assets); *Jewsbury* v. *Mummery* (1872), L. R. 8 C. P. 56, Ex. Ch. (verdict against executor on a plea of *plene administravit* estopped him from any defence open to him under that plea), citing *Ramsden* v. *Jackson* (1737), 1 Atk. 292; compare *Dawson* v. *Gregory* (1845), 7 Q. B. 756; *Ennis* v. *Rochford* (1884), 14 L. R. Ir. 285; *Erving* v. *Peters* (1790), 3 Term Rep. 685; *Thompson & Sons* v. *Clarke* (1901), 17 T. L. R. 455; and other cases in the Yearly Practice of the Supreme Court, 1910, p. 152, notes to r. 8; and see *Re South American and Mexican Co., Ex parte Bank of England*, [1895] 1 Ch. 37, C. A.; *Doe* v. *Wright* (1839), 10 Ad. & El. 763 (judgment in ejectment before the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), conclusive in action for mesne profits); distinguish *Harris* v. *Mulkern* (1875), 1 Ex. D. 31, after that Act; for the modern practice, see R. S. C., Ord. 13, r. 9; Ord. 18, r. 2, and title PRACTICE AND PROCEDURE. For recent applications of the same principle to criminal proceedings, see *R.* v. *Brakenridge* (1884), 48 J. P. 293; *Ryley* v. *Brown* (1890), 62 L. T. 458; *Welton* v. *Tuneborne* (1908), 99 L. T. 668. See title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 356, note (*a*). For its application in divorce proceedings, see *Sopwith* v. *Sopwith* (1861), 2 Sw. & Tr. 160; *Finney* v. *Finney* (1868), L. R. 1 P. & D. 483; approved, *Harriman* v. *Harriman*, [1909] P. 123, *per* FARWELL, L.J., at p. 144; *Butler* v. *Butler*, [1894] P. 25, C. A.

(*l*) *Re Graydon, Ex parte Official Receiver*, [1896] 1 Q. B. 417.

(*m*) *Collier* v. *Walters* (1873), L. R. 17 Eq. 252; *Badar Bee* v. *Habib Merican Noordin*, [1909] A. C. 615, P. C. In *Marriot* v. *Hampton* (1797), 7 Term Rep. 269, which rested on the same principle, the plaintiff, on its appearing in an action for money had and received that the money had been paid under a judgment which had not been set aside, was nonsuited.

SECT. 1. What will create Estoppel by Record.

of law, the true view seems to be that the legal rights of the parties are such as they have been determined to be by the judgment of a competent court. But the conclusiveness of the determination rests upon the same principles in each case. The doctrine of *res judicata* is not a technical doctrine applicable only to records: it is a fundamental doctrine of all courts that there must be an end of litigation (*n*). It will therefore be convenient to follow the ordinary classification and treat it as a branch of the law of estoppel.

Essentials of *res judicata*.

465. In order that a defence of *res judicata* may succeed it is necessary to show not only that the cause of action was the same, but also that the plaintiff has had an opportunity of recovering (*o*), and but for his own fault might have recovered in the first action that which he seeks to recover in the second. A plea of *res judicata* must show either an actual merger, or that the same point has been actually decided between the same parties (*p*). Where the former judgment has been for the defendant, the conditions necessary to conclude the plaintiff are not less stringent. It is not enough that the matter alleged to be concluded might have been put in issue, or that the relief sought might have been claimed. It is necessary to show that it actually was so put in issue or claimed (*q*).

(*n*) *Re May* (1885), 28 Ch. D. 516, C. A. *per* BRETT, M.R., at p. 518; compare *Re Graydon, Ex parte Official Receiver*, [1896] 1 Q. B. 417; *Phillips* v. *Bury* (1794), 1 Ld. Raym. 5, *per* Lord HOLT, C.J., at p. 14; *Badar Bee* v. *Habib Merican Noordin*, [1909] A. C. 615, P. C.; see also title JUDGMENTS AND ORDERS. A verdict for the plaintiff on a plea of set-off (being a matter distinctly put in issue) was pleadable by way of estoppel in an action subsequently brought against him by the defendant for the debt which he had sought to set off (*Eastmure* v. *Lawes* (1839), 5 Bing. (N. C.) 444; followed, *Danks* v. *Harley* (1853), 1 W. R. 291; compare *Webster* v. *Armstrong* (1885), 54 L. J. (Q. B.) 236). A verdict for defendant in an action for libel in respect of certain parts of a publication constituted a defence of *res judicata* to a second action in respect of other parts of the same publication, the subject-matter of both actions being the same (*Macdougall* v. *Knight* (1890), 25 Q. B. D. 1, C. A.).

(*o*) *Sc.*, by its being open to him on the pleadings (see *Re Hilton, Ex parte March* (1892), 67 L. T. 594). A plaintiff is not bound to join two separate causes of action in one proceeding (see *Seddon* v. *Tutop* (1790), 6 Term Rep. 607; *Hadley* v. *Green* (1832), 2 Cr. & J. 374; *Florence* v. *Jenings* (1857), 2 C. B. (N. S.) 454; *Brunsden* v. *Humphrey* (1884), 14 Q. B. D. 141, 146; *Balby-with-Hexthorpe* v. *Millard* (1903), 2 L. G. R. 330; compare *Overton* v. *Harvey* (1850), 9 C. B. 324; *Russell* v. *Waterford and Limerick Rail. Co.* (1885), 16 L. R. Ir. 314).

(*p*) *Nelson* v. *Couch* (1863), 15 C. B. (N. S.) 99, 108, 109 (plea of judgment recovered by the plaintiff).

(*q*) *Collins* v. *Gough* (1785), 7 Bro. Parl. Cas. 94, 99; *Hunter* v. *Stewart* (1861), 4 De G. F. & J. 168, 177—179; compare *Davis* v. *Hedges* (1871), L. R. 6 Q. B. 687; *Moore* v. *Battie* (1759), Amb. 371; *Hindley* v. *Haslam* (1878), 27 W. R. 61; and see also *Brunsden* v. *Humphrey*, *supra*, *per* BOWEN, L.J., at p. 147; *Bake* v. *French*, [1907] 1 Ch. 428 (and see p. 355, *post*). *Humphries* v. *Humphries*, [1910] 1 K. B. 796; affirmed [1910] 2 K. B. 531, C. A. (*res judicata* as to the Statute of Frauds, which might have been, but was not, pleaded in a former action for rent of the same premises, in which the existence of the agreement was in issue), appears at first sight to conflict with this proposition. But in such a case the issue is contract or no contract. The statute only prescribes the evidence by which the contract must be proved. The fact that it was founded on defective or incomplete evidence is no answer to a judgment which has not been

SECT. 1.
What will create Estoppel by Record.

Applicable wherever same cause of action has been determined on the merits.

466. But in all cases where the cause of action is really the same, and has been determined on the merits (*r*), and not on some ground (as the non-expiration of the term of credit) which has ceased to operate when the second action is brought, the plea of *res judicata* would succeed. The doctrine applies to all matters which existed at the time of the giving of the judgment, and which the party had an opportunity of bringing before the court. But if there be matter subsequent which could not be brought before the court at the time, the party is not estopped from raising it (*s*).

Party cannot raise issue available in former action.

467. A party cannot in a subsequent proceeding raise a ground of claim or defence which upon the pleadings or the form of the issue was open to him in the former one (*t*). The mere discovery of fresh evidence (as distinguished from the development of fresh circumstances (*u*)) on matters which have been open for controversy in the earlier proceeding is no answer to a defence of *res judicata*. Where this is applicable, the original cause of action is gone, and can only be restored by getting rid of the *res judicata* (*a*); and this must be done by an action or application, which can only succeed on the same grounds as the former "bill of review" in the Court of Chancery, namely, the discovery of fresh evidence which entirely changes the aspect of the case, and was not and could not by reasonable diligence have been obtained before (*b*). The effect of

set aside (see notes (*u*), (*a*), *infra*); and this proposition is not affected by a rule of court which prevents the evidence being objected to without notice by pleading or otherwise. The question could not have arisen under the old system of pleading, under which a mere denial of the contract threw upon the plaintiff the burden of proving it by proper evidence (*Buttemere* v. *Hayes* (1839), 5 M. & W. 456, 461; Bullen and Leake, Precedents of Pleadings, 3rd ed., p. 467).

(*r*) *Badar Bee* v. *Habib Merican Noordin*, [1909] A. C. 615; *Livesey* v. *Harding* (1855), 21 Beav. 227; *A.-G.* v. *Rochester Corporation* (1833), 6 Sim 273. A prohibition is not a decision on the merits, and raises no estoppel as regards the cause of action in the prohibited proceeding (*Grundy* v. *Townsend* (1888), 36 W. R. 531, C. A.). As to the effect of want of finality, see p. 359, *post*.

(*s*) *Newington* v. *Levy* (1870), L. R. 6 C. P. 180, Ex. Ch., *per* BLACKBURN, J., at p. 193; see also the sequel in *Hall* v. *Levy* (1875), L. R. 10 C. P. 154; *Peterborough* (*Earl*) v. *Germaine* (1709), 6 Bro. Parl. Cas. 1; and see pp. 349, 354, *post*.

(*t*) *Re Hilton, Ex parte March* (1892), 67 L. T. 594.

(*u*) *Heming* v. *Wilton* (1832), 5 C. & P. 54; *Liverpool Corporation* v. *Chorley Waterworks Co.* (1852), 2 De G. M. & G. 852, C. A.; *Cotter* v. *Barrymore* (1733), 4 Bro. Parl. Cas. 203; *Hall* v. *Levy*, *supra*; compare *R.* v. *Evenwood and Barony* (*Inhabitants*) (1843), 3 Q. B. 370, 377, and distinguish *R.* v. *Wick St. Lawrence* (*Inhabitants*) (1833), 5 B. & Ad. 526, 533; *Peters* v. *Tilly* (1886), 11 P. D. 145; see p. 354, *post*. On application to review an order for weekly payments under the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I., very slight evidence of change of circumstances will exclude the doctrine of *res judicata* (*Radcliffe* v. *Pacific Steam Navigation Co.*, [1910] 1 K. B. 685, C. A.).

(*a*) *Lockyer* v. *Ferryman* (1877), 2 App. Cas. 519; compare *Dundas* v. *Waddell* (1880), 5 App. Cas. 249. The same principle applies to defences, and the failure to plead the Statute of Frauds falls within it (*Humphries* v. *Humphries*, [1910] 1 K. B. 796; affirmed [1910] 2 K. B. 531, C. A.); see note (*q*) on p. 332, *ante*. But an order of a bankruptcy court as to amendment of proof made under mistake does not amount to *res judicata* (*Re Greaves, Ex parte Whitton* (1880), 43 L. T. 480).

(*b*) *Phosphate Sewage Co.* v. *Molleson* (1879), 4 App. Cas. 801, 814, *per* Lord CAIRNS, L.C.; *Re May* (1885), 28 Ch. D. 516, C. A., *per* COTTON, L.J., at p. 521;

SECT. 1. What will create Estoppel by Record.

fraud and collusion in preventing an estoppel by record from arising will be considered later (*c*).

Res judicata not limited to formal records.

468. *Res judicata* is no technical doctrine. It has been applied to the dismissal of a petition on the ground of insufficient evidence although there was, strictly speaking, no record (*d*), and to an order, interlocutory in form, which was meant to be a declaration of the rights of the parties (*e*). On the same principle an action was stayed as frivolous and vexatious, when the point had been determined by a county court in a manner intended to be final, but not amounting to *res judicata*, because on an interlocutory application (*f*). The doctrine applies equally in all courts, and it is immaterial in what court the former proceeding was taken, provided only that it was a court of competent jurisdiction, or what form the proceeding took, provided it was really for the same cause (*g*).

SUB-SECT. 5.—*Judgment Recovered.*

Cause of action merged in the judgment.

469. The defence of "judgment recovered," arising as it does out of *res judicata*, has much in common with estoppel by record, though it is not founded upon it. A plaintiff, who has once sued a defendant to judgment, cannot, while the judgment stands, although unsatisfied, sue him again for the same cause, not because he is estopped from doing so (though he, as well as the defendant, is estopped from averring anything contrary to the record (*h*)), but

Falcke v. *Scottish Imperial Insurance Co.* (1887) 57 L. T. 39; *Re Scott and Alvarez's Contract, Scott* v. *Alvarez*, [1895] 1 Ch. 596, C. A. There seems to be no instance of such an action succeeding on this ground since the Judicature Acts. As to an action in the nature of a bill of review for fraud, see *Cole* v. *Langford*, [1898] 2 Q. B. 36; *Boswell* v. *Coaks* (No. 2) (1894), 86 L. T. 365, n., H. L.; and see p. 352, *post*.

(*c*) See p. 351, *post*.

(*d*) *Re May* (1885), 28 Ch. D. 516, 518, C. A.; compare *Jones* v. *Nixon* (1831), You. 359; *Symons* v. *Rees* (1876) 1 Ex. D. 416.

(*e*) *Peareth* v. *Marriott* (1882), 22 Ch. D. 182, 191, C. A.; compare *Livesey* v. *Harding* (1855), 21 Beav. 227; *Re Larrard* (1896), 3 Mans. 317, C. A.; *Badar Bee* v. *Habib Merican Noordin*, [1909] A. C. 615, P. C.

(*f*) *Stephenson* v. *Garnett*, [1898] 1 Q. B. 677, C. A.

(*g*) The finding of a county court judge in an action for wrongful dismissal that the dismissal was justified was conclusive on a summons for wages before justices founded on the same dismissal (*Routledge* v. *Hislop* (1860), 2 E. & E. 549; compare *Flitters* v. *Allfrey* (1874), L. R. 10 C. P. 29; *Eastmure* v. *Laws* (1839), 5 Bing. (N. C.) 444; *Furness, Withy & Co.* v. *Hall* (*J. & E.*) (1909), 25 T. L. R. 233 (plaintiff, who has recovered in one action for breach of contract the damages which he has had to pay to a third party, cannot bring second action for the costs incurred in defending the third party's action, because they are in fact damages for the cause of action already sued upon; and the fact that they are claimed on a contract of indemnity arising upon an implied request to defend the third party's action makes no difference). So a dismissal by justices of a summons for bringing forward a house beyond the building line was a bar to a summons for subsequently continuing the same house beyond the same line (*Kinnis* v. *Graves* (1898), 78 L. T. 502). But a decision of justices which amounts merely to an exercise of discretion does not estop them from giving a contrary decision on the same facts on a subsequent occasion (*Smith* v. *Shann*, [1898] 2 Q. B. 347); see also p. 354, *post*.

(*h*) *Webster* v. *Armstrong* (1885), 54 L. J. (Q. B.) 236; *Todd* v. *Stewart* (1845), 9 Q. B. 759; reversed, *Stewart* v. *Todd* (1846), 9 Q. B. 767, Ex. Ch.

because the cause of action is merged in the judgment, which creates an obligation of a higher nature (*i*). It is also probably true to say that a person who has once recovered judgment for a sum of money is estopped from averring that he ought to recover any further sum for the same cause of action (*k*). Thus, the recovery of £50 in a county court for fraudulent misrepresentation is a bar to an action for damages subsequently accruing from the same misrepresentation (*l*). So a consent order in the Chancery Division restraining the defendant from parting with shares is a bar to an action in the King's Bench Division for damages for detention of the same shares, as the plaintiff might have obtained the relief in the first action. The principle is that where there is but one cause of action, the damages must be assessed once for all (*m*).

Judgment against one of two who are jointly liable.

470. On this principle, a judgment recovered (though unsatisfied) against some one of a number of persons who are jointly (not jointly and severally) liable on the same contract (*n*), or are liable for the same tort (*o*), with others is, until set aside (*p*), a bar to an action against the others (although the plaintiff may not have been

(*i*) See *King* v. *Hoare* (1844), 13 M. & W. 494, *per* PARKE, B., at p. 504; *Re Hodgson, Beckett* v. *Ramsdale* (1885), 31 Ch. D. 177, C. A. *per* BOWEN, L.J., at pp. 188, 189; *Florence* v. *Jenings* (1857), 2 C. B. (N. S.) 454; *Stewart* v. *Todd* (1846), 9 Q. B. 767, 777, 778, Ex. Ch.; compare *Savile* v. *Jackson* (1824), 13 Price, 715. See form of plea, Bullen and Leake, Precedents of Pleadings, 3rd ed., p. 624; see also title JUDGMENTS AND ORDERS.

(*k*) *Stewart* v. *Todd, supra.*

(*l*) *Clarke* v. *York* (1882), 52 L. J. (CH.) 32 (see County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 81); compare *Wright* v. *London General Omnibus Co.* (1877), 2 Q. B. D. 271; *Sanders* v. *Hamilton* (1907), 96 L. T. 679.

(*m*) *Serrao* v. *Noel* (1885), 15 Q. B. D. 549, C. A., *per* BOWEN, L.J., at p. 559; distinguished, *Worman* v. *Worman* (1889), 43 Ch. D. 296, 308, 309 (relief claimed in second action entirely outside the former compromise); and compare *Bagot (Lord)* v. *Williams* (1824), 3 B. & C. 235.

(*n*) *King* v. *Hoare, supra*; *Kendall* v. *Hamilton* (1879), 4 App. Cas. 504; *Re Tyler, Ex parte Higgins*, (1858), 3 De G. & J. 33, C. A. The rule applies to a husband and wife contracting jointly, though the latter only contracts with respect to her separate estate (*Houre* v. *Niblett*, [1891] 1 Q. B. 781); but judgment against a married woman for an ante-nuptial debt is no defence to a subsequent action for the same debt against her husband, because the liability is not joint (*Beck* v. *Pierce* (1889), 23 Q. B. D. 316, C. A.; see title HUSBAND AND WIFE). As to the peculiar several liability of the estate of a deceased partner, see Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 9; and title PARTNERSHIP.

(*o*) *Brinsmead* v. *Harrison* (1871), L. R. 6 C. P. 584; affirmed (1872) L. R. 7 C. P. 547, Ex. Ch., following *Brown* v. *Wootton* (1605), Cro. Jac. 73; *Pease* v. *Chaytor* (1861), 1 B. & S. 658; (1863) 3 B. & S. 620, 647. The result is the same where the plaintiff having the right to sue either in tort or contract upon the same facts, having sued one joint tortfeasor to judgment in tort, endeavours to proceed against the other in contract (*Buckland* v. *Johnson* (1854), 15 C. B. 145; compare *Smith* v. *Baker* (1873), L. R. 8 C. P. 350). But an unsatisfied judgment for the plaintiff in an action of conversion does not change the property in the goods (*Manton* v. *Phillips* (1863), 9 L. T. 289); and one who was a joint tortfeasor with the defendant may thereafter be sued by the plaintiff for a fresh tort to the same goods (*Brinsmead* v. *Harrison, supra*).

(*p*) *Partington* v. *Hawthorne* (1888), 52 J. P. 807; but a consent judgment regularly obtained, and not objectionable on the merits, cannot be set aside by consent of parties, so as to prejudice a third person in whose favour it is a bar (*Hammond* v. *Schofield*, [1891] 1 Q. B. 453; *Cross & Co.* v. *Matthews and Wallace* (1904), 91 L. T. 500).

SECT. 1. What will create Estoppel by Record.

aware of their liability (*q*)), not on any ground of estoppel, but because there was but one cause of action, and that has merged in the judgment—*transit in rem judicatam* (*r*); and because in the case of contract the others are deprived by the act of the plaintiff of the right to have their liability determined in the same judgment with their co-contractors (*s*). For the last-mentioned reason it seems that a judgment in favour of one of several joint contractors is a bar to an action against the others, if it proceeds upon a ground (*e.g.*, payment or release) which would have been a defence to them. It is clearly not so if it is founded on a defence which is personal to the defendant, *e.g.*, infancy or bankruptcy (*t*).

Subject to exceptions provided by the rules of court (*a*), a separate judgment against one joint contractor is equally efficacious as a defence to the others though obtained in a proceeding to which they were parties (*b*).

Judgment against one of two alternative defendants.

The above principles apply where a plaintiff having a right to elect which of two parties to sue (*e.g.*, principal or agent) sues one of them to judgment (*c*). But to bar the second action it is essential (as in the case of a former judgment against the same defendant (*d*)) that the earlier judgment should be for the same cause of action as it is sought to enforce in the later proceedings. Thus, an unsatisfied judgment on a bill or cheque, given by one joint contractor only, in conditional payment of a joint debt, is no answer to an action on the original consideration against the others (*e*).

No merger unless full opportunity of recovering.

471. But there will be no merger, unless the cause of action is the same (*f*) and the plaintiff had an opportunity of recovering in the first action what he seeks to recover in the second; otherwise

(*q*) *Kendall* v. *Hamilton* (1879), 4 App. Cas. 504 (contract); *Munster* v. *Cox* (1885), 10 App. Cas. 680, see *per* Lord BLACKBURN, at p. 688 (tort); distinguish *Badeley* v. *Consolidated Bank* (1886), 34 Ch. D. 536, 555 (surety's right of indemnity against partner preserved); see titles GUARANTEE; PARTNERSHIP.

(*r*) *King* v. *Hoare* (1844), 13 M. & W. 494, 504; *Re Hodgson, Beckett* v. *Ramsdale* (1885), 31 Ch. D. 177, C. A., *per* BOWEN, L.J., at pp. 188, 189; compare *Bermondsey Vestry* v. *Ramsey* (1871), L. R. 6 C. P. 247, 251.

(*s*) *Kendall* v. *Hamilton*, *supra*, *per* Lord CAIRNS, L.C., at pp. 515, 516.

(*t*) *Phillips* v. *Ward* (1863), 2 H. & C. 717, *per* BRAMWELL, B., at p. 721.

(*a*) See R. S. C., Ord. 13, r. 4; Ord. 14, r. 5; Ord. 27, r. 3. In an action against two joint debtors, on summons for judgment under Ord. 14 one consented to judgment against him and paid half the debt, the other obtained leave to defend. It was held that plaintiff could proceed with the action against that defendant (*Weall* v. *James* (1893), 68 L. T. 515, C. A.; and see title PRACTICE AND PROCEDURE).

(*b*) *McLeod* v. *Power*, [1898] 2 Ch. 295; compare *Cross & Co.* v. *Matthews and Wallace* (1904), 91 L. T. 500.

(*c*) *Priestly* v. *Fernie* (1865), 3 H. & C. 977; *Cross & Co* v. *Matthews and Wallace*, *supra*; *Scarf* v. *Jardine* (1882), 7 App. Cas. 345; see title AGENCY, Vol. I., p. 209; *French* v. *Howie*, [1906] 2 K. B. 674, C. A.

(*d*) See next paragraph.

(*e*) *Drake* v. *Mitchell* (1803), 3 East, 251; followed, *Wegg-Prosser* v. *Evans*, [1895] 1 Q. B. 108, C. A., overruling *Cambefort* v. *Chapman* (1887), 19 Q. B. D. 229.

(*f*) *Leggott* v. *Great Northern Rail. Co.* (1876), 1 Q. B. D. 599 (recovery by personal representatives of damages sustained by relatives of deceased from his death by accident is no bar to action for damage to his estate); followed, *Daly* v. *Dublin, Wicklow and Wexford Rail. Co.* (1892), 30 L. R. Ir. 514, C. A.

SECT. 1. What will create Estoppel by Record.

the defendant is not twice vexed for the same cause (*g*). Accordingly a plaintiff in the High Court, who, in a county court action brought against him by the defendant, had obtained a verdict on a counterclaim for an amount exceeding the limit of county court jurisdiction whereby he defeated the then plaintiff's action, but recovered no judgment for the balance due to him, was allowed to proceed with his own action for that which he had had no opportunity of recovering; but the defendant in the second action was estopped by the county court judgment from again contesting the issues of fact, which it was within the jurisdiction of the county court to determine, the question of amount alone remaining open (*h*). So a plaintiff is not precluded by an order in an administration suit to which he was a party from afterwards commencing proceedings relating to the same subject-matter for relief which he was not in a position to ask in the earlier suit (*i*); and this principle applies even though the plaintiff might have set up in the first suit the case which he made in the second, and did not do so (*k*). *A fortiori*, where the matters in question in the second suit arose while the first was pending, and could only have been raised (if at all) in the first by amendment of the proceedings (*l*); or where, though the causes of action in the first and the second proceeding have a common origin, they are not the same, as in the case of a continuing trespass (*m*) or of successive breaches of the same contract (*n*). A plaintiff is allowed to bring successive actions in respect of the very same circumstances, provided those circumstances give rise to two different causes of action (*o*); so an action

Nor where causes of action different.

(*g*) See *Nelson* v. *Couch* (1863), 15 C. B. (N. S.) 99; *Few* v. *Backhouse* (1838), 8 Ad. & El. 789.

(*h*) *Webster* v. *Armstrong* (1885), 54 L. J. (Q. B.) 236; see now, on the question of jurisdiction, Judicature Act, 1884 (47 & 48 Vict. c. 61), s. 18; compare *Midland Rail. Co.* v. *Martin & Co.*, [1893] 2 Q. B. 172. But a party who selects a tribunal having jurisdiction in the premises cannot afterwards seek the same remedy before another tribunal on the ground that the first had not power to award him adequate damages (*Wright* v. *London Omnibus Co.* (1877), 2 Q. B. D. 271).

(*i*) *Guidici* v. *Kinton* (1843), 6 Beav. 517; compare *Whittaker* v. *Kershaw* (1890), 45 Ch. D. 320. 327, C. A.; *Re Hampshire Co-operative Milk Co.*, *Purcell's Case* (1880), 29 W. R. 170.

(*k*) *Hunter* v. *Stewart* (1861), 4 De G. F. & J. 168.

(*l*) *National Bolivian Navigation Co.* v. *Wilson* (1880), 5 App. Cas. 176, 185, 198, 199.

(*m*) *Clarke* v. *Midland and Great Western Rail. Co.*, [1895] 2 I. R. 294, C. A., following *Thompson* v. *Gibson* (1841), 7 M. & W. 456.

(*n*) *Bristowe* v. *Fairclough* (1840), 1 Man. & G. 143; *Ebbetts* v. *Conquest* (1900), 82 L. T. 560 (breaches of covenant to keep, and to deliver up, in repair).

(*o*) *Brunsden* v. *Humphrey* (1884), 14 Q. B. D. 141, C. A. (injury to a man's person and to his carriage). "The test is not whether the plaintiff had the opportunity of recovering in the first action what he claims to receive in the second" (*ibid.*, *per* BOWEN, L.J., at p. 146), but whether he in fact sought to do so; compare *Florence* v. *Jenings* (1857), 2 C. B. (N. S.) 454 (plaintiff recovered the principal due on a bill in one action, and in another interest due under a separate agreement, but only down to the date of the first judgment, for thereupon the bill passed *in rem judicatam*); *Whittaker* v. *Kershaw*, *supra*; *Gibbs* v. *Cruikshank* (1873), L. R. 8 C. P. 454 (recovery in replevin of the value of the goods barred an action for damage by the same trespass to the same goods, for such damage might have been recovered in the former action; *aliter* of damages for trespass to the land, which were not recoverable in that action).

SECT. 1. What will create Estoppel by Record.

for false imprisonment is no bar to a subsequent action for a malicious prosecution following on the same arrest, even though the jury improperly gave damages in the first action for imprisonment consequential on the prosecution (*p*).

SECT. 2.—*Parties estopped by Record.*

SUB-SECT. 1.—*Parties estopped by Judgment in rem.*

Distinction between judgments *in rem* and *in personam*

472. The most important distinction between judgments *in rem* and judgments *in personam* is that whereas the latter are only binding as between the parties thereto and those who are privy to them (*a*), the judgment *in rem* of a court of competent jurisdiction is, as regards persons domiciled (*b*) and property situated (*c*) within the jurisdiction of the court pronouncing the judgment, conclusive against all the world in whatever it settles as to the status of the persons or property (*d*), or as to the right or title to the latter, and as to whatever disposition it makes of the property itself, or of the proceeds of its sale (*e*). In other words, all persons, whether party to the proceedings or not, are estopped from averring that the status of persons or things, or the right or title to property, is other than the court has by such a judgment declared or made it to be. But a judgment *in rem* can have no effect beyond the limits of the State within which the court delivering the judgment exercises jurisdiction, unless the thing affected is situate (*f*), or the person is domiciled (*g*), within those limits.

(*p*) *Guest* v. *Warren* (1854), 9 Exch. 379.

(*a*) See p. 343, *post.*

(*b*) *Bater* v. *Bater*, [1906] P. 209, C. A.; *Harvey* v. *Farnie* (1882), 8 App. Cas. 43; *Pemberton* v. *Hughes*, [1899] 1 Ch. 781, C.A.; see title CONFLICT OF LAWS, Vol. VI., pp. 268, 269, 297. An exception must be made in regard to the establishment of a penal status by a foreign court; see *ibid.*, p. 284; *Re Selot's Trust*, [1902] 1 Ch. 488, 492.

(*c*) *Castrique* v. *Imrie* (1870), L. R. 4 H. L. 414, *per* BLACKBURN, J., at p. 428, quoting Story, Conflict of Laws, s. 592; and *per* Lord CHELMSFORD, at p. 448; see also *Wakefield Corporation* v. *Cooke*, [1904] A. C. 31; *R.* v. *St. Pancras* (*Inhabitants*) (1794), Peake, 286 [219] (highway cases), as to immovables. The finding of a jury on an inquisition in lunacy presents an exception; see p. 329, *ante*, and p. 341, *post.*

(*d*) *R.* v. *Wick St. Lawrence* (*Inhabitants*) (1833), 5 B. & Ad. 526, 535, 536 (settlement of pauper); *Noel* v. *Wells* (1668), 1 Lev. 235; *Poulton* v. *Adjustable Cover and Boiler Block Co.*, [1908] 2 Ch. 430, C. A., *per* MOULTON, L.J., at p. 439. It may be noted that the decree of a court of probate, establishing a will, or the status of administrator, though conclusive against all parties and in all courts until set aside, is not, as against persons who had no opportunity of intervening or upon whom a fraud has been practised in obtaining the decree, so far conclusive as to prevent their taking proceedings in the same court for revocation of the probate or the grant; see *Young* v. *Holloway*, [1895] P. 87; *Priestman* v. *Thomas* (1884), 9 P. D. 70, 210; compare *Ritchie* v. *Malcolm*, [1902] 2 I. R. 403; and title EXECUTORS AND ADMINISTRATORS.

(*e*) *Minna Craig Steamship Co.* v. *Chartered Mercantile Bank of India, London and China*, [1897] 1 Q. B. 460, C. A.

(*f*) *Castrique* v. *Imrie*, *supra*, *per* BLACKBURN, J., at p. 435, citing *Novelli* v. *Rossi* (1831), 2 B. & Ad. 757. As to the conclusiveness of a foreign judgment as to title to personal estate of a person domiciled in the foreign country at his death, see *Doglioni* v. *Crispin* (1866), L. R. 1 H. L. 301, 306, 310; *Re Trufort, Trafford* v. *Blanc* (1887), 36 Ch. D. 600. See title CONFLICT OF LAWS, Vol. VI., pp. 222, 296.

(*g*) *Shaw* v. *Gould* (1868), L. R. 3 H. L. 55; *Bonaparte* v. *Bonaparte*, [18

SECT. 2.
Parties estopped by Record.

Judgment *in rem*, how far conclusive against strangers.

473. The question whether and in what cases the findings of the court upon which its determination of a question of status or title, or the disposition of property, have been founded are binding on strangers does not admit of a categorical answer. It is a fundamental rule that a judgment is not conclusive as to anything but the point decided (*h*), nor of any matter which came collaterally in question, or of any matter incidentally cognisable, or of any matter to be inferred by argument from the judgment (*i*), and this applies as well to judgments *in rem* as to judgments *inter partes*. Accordingly, a judgment of the Admiralty Court in a salvage action, where salvage services are admitted and money paid into court, concludes nothing more (at least against strangers) than the amount of the award, and the existence of a lien for it, and is not conclusive in an action by the owners of the salved vessel against underwriters that the loss was due to sea perils (*k*). The difficulty arises in the application of the rule, in determining in each case what was the point decided and what was matter incidentally cognisable, and the opinion of judges seems to have undergone some fluctuations (*l*). But in order that a judgment

P. 402. And even as regards such persons it cannot, where they have concluded in a foreign country a contract affecting their status with due regard to the ceremonies prescribed by the *lex loci contractûs*, affect in that country the validity of the ceremony, so that it is possible for a marriage to be invalid in the country of domicil and valid in the country of its celebration; see *Simonin* (falsely called *Mallac*) v. *Mallac* (1860), 2 Sw. & Tr. 67; *Hay* v. *Northcote*, [1900] 2 Ch. 262; *Ogden* v. *Ogden*, [1908] P. 46, C. A. As to how far the capacity of parties to enter into a contract is to be determined by the law of their domicil, see *Sottomayor* v. *De Barros* (1877), 3 P. D. 1, C. A.; *Sottomayor* v. *De Barros* (1879) 5 P. D. 94; *Ogden* v. *Ogden*, *supra*, at p. 74; *Chetti* v. *Chetti*, [1909] P. 67; *Cass* v. *Cass* (otherwise *Pfaff*) (1910), 102 L. T. 397; and see title CONFLICT OF LAWS, Vol. VI., p. 254.

(*h*) *Castrique* v. *Imrie* (1870), L. R. 4 H. L., 414, 434.

(*i*) *Kingston's* (*Duchess*) *Case* (1776), 2 Smith, L. C., 11th ed., 731, 732.

(*k*) *Ballantyne* v. *Mackinnon*, [1896] 2 Q. B. 455, C. A.; and see *Hill* v. *Clifford*, [1907] 2 Ch. 236, C. A., *per* GORELL BARNES, P., at p. 251.

(*l*) In *Hood-Barrs* v. *Jackson* (1842), 1 Y. & C. Ch. Cas. 585, KNIGHT BRUCE, V.-C., after quoting the well-known passage from *Kingston's* (*Duchess*) *Case*, goes on at pp. 597, 598 to say that "however essential the establishment of particular facts may be to the soundness of a judicial decision, however it may proceed on them as established, and however binding and conclusive the decision may, as to its immediate and direct object, be, those facts are not all necessarily established conclusively between the parties, and that either may again litigate them for any other purpose as to which they may come in question"; and he held that a finding of fact in a suit in the ecclesiastical court for a grant of letters of administration, necessary to the decision, and appearing on the face of the order (a judgment *in rem*), was not conclusive in proceedings between the same parties in a court of equity for distribution. This decision was reversed by Lord LYNDHURST, L.C., on the authority of *Bouchier* v. *Taylor* (1776), 4 Bro. Parl. Cas. 708, which proceeded partly at least on the ground (see *Barrs* v. *Jackson* (1845), 1 Ph. 582, 585) that the ecclesiastical court was (what the Probate Division is not) a court of distribution, and of the inconvenience attending the existence of two different findings by two courts of co-ordinate jurisdiction; and though, having regard to Lord LYNDHURST'S remarks on *Kingston's* (*Duchess*) *Case*, it is difficult to resist the conclusion that there was a difference of opinion between him and the vice-chancellor as to what matters were to be regarded as "incidentally cognisable," and what as "the point decided," it is said on high authority that the principles laid down by the vice-chancellor are "untouched by the reversal" (see 2 Smith, L. C., 11th ed., p. 779; *R.* v. *Hutchings* (1881), 6 Q. B. D. 301, C. A., *per* Lord

SECT. 2. Parties estopped by Record.

in rem may conclude strangers as to any finding of fact besides the status or title which it establishes, it is necessary that the finding should be essential to the judgment (*m*), and ascertainable without ambiguity from the judgment itself (*n*). It is not sufficient to create an estoppel, even *inter partes*, if the finding relied on is only discoverable from a perusal of the judge's reasons (*o*).

Prize cases.

474. Prize cases have been regarded as to a certain extent exceptional (*p*), and the rule applied in actions against underwriters

SELBORNE, L.C., at p. 304), and his judgment is regarded as a *locus classicus* on the subject of estoppel by record. On the other hand, a grant of probate is conclusive as to the validity of the testamentary document, and concludes any question as to the regularity of its execution; therefore, so long as the probate remains unrecalled, no relief can be obtained in equity against a fraud in obtaining the execution of the document (*Allen* v. *M'Pherson* (1847), 1 H. L. Cas. 191; followed in *Meluish* v. *Milton* (1876), 3 Ch. D. 27, C. A.). In the former case the codicil in question had been contested by the plaintiff in the Chancery suit; but in the latter the will appears from the dates (see p. 28) to have been proved in common form. Moreover, the record of a condemnation in the Exchequer was conclusive on all parties as to the title of the Crown to the goods and their liability to be seized; and also, in civil proceedings and in proceedings for penalties under the statute creating the forfeiture (but not under a different statute), as to the grounds of condemnation appearing on the record (*Scott* v. *Shearman* (1775), 2 Wm. Bl. 977; *A.-G.* v. *King* (1817), 5 Price, 195). Again, in *R.* v. *Hartington Middle Quarter* (*Inhabitants*) (1855), 4 E. & B. 780, an order for removal of unemancipated pauper children, based (as might be gathered from the order itself) upon a finding (erroneous in fact) as to the settlement, was held to be conclusive (at least between the same parties) on the question of the father's settlement; and the judgment (p. 794) went further, treating the finding as a judgment *in rem*. "Orders of removal," said COLERIDGE, J. (p. 797), "unappealed against, or confirmed on appeal, are conclusive evidence, not merely of the fact directly decided, but of those facts also which are mentioned in them and necessary steps to the decision. Unless they are necessary steps the rule fails, and they are collateral facts only." Some doubt was thrown upon this case by Lord SELBORNE, L.C., in *R.* v. *Hutchings* (1881), 6 Q. B. D. 301, C. A., at p. 303. But the rule had been laid down in the same words in *R.* v. *Wye* (*Inhabitants*) (1838), 7 Ad. & El. 761, 769, 770, adopting the law as laid down in *R.* v. *Catterall* (*Township*) (1817), 6 M. & S. 83, but distinguishing the facts; see also *Nympsfield* (*Parish*) v. *Woodchester* (*Parish*) (1742), 2 Stra. 1172; *R* v. *St. Mary, Lambeth* (*Inhabitants*) (1796), 6 Term Rep. 615; and *R.* v. *Hartington Middle Quarter* (*Inhabitants*) (1855), *supra*, was cited, apparently with approval, in *Wakefield Corporation* v. *Cooke*, [1903] 1 K. B. 417, C. A., by VAUGHAN WILLIAMS, L.J., at p. 424; affirmed [1904] A. C. 31. It may be doubted whether these cases are within the limits laid down by Lord BLACKBURN and DE GREY, C.J., quoted in the text. They appear to place pauper cases almost on the same footing as prize cases, which are admittedly anomalous; see *supra*. The question whether in a pauper case a separation order made by justices under the Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), was admissible or conclusive evidence of the desertion on which it was founded was left open in *Eastbourne Guardians* v. *Croydon Guardians*, [1910] 2 K. B. 16.

(*m*) *Concha* v. *Concha* (1886), 11 App. Cas. 541 (it seems that such a finding after the matter had been litigated, appearing on the face of a judgment *in rem*, would be binding *inter partes*, though not essential to the judgment (*ibid.*)); *R.* v. *Hartington Middle Quarter* (*Inhabitants*), *supra*.

(*n*) *Hobbs* v. *Henning* (1864), 17 C. B. (N. S.) 791, 824; *Dalgleish* v. *Hodgson* (1831), 7 Bing. 495, 504; *R.* v. *Hartington Middle Quarter* (*Inhabitants*), *supra*.

(*o*) *Re Bank of Hindustan, China, and Japan, Alison's Case* (1873), 9 Ch. App. 1, 26, C. A.; *Re Allsop and Joy's Contract* (1889), 61 L. T. 213, 215. As to the conclusiveness of decisions of courts for hearing election petitions, see title ELECTIONS, Vol. XII., pp. 410, 411, 460.

(*p*) *Hobbs* v. *Henning*, *supra*, at p. 823; *Ballantyne* v. *Mackinnon*, [1896] 2 Q. B. 455, 463, C. A.

by owners of vessels condemned as prize has been that the judgment of a foreign prize court condemning a vessel or cargo as enemy's property is conclusive evidence not only that the property was condemned, but also that it was not neutral (*q*); but it is otherwise if it can be shown (*i.e.*, it seems from an examination of the sentence) (*r*) that the judgment did not proceed on that ground (*s*). And it has been laid down further that, in the absence of any other cause appearing on the sentence, it must be presumed from the condemnation that it proceeded on the ground that the property was that of the enemy (*t*). But where the circumstances are not such as to give rise to this presumption, as, for example, where the sentence itself suggests some other ground of condemnation, it is not conclusive if there be any ambiguity as to what the ground is. It must not be left in uncertainty whether the ship was condemned on a ground which would be just by the law of nations, or on another ground which would amount only to a breach of the municipal regulations of the condemning country. In such case the sentence must be carefully examined to see whether the fact in proof of which it is adduced is clearly and certainly found by the judge whose sentence is relied on (*a*). Such a finding of fact in the course of adjudication by a prize court, though receivable as conclusive evidence of the fact, is not regarded as raising an estoppel strictly so called, and is therefore not pleadable as such (*b*). Further, the ground of condemnation, to be conclusive, must be found in the operative part of the sentence (*c*). The recitals may, however, be looked at, if incorporated in the operative part by reference (*d*).

Certain judgments *in rem* admissible in evidence.

475. There are some cases in which judgments *in rem*, though not conclusive in proceedings to which strangers are party, so far differ from judgments *in personam* that they are not deemed to be *res inter alios actæ*, and are admissible in evidence. Of this nature is the verdict of a jury on an inquisition in lunacy, which, though

(*q*) *Kindersley* v. *Chase* (1801), 2 Park, Marine Insurance, 8th ed., 743, 747, 791; *Baring* v. *Royal Exchange Assurance Co.* (1804), 5 East, 99; and see titles INSURANCE; PRIZE LAW AND JURISDICTION.

(*r*) See *Dalgleish* v. *Hodgson* (1831), 7 Bing. 495, *per* TINDAL, C.J., at p. 504; *Calvert* v. *Bovill* (1798), 7 Term Rep. 523.

(*s*) *Castrique* v. *Imrie* (1870), L. R. 4 H. L. 414, *per* BLACKBURN, J., at p. 434; *Geyer* v. *Aguilar* (1798), 7 Term Rep. 681; *Pollard* v. *Bell* (1800), 8 Term Rep. 434, 437; *Baring* v. *Clagett* (1802), 3 Bos. & P. 215; *Bolton* v. *Gladstone* (1804), 5 East, 155; affirmed (1809) 2 Taunt. 85, Ex. Ch. As to how the rule came into existence, see *Lothian* v. *Henderson* (1803), 3 Bos. & P. 499, H. L., *per* Lord ELDON, L.C., at p. 545.

(*t*) *Saloucci* v. *Woodmass* (1784), 2 Park, Marine Insurance, 8th ed., 727; *Baring* v. *Clagett*, *supra*; *Lothian* v. *Henderson*, *supra*. But see *Dalgleish* v. *Hodgson*, *supra*, and cases cited in following note. This is an exception to the rule "that estoppels must be certain to every intent"; "if a thing be not directly and precisely alleged, it shall be no estoppel" (Co. Litt. 352 a).

(*a*) *Hobbs* v. *Henning* (1864), 17 C. B. (N. S.) 791, 824, citing *Dalgleish* v. *Hodgson*, *supra*; *Bernardi* v. *Motteux* (1781), 2 Doug. (K. B.) 575; *Calvert* v. *Bovill*, *supra*; *Fisher* v. *Ogle* (1808), 1 Camp. 418.

(*b*) *Hobbs* v. *Henning*, *supra*.

(*c*) *Christie* v. *Secretan* (1799), 8 Term Rep. 192.

(*d*) *Dalgleish* v. *Hodgson*, *supra*; *Bernardi* v. *Motteux*, *supra*.

SECT. 2. Parties estopped by Record.

it declares the status of the party at the time of taking the inquisition, is not conclusive otherwise than *inter partes* even as to that point of time (*e*), but is admissible as to his mental state at a later period, though liable to be contradicted (*f*). And on the same principle an order of the General Medical Council under the Dentists Act, 1878 (*g*), erasing the name of a dentist from the register on the ground that he had been guilty of conduct infamous or disgraceful in a professional respect, which is apparently conclusive on all parties as to the professional status of the dentist (*h*), may be admitted in proceedings between the dentist and third parties as evidence, though not conclusive, not only as to what the grounds of erasure were, but as to the truth of those grounds (*i*).

Consent judgment *in rem*.

476. Although a judgment by consent may well create an estoppel between the parties (*k*), it is at least doubtful whether a judgment *in rem* obtained by consent of parties can ever be conclusive against persons who were not and do not claim through the parties to it, except so far as may be necessary to protect the title of a person who purchases the *res* on the faith of the judgment. It has been laid down that a judgment by consent cannot effect a *res judicata* so as to bind the public or absent parties (*l*), and that a judgment by consent establishing a will in solemn form does not bind a party who, though served with a citation to see proceedings, has not appeared or been represented at the hearing, so as to prevent him from taking proceedings to revoke probate (*m*).

Judgment *in rem*, how far conclusive in criminal cases.

477. It seems clear that in criminal cases, at all events, a judgment *in rem* is conclusive, as between strangers or between a party to it and a stranger, only as to the status or title which it declares or creates (*n*), or the disposition which it actually makes, and not as to any matter of fact upon which it may be founded (*o*). So a decree absolute in a divorce case concludes the fact of dissolution of the marriage, but nothing further; and it is apprehended that

(*e*) *Sergeson* v. *Sealey* (1742), 2 Atk. 412, 414.

(*f*) *Sergeson* v. *Sealey*, *supra*; *Faulder* v. *Silk* (1811), 3 Camp. 125; *Hill* v. *Clifford*, [1907] 2 Ch. 236, C. A., *per* COZENS-HARDY, M.R., at p. 244, citing *Von Grutten* v. *Foxwell*, [1897] A. C. 658, not reported on this point. See title LUNATICS, ETC.

(*g*) 41 & 42 Vict. c. 33, ss. 13, 14, 15.

(*h*) See *Hill* v. *Clifford*, *supra*, *per* GORELL BARNES, P., at p. 252; Dentists Act, 1878 (41 & 42 Vict. c. 33), s. 3; and see title MEDICINE AND PHARMACY.

(*i*) *Hill* v. *Clifford*, *supra*, *dubitante* GORELL BARNES, P., on this point; affirmed *sub nom. Clifford* v. *Timms*, [1908] A. C. 12, without reference to the points dealt with in the Court of Appeal.

(*k*) *Bowden* v. *Beauchamp* (1740), 2 Atk. 82, and cases cited p. 327, *ante*.

(*l*) *Jenkins* v. *Robertson* (1867), L. R. 1 Sc. & Div. 117 (a Scotch case; had the judgment been the result of a contest it would have determined the question of highway as against the public and been in the nature of a judgment *in rem*); compare *Ballantyne* v. *Mackinnon*, [1896] 2 Q. B. 455, C. A.; *The Bellcairn* (1885), 11 P. D. 1, C. A.; see also note (*g*), p. 327, *ante*.

(*m*) *Ritchie* v. *Malcolm*, [1902] 2 I. R. 403; and see note (*d*), p. 338, *ante*.

(*n*) Compare *R.* v. *Grundon* (1775), 1 Cowp. 315.

(*o*) *Kingston's* (*Duchess*) *Case* (1776), 2 Smith, L. C., 11th ed., 731, 735–738; *R.* v. *Buttery* (1818), Russ. & Ry. 342 (grant of probate not conclusive in favour of prisoner on indictment for forging a will); not following *R.* v. *Vincent* (1721), 1 Stra. 481.

a decree of nullity pronounced by the English court on a marriage celebrated here or of a foreign court on a marriage celebrated in the country of its jurisdiction, and under the law of that country (*p*), between persons domiciled there, is equally conclusive as to the question of existence of the marriage (*q*). A mere dismissal of a suit would not have a similar effect (*r*). The old cases referred to above (*s*), upon the conclusiveness of a record of condemnation in the Exchequer in subsequent proceedings for penalties under the statute creating the forfeiture as to the grounds of condemnation appearing on the record, form an apparent exception to the above propositions. Apart from the fact that an information for penalties for breach of the revenue laws is not, strictly speaking, a criminal proceeding (*t*), they may perhaps be explained by the fact that the parties were in substance the same—the defendant on the one hand, and on the other the King, prosecuting in his own name or in that of his Attorney-General.

SUB-SECT. 2.—*Parties estopped by Judgment inter partes.*

Parties and privies.

478. A judgment *inter partes* raises an estoppel only against the parties (*a*) to the proceeding in which it is given, and their privies, *i.e.*, those claiming or deriving title under them (*b*). As against all other persons it is *res inter alios acta* (*c*), and with certain exceptions (*d*), though conclusive of the fact that the judgment was

(*p*) As to marriages celebrated in a British consulate, see *Hay* v. *Northcote*, [1900] 2 Ch. 262.

(*q*) This seems to follow from the reasoning of the notes to *Kingston's* (*Duchess*) *Case* (1776), 2 Smith, L. C., 11th ed., 731, at p. 755, and of BLACKBURN, J., in *Castrique* v. *Imrie* (1870), L. R. 4 H. L. 414, at p. 428. De GREY, C.J. (see 2 Smith, L. C., 11th ed., at pp. 734, 737), did not concede so much to the sentences of ecclesiastical courts. But those courts had not the power to effect a dissolution of marriage; and he apparently did not regard the sentence of an ecclesiastical court, pronouncing against the fact of marriage, as final (see *ibid.*, p. 737). See the point discussed, 2 Smith, L. C., 11th ed., at p. 777. For the modern doctrine as to decrees of nullity, as distinguished from decrees of divorce, see *Ogden* v. *Ogden*, [1908] P. 46, 78 *et seq.*, C. A.

(*r*) *Needham* v. *Bremner* (1866), L. R. 1 C. P. 583. In this case the petition was for dissolution, but the same principle would seem to apply to nullity proceedings.

(*s*) *R.* v. *Matthews* (1797), *A.-G.* v. *Wakefield* (1797), *A.-G.* v. *Reynolds* (1804), in the notes to *A.-G.* v. *King* (1817), 5 Price, 195, at p. 202; see also the note to *Scott* v. *Shearman* (1775), 2 Wm. Bl. 977, at p. 982; and note (*l*), p. 339, *ante*.

(*t*) *R.* v. *Hausmann* (1909), 73 J. P. 516, C. C. A.

(*a*) 1 Eq. Cas. Abr. 163.; Co. Litt. 352.

(*b*) *Borough* v. *Whichcote* (1732), 3 Bro. Parl. Cas. 595 (privity to a decree which was a hundred years old); *Gray* v. *Lewis*, *Parker* v. *Lewis* (1873), 8 Ch. App. 1035, 1060; *Outram* v. *Morewood* (1803), 3 East, 346, 355; *Strutt* v. *Bovingdon* (1803), 5 Esp. 56; *Richards* v. *Johnson* (1859), 4 H. & N. 660; citing Com. Dig. tit. Estoppel (C).

(*c*) *Christy* v. *Tancred* (1842), 9 M. & W. 438; *Spencer* v. *Williams* (1871), L. R. 2 P. & D. 230; *Jenkyn* v. *Jenkyn* (1856), 5 W. R. 43; *Muskerry* (*Lord*) v. *Skiffington* (1868), L. R. 3 H. L. 144.

(*d*) *E.g.*, where the judgment determines a question of public right and is admissible as evidence of reputation (*Reed* v. *Jackson* (1801), 1 East, 355; *Pim* v. *Curell* (1840), 6 M. & W. 234; *Petrie* v. *Nuttall* (1856), 11 Exch. 569; *Berry* v. *Banner* (1792), Peake, 212 [156]), or where the amount of damages recovered in a former action is in question (*Green* v. *New River Co.* (1792), 4 Term Rep. 589, 590. See title EVIDENCE, *post*.

SECT. 2. **Parties estopped by Record.**

Classes of privies.

obtained and of its terms (*e*), is not even admissible evidence of the facts established by it (*f*). Privies are of three classes:—(1) Privies in blood, as ancestor and heir (*g*). (2) Privies in law, as tenant by the courtesy, tenant in dower; and others that come in by act in law (*h*), as testator and executor, intestate and administrator (*i*); bankrupt and trustee in bankruptcy (*k*). (3) Privies in estate, as testator and devisee (*l*); vendor and purchaser (*m*); lessor and lessee (*n*); a husband and his wife claiming under his title and *e converso* (*o*); successive incumbents of the same benefice (*p*);

(*e*) *Reed* v. *Jackson* (1801), 1 East, 355; see title JUDGMENTS AND ORDERS.

(*f*) *Castrique* v. *Imrie* (1870), L. R. 4 H. L. 414, 434; *Evans* v. *Evans* (1844), 1 Rob. Eccl. 165, 170; *Doe* d. *Bacon* v. *Brydges* (*Lady*) (1843), 6 Man. & G. 282; *Yates* v. *Kyffin-Taylor*, [1899] W. N. 141 (proof of conviction of defendant no evidence in civil proceedings of his guilt), following *Leyman* v. *Latimer* (1878), 3 Ex. D. 352, C. A., *per* BRAMWELL, L.J., at p. 354; see also *Anderson* v. *Collinson*, [1901] 2 K. B. 107; and title EVIDENCE, *post*. The question whether an acquittal on a charge of murder could be pleaded by way of estoppel in civil proceedings by the prisoner when the question "Murder or no" was in issue was raised, but not decided, the opinion of the court being apparently against the estoppel, in *Helsham* v. *Blackwood* (1851), 11 C. B. 111. Seamen convicted and imprisoned for refusing to go to sea brought an action for wages. It was held that the conviction did not operate as an estoppel between them and the owners so as to defeat their claim (*Caine* v. *Palace Steam Shipping Co.*, [1907] 1 K. B. 670, C. A.; affirmed, *Palace Shipping Co., Ltd.* v. *Caine*, [1907] A. C. 386, on another point; see also *Wilson* v. *Bennett* (1904), 6 F. (Ct. of Sess.) 269. Having regard to s. 31 of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), the Divorce Court will treat as conclusive its own previous finding of the adultery of a party to an earlier suit who was also party to a later one, although the issue was raised in each suit by one who was not a party to the other (by a co-respondent in the first and by the King's Proctor in the second) (*Conradi* v. *Conradi* (1868), L. R. 1 P. & D. 514, 521).

(*g*) Co. Litt. 352 a; *Conner* v. *Browne* (1784), 1 Ridg. Parl. Rep. 139; *Dundas* v. *Waddell* (1880), 5 App. Cas. 249; *Weeks* v. *Birch* (1893), 69 L. T. 759. The Inheritance Act, 1833 (3 & 4 Will. 4, c. 106), s. 2, while it altered the mode of tracing the descent of particular property, did not affect the question of privity in blood (*ibid.*).

(*h*) Co. Litt. 352 a.

(*i*) *R.* v. *Hebden* (1738), Andr. 388; *Ennis* v. *Rochford* (1884), 14 L. R. Ir. 285.

(*k*) *Jones* v. *Yates* (1829), 9 B. & C. 532; *Edmands* v. *Best* (1862), 7 L. T. 279; *Harris* v. *Truman* (1882), 9 Q. B. D. 264, C. A. For some limitations on the effect of the trustee's privity with the bankrupt, see p. 348, *post*.

(*l*) *Dalton* v. *Fitzgerald*, [1897] 2 Ch. 86, C. A. But the purchaser for value from a devisee with the legal estate is not affected by an equitable interest created by the devisor, of which the purchaser had no notice (*Clemow* v. *Geach* (1870), 40 L. J. (CH.) 44).

(*m*) 1 Eq. Cas. Abr. 163; *Board* v. *Board* (1873), L. R. 9 Q. B. 48; *Sumner* v. *Schofield* (1880), 43 L. T. 763; *Doe* d. *Gaisford* v. *Stone* (1846), 3 C. B. 176 (mortgagor, and purchaser of equity of redemption).

(*n*) Co. Litt. 352 a.

(*o*) *Doe* d. *Leeming* v. *Skirrow* (1837), 7 Ad. & El. 157; *Whittaker* v. *Jackson* (1864), 2 H. & C. 926; *Outram* v. *Morewood* (1803), 3 East, 346.

(*p*) *Borough* v. *Whichcote* (1732), 3 Bro. Parl. Cas. 595; *Dundas* v. *Waddell* (1880), 5 App. Cas. 249 (ministers of Scotch Church). It was held by the Divisional Court that the incumbent was privy to the patron under whom he claimed (*Magrath* v. *Reichel* (1887), 57 L. T. 850), on the authority of Bro. Abr. tit. Quare Impedit, pl. 66 (*R.* v. *W. de L.* (1364), Y. B. 38 Edw. 3, fo. 31). The decision was affirmed by the Court of Appeal, who, however, apparently differed from the Divisional Court on this point (see 14 App. Cas. at p. 667), and in the House of Lords, but without discussing this question (*Reichel* v. *Magrath* (1889), 14 App. Cas. 665).

assignor and assignee of a bond (*q*); the servant of a corporation defending an action of trespass at the cost of his employers and justifying under their title, and the corporation itself (*r*). So a judgment of ouster against a corporator would be conclusive evidence against another deriving title under him—*i.e.*, by his vote (*s*).

Similar interest not privity.

479. But it is necessary to the relation of party and privy, not only that the two persons should have a similar interest in the property to which the estoppel relates, but that the latter should derive title from the former (*t*). Thus a tenant admitted by the landlord upon a surrender by the former tenant is not estopped from denying the truth of a recital in the former tenant's deed to the effect that he was seised for life; for his estate comes not from the former tenant, but from the landlord (*u*).

So, if the heir of a deceased man do not claim as privy, but by his own purchase, or from another ancestor, he is not bound by an estoppel upon the deceased (*a*); and as neither a sheriff nor an execution creditor is privy to the debtor, neither of them is bound by an estoppel which prevents the latter from denying the title of a third person who has in fact no property in the goods (*b*). So strictly is this rule applied that the determination in a Chancery suit as to who are next of kin of the deceased is not binding on persons claiming to be entitled to a grant of letters of administration in respect of an independent right arising upon the renunciation of the next of kin, though they trace their kinship through one of the parties to the former suit (*c*). But the successive possession of a similar interest is evidence of privity of estate. Thus the fact that a sole plaintiff was in possession of an estate when the former cause of action accrued, and that he and his

(*q*) *Horton* v. *Westminster Improvement Commissioners* (1852), 7 Exch. 780.

(*r*) *Re Walton-cum-Trimley Manor, Ex parte Tomline* (1873), 28 L. T. 12; compare *Hancock* v. *Welsh and Cooper* (1816), 1 Stark. 347 (privity between bailiff and landlord under whom he justified).

(*s*) *R.* v. *York Corporation* (1792), 5 Term Rep. 66, 72, 76, differing from *R.* v. *Grimes* (1770), 5 Burr. 2598, 2601, as to the conclusiveness of the verdict.

(*t*) *Liverpool and North Wales Steamship Co., Ltd.* v. *Mersey Trading Co., Ltd.*, [1909] 1 Ch. 209, C. A., *per* FARWELL, L.J., at p. 217.

(*u*) *Doe* d. *Marchant* v. *Errington* (1839), 6 Bing. (N. C.) 79; compare *Lock* v. *Norborne* (1688), 3 Mod. Rep. 147 (verdict against one only of several defendants; no evidence against the others).

(*a*) *Goodtitle* v. *Morse* (1789), 3 Term Rep. 365, *per* Lord KENYON, C.J., at p. 371, citing *Edwards* v. *Rogers* (1640), W. Jo. 459; compare *Keate* v. *Phillips* (1881), 18 Ch. D. 456, 577 (*cestui que trust* not bound by estoppel on fraudulent trustee).

(*b*) *Richards* v. *Johnston* (1859), 4 H. & N. 660, citing *Heane* v. *Rogers* (1829), 9 B. & C. 577, 586; followed, *Richards* v. *Jenkins* (1886), 18 Q. B. D. 451, C. A.; and see *Heugh* v. *Chamberlain* (1877), 25 W. R. 742 (one who after assignment of a patent becomes partner of the assignor, not privy to the estoppel arising out of the assignment); *Tighe* v. *Tighe* (1877), 11 I. R. Eq. 203 (no privity between administrator appointed in colony and administrator appointed at home of deceased having assets in both places).

(*c*) *Spencer* v. *Williams* (1871), L. R. 2 P. & D. 230, more fully and more correctly reported *sub nom. Spencer* v. *Spencer*, 40 L. J. (P. & M.) 45; compare *Mercantile Investment and General Trust Co.* v. *River Plate Trust, Loan, and Agency Co.*, [1894] 1 Ch. 578.

SECT. 2. Parties estopped by Record.

co-plaintiff were so at the time of the later cause of action, is *prima facie* evidence that the later plaintiffs are privy in estate to the former plaintiff (*d*), and privity has been assumed to exist between successive lords of the same manor (*e*).

Privy's title must be derived subsequent to proceedings.

480. In order that a judgment may be conclusive against a person as privy in estate to a party litigant it is necessary to show (apart from his taking with a notice of a *lis pendens*) (*f*) that he derives title under the latter by act or operation of law subsequent to the recovery of the judgment (*g*), or at least to the commencement of the proceedings, and that the judgment was one affecting the property to which title is derived. Purchasers of land are not estopped by proceedings commenced after the purchase (*h*); and a judgment obtained against the mortgagor of land after completion of the mortgage, setting aside his purchase of the land on the ground of fraud, is not even evidence against the mortgagee who was not a party to the action (*i*).

Party must sue or defend in same right.

481. Again, it is necessary to an estoppel by record that the parties to the litigation (or their privies) should have claimed or defended in the same right in the former proceedings as they represent in the later ones (*k*). A patentee whose patent has in an action by himself for infringement been held invalid for want of novelty is not in subsequent proceedings by the defendant as

(*d*) *Blakemore* v. *Glamorganshire Canal Co.* (1835), 2 Cr. M. & R. 133; *R.* v. *Blakemore* (1852), 2 Den. 410 (conviction of former owner and occupier, liable *ratione tenuræ*, for non-repair of highway).

(*e*) *Re Walton-cum-Trimley Manor, Ex parte Tomline* (1873), 28 L. T. 12.

(*f*) See Judgments Act, 1839 (2 & 3 Vict. c. 11), s. 7; and title JUDGMENTS AND ORDERS.

(*g*) *Re De Burgho's Estate*, [1896] 1 I. R. 274, 280; and see *Doe* d. *Foster* v. *Derby (Earl)* (1834), 1 Ad. & El. 783, 790; cited, *Hodson* v. *Walker* (1872), L. R. 7 Exch. 55, 61.

(*h*) *Mercantile Investment and General Trust Co.* v. *River Plate Trust, Loan, and Agency Co.*, [1894] 1 Ch. 578; compare *The Thyatira* (1883), 8 P. D. 154, (indorsee of bill of exchange not affected by proceedings commenced after indorsement); *Poore* v. *Clark* (1742), 2 Atk. 515 (lord of manor and copyholders); *Gaunt* v. *Wainman* (1836), 3 Bing. (N. C.) 69 (widow not estopped in action of dower by recital in her husband's deed); *Wenman (Lady)* v. *Mackenzie* (1855), 5 E. & B. 447, 458, following *Evans* v. *Rees* (1839), 10 Ad. & El. 151 (landlord and tenant); but it is otherwise where the tenant proceeds by direction and authority of his landlord (*Kinnersley* v. *Orpe* (1780), 2 Doug. (K. B.) 517); compare *Mowatt* v. *Castle Steel and Iron Works Co.* (1886), 34 Ch. D. 58, 63, C. A. (estoppel by representation).

(*i*) *Natal Land and Colonization Co.* v. *Good* (1868), L. R. 2 P. C. 121, 132; compare *Morret* v. *Westerne* (1710), 2 Vern. 663; *Simpson* v. *Pickering* (1834), 1 Cr. M. & R. 527; *Doe* d. *Downe (Lord)* v. *Thompson* (1847), 9 Q. B. 1037 (estoppel by lease on mortgagor did not bind mortgagee).

(*k*) *Robinson's Case* (1603), 5 Co. Rep. 32 b; *Huggins* v. *York-Buildings Co.* (1740), 2 Atk. 44; *Rattenbury* v. *Fenton* (1833), Coop. *temp.* Brough. 60; *Bainbrigge* v. *Baddeley* (1847), 2 Ph. 705; *Hacking* v. *Lee* (1860), 9 W. R. 70; *Bennett* v. *Gamgee* (1876), 2 Ex. D. 11 (trustee in bankruptcy, after electing not to continue debtor's action, not barred from bringing his own); *Metters* v. *Brown* (1863), 1 H. & C. 687 (principle applied to estoppel by deed), citing Com. Dig. Estoppel, C. It does not matter in what character they are summoned (*e.g.*, as heir-at-law or next of kin) provided they have been party in their own right (*Beardsley* v. *Beardsley*, [1899] 1 Q. B. 746, following *Emberley* v. *Trevania* (1860), 4 Sw. & Tr. 197).

petitioner for the revocation of the same patent precluded from again alleging the novelty of the patent, because the petition is on behalf of the public, and the former defendant is therefore appearing in a different right (*l*). Again, the determination of the issues in an action by a personal representative for damage sustained by the relatives of the deceased from his death by accident raises no estoppel in a subsequent action by the same plaintiff for damage caused to the deceased's estate by the same accident, because the plaintiff sues in two different rights, and in effect the parties in the two actions are different (*m*).

Quasi-privity: contract of indemnity.

482. In certain cases, though there is in strictness no privity between a party to a judgment and the person against whom it is set up, the relations between them are such that the latter is not allowed to dispute it. There is no privity of estate between the parties to a contract of indemnity (*n*); but a person who has covenanted to indemnify another against liabilities and actions in respect thereof is, as between himself and the party indemnified, estopped from disputing the judgment in an action against the latter (*o*), not because he is a privy, but because that is the true meaning of the contract. On the other hand, where indemnity is claimed independently of contract against trustees who have committed a breach of trust, they are not estopped by a judgment obtained by third parties against the plaintiffs from saying that no damage has arisen from the breach (*p*).

Trustee and *cestui que trust*.

Again, although a trustee and his *cestui que trust* are different parties, and neither derives his title from the other (*q*), equity will not allow the same question to be litigated betwen a person and the *cestui que trust* and afterwards between the same person and the trustee (*r*). There may perhaps be said to be a *quasi*-privity between them.

(*l*) *Re Deeley's Patent*, [1895] 1 Ch. 687, C. A.; reversed on other points, *sub nom. Deeley* v. *Perkes*, [1896] A. C. 496; compare *Poulton* v. *Adjustable Cover and Boiler Block Co.*, [1908] 2 Ch. 430, C. A.

(*m*) *Leggott* v. *Great Northern Rail. Co.* (1876), 1 Q. B. D. 599; followed, *Daly* v. *Dublin, Wicklow, and Wexford Rail. Co.* (1892), 30 L. R. Ir. 514, C. A.

(*n*) *King* v. *Norman* (1847), 4 C. B. 884, 898; nor between a surety and the principal debtor or his trustee in bankruptcy (*Pritchard* v. *Hitchcock* (1843), 6 Man. & G. 151 (surety not concluded by judgment between the debtor's trustee and the creditor that the debtor's discharge of the debt was a fraudulent preference)).

(*o*) *Mercantile Investment and General Trust Co.* v. *River Plate Trust, Loan, and Agency Co.*, [1894] 1 Ch. 578. There is no estoppel between the indemnifying parties and the plaintiff in the action, although they have assisted in the action and paid the costs (*ibid.*).

(*p*) *Gray* v. *Lewis*, *Parker* v. *Lewis* (1873), 8 Ch. App. 1035, 1059. Where the party indemnified has given to the surety notice of the proceedings, and an opportunity of defending the action or paying the claim, the latter is bound by any settlement *bonâ fide* made by the former (*ibid.*, at p. 1059; *Jones* v. *Williams* (1841), 7 M. & W. 493; see also *Duffield* v. *Scott* (1789), 3 Term Rep. 374, *per* BULLER, J., at p. 377; *Smith* v. *Compton* (1832), 3 B. & Ad. 407.

(*q*) See *Keate* v. *Phillips* (1881), 18 Ch. D. 560, 577.

(*r*) *Re Defries*, *Norton* v. *Levy* (1883), 48 L. T. 703; compare *Farquharson* v. *Seaton* (1828), 5 Russ. 45 (second incumbrancer and mortgagor).

SECT. 2. **Parties estopped by Record.**

Members of class.

483. Members of a class are frequently bound by a judgment obtained against others suing or being sued in a representative capacity (*s*). Where a multitude of persons are interested in a general right, and individuals are selected, whether as plaintiffs or defendants, to represent the multitude to try the question of the existence of the right, everybody interested is bound (in the absence of fraud or collusion) by the decision, although not actually present, because he is present by representation: but it is open to any individual to show a special ground of exemption; the decree is only final against him so far as regards the general right (*t*).

Exceptional right of trustee in bankruptcy.

484. It should be noted that although a trustee in bankruptcy is privy to the bankrupt, he is entitled and bound to inquire into the consideration for a judgment debt to see whether it is one which is properly provable (*a*). Similarly, the court may inquire into the merits of a judgment debt on which a bankruptcy petition is founded and refuse in its discretion to make a receiving order; but such refusal does not affect the *res judicata* of the debt, and, though it creates a *res judicata* on that petition, it is no bar to a fresh petition for the same debt (*b*), but in a proper case the court might decline to entertain such fresh petition as vexatious (*c*).

A trustee is not estopped from setting up a fraud which the bankrupt himself would be estopped from setting up, when it is also a fraud on the bankruptcy law—*e.g.*, as being a fraudulent preference (*d*).

(*s*) *Brown* v. *Howard* (1701), 1 Eq. Cas. Abr. 163 (tenants of a manor); *Brown* v. *Booth* (1690), 1 Eq. Cas. Abr. 163; 2 Vern. 184 (representative miners).

(*t*) *Sewers Commissioners* v. *Gellatly* (1876), 3 Ch. D. 610, *per* JESSEL, M.R., at p. 616. An order appointing a person to represent a class does not affect one of the class who claims a distinct and independent right so far as regards that right (*Re Lart, Wilkinson* v. *Blades*, [1896] 2 Ch. 788, 793).

(*a*) *Re Tollemache, Ex parte Revell* (No. 1) (1884), 13 Q. B. D. 720, C. A.; *Re Tollemache, Ex parte Anderson* (1885), 14 Q. B. D. 606, C. A.; *Re Deerhurst, Ex parte Leaton* (1891), 64 L. T. 273, C. A., *per* Lord HALSBURY, at p. 274. In this case it was held in the court below (*ibid.*, p. 118) that an invitation by the debtor's solicitor to vote, in respect of a gaming debt, for a scheme of arrangement does not estop the trustee under the scheme from denying that the debt is provable, but this point was not dealt with in the Court of Appeal. See also *Re Dingle, Ex parte Butterfill, Ex parte Rashleigh* (1811), 1 Rose, 192; and title BANKRUPTCY, Vol. II., p. 234.

(*b*) *Re Vitoria, Ex parte Vitoria*, [1894] 2 Q. B. 386, C. A.; see title BANKRUPTCY, Vol. II., p. 57. The trustee's rejection of a proof would seem to be equally inefficacious to affect the *res judicata;* but the effect of s. 35 (2) of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), is to render the judgment in such cases unenforceable after annulment of the bankruptcy (*Brandon* v. *McHenry*, [1891] 1 Q. B. 538, C. A.).

(*c*) *Re Vitoria, Ex parte Vitoria, supra, per* KAY, L.J., at p. 391; *Re Larard, Ex parte Yeomans and Heap* (1896), 3 Mans. 317, C. A.

(*d*) *Jones* v. *Yates* (1829), 9 B. & C. 532, 540; *Heilbut* v. *Nevill* (1869), L. R. 4 C. P. 354; affirmed (1870), L. R. 5 C. P. 478, Ex. Ch.; see Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 48. The judgments of COCKBURN, C.J., L. R. 5 C. P. at p. 481, and BLACKBURN, J., at p. 483, seem to suggest that, the trustee being innocent of the fraud and the defendant cognisant of it, the former was, independently of the question of fraudulent preference, subject to no estoppel; see however, *Jones* v. *Yates, supra.*

SECT. 3.—*Who may take advantage of Estoppel.*

SUB-SECT. 1.—*In General.*

SECT. 3. Who may take advantage of Estoppel.

485. This question is governed by the rule that estoppels ought to be mutual (*e*). Only those can take advantage of an estoppel by record who, if the decision had been the other way, would have been bound by it—that is to say, in case of a judgment *inter partes*, the parties and their privies. It is not enough that the person against whom the estoppel is set up was party or privy to the judgment relied on; each party to the later proceeding must have been party or privy to the earlier one (*f*). It follows that only those can take advantage of an estoppel who claim or defend in the same right in the later proceeding as they, or those to whom they claim to be privy, represented in the earlier (*g*).

Estoppel must be mutual.

486. But while it is true that estoppel by record must be reciprocal, yet a judgment in favour of a defendant, though equally conclusive as to what it actually decides, is not always as decisive in his favour on the points in issue as a judgment for a plaintiff. Where a plaintiff recovers judgment it almost necessarily follows that all the issues raised by the defendant have been determined in the plaintiff's favour: there must at least have been a decision on the merits. On the other hand, a judgment may have passed in favour of the defendant on dilatory grounds (*h*), or on one only of many alternative defences; and circumstances may have arisen entitling

Judgment for defendant not always decisive.

(*e*) See p. 325, *ante*.

(*f*) *Shedden* v. *A.-G.* (1860), 30 L. J. (P. M. & A.) 217, 228, 231, where a suit for declaration of legitimacy to which the Attorney-General was a necessary party, and in which other parties were cited, was held not to be barred by a judgment of the Scotch court against the petitioner on proceedings between the petitioner and the cited parties in which the same question of legitimacy was in issue, because the Attorney-General was not a party to the earlier proceedings; *Petrie* v. *Nuttall* (1856), 11 Exch. 569 (conviction of obstructing highway cannot be pleaded as estoppel by third party in action by former defendant for trespass: as to mutuality, see *ibid.*, at p. 575); compare *Horton* v. *Westminster Improvement Commissioners* (1852), 7 Exch. 780; see also *Gaunt* v. *Wainman* (1836), 3 Bing. (N.C.) 69 (widow cannot take advantage of estoppel by deed of her husband's tenant where she herself would not have been estopped); *Callow* v. *Jenkinson* (1851), 6 Exch. 666 (judgment against defendant sued jointly with others not conclusive in subsequent proceedings between same plaintiff and defendant alone); *Le Clerc* v. *Greene* (1873), 7 I. R. Eq. 371, 377; Co. Litt. 352 a.

(*g*) *Re Deeley's Patent*, [1895] 1 Ch. 687, C. A. Letters patent, which are matters of record, probably create, as to matters of fact stated therein, an estoppel between the grantee and the Crown; but they create none between the grantee and anyone else, for the latter is neither party nor privy to them (*Cropper* v. *Smith* (1884), 26 Ch. D. 700, 705, 708, 713, C. A., *per* FRY, L.J., at p. 712; affirmed, without giving reasons, *sub nom. Smith* v. *Cropper* (1885), 10 App. Cas. 249).

(*h*) An order of sessions quashing an order of removal of a pauper, though *primâ facie* evidence between the parties that the pauper was not settled in the appellant parish, may be shown to have been made on some other ground (*R.* v. *Wick St. Lawrence* (*Inhabitants*) (1833), 5 B. & Ad. 526). If made on the merits, it is conclusive between them (*R.* v. *Evenwood and Barony* (*Inhabitants*) (1843), 3 Q. B. 370; *R.* v. *Clint* (*Inhabitants*) (1841), 11 Ad. & El. 624, n.; compare *Langmead* v. *Maple* (1865), 18 C. B. (N. S.) 255; *Palmer* v. *Temple* (1839), 9 Ad. & El. 508; *Jenkyns* v. *Merthyr Tydvil Urban District Council* (1899), 80 L. T. 600 (same principle applied in criminal proceeding).

SECT. 3. **Who may take advantage of Estoppel.**

the plaintiffs to judgment which were not in existence when the first action was brought (*i*).

SUB-SECT. 2.—*Necessity of pleading Estoppel.*

Facts relied on must be pleaded.

487. The old rule was that estoppel by record and deed must be pleaded if there were an opportunity (*k*). If the party against whom the record was used gave by his pleading the opportunity of pleading the estoppel, and this was not done, the record could not be relied on as conclusive (*l*), but as evidence only (*m*). It was otherwise if no such opportunity were given (*n*). Under the modern practice the facts relied on to establish an estoppel of any kind (including estoppels *in pais*) should be pleaded in any case in which it is intended to rely upon it (*o*), except in answer to a claim in ejectment (*p*), and in the cases (if any) in which "not guilty by statute" may still be pleaded (*q*), even though the doing so involves a special reply (*r*); if, as may occur in the exceptional cases referred to, or where the matter giving rise to the estoppel has occurred since the close of the pleadings (*s*), there is really no opportunity for the party relying on the estoppel to plead it, he need not do so. But if a plaintiff in ejectment relies on an estoppel as part of his title, it seems that he should plead it in his statement of claim (*t*).

(*i*) *National Bolivian Navigation Co.* v. *Wilson* (1880), 5 App. Cas. 175, 185, 198, 199; *Waine* v. *Crocker* (1862), 3 De G. F. & J. 421, C. A.; *Heath* v. *Weaverham (Township) Overseers*, [1894] 2 Q. B. 108; *Hall* v. *Levy* (1875), L. R. 10 C. P. 154; compare *R.* v. *North Eastern-Rail. Co.* (1901), 84 L. T. 502; *Hitchin* v. *Campbell* (1771), 2 Wm. Bl. 779, where a judgment for a defendant in trover on general issue pleaded was held on demurrer no answer to an action for money received for the same goods, since though it appeared that the goods were the same it did not appear that the question was the same. At the trial it appeared that the only question was the property in the goods, and it was held that the first action was a bar (*ibid.*, at pp. 827, 832); compare *Phillips* v. *Ward* (1863), 2 H. & C. 717; *Behrens* v. *Sieveking* (1837), 2 My. & Cr. 602; *Moss* v. *Anglo-Egyptian Navigation Co.* (1865), 1 Ch. App. 108; *R.* v. *May* (1880), 5 Q. B. D. 382; compare, as to judgment of acquittal in the Exchequer, *Cooke* v. *Sholl* (1793), 5 Term. Rep. 255, 256, citing Buller, Nisi Prius, 245; and see pp. 354, 255, *post*.

(*k*) It was otherwise with estoppels *in pais* (*Freeman* v. *Cooke* (1848), 2 Exch. 654, 662; *Ashpitel* v. *Bryan* (1863), 3 B. & S. 474, 490, citing 1 Wms. Saund., 6th ed., 325 a, n. (d)).

(*l*) *Treviban* v. *Lawrence* (1704), 2 Ld. Raym. 1048, 1051; *Magrath* v. *Hardy* (1838), 4 Bing. (N. C.) 782; see *Potts* v. *Nixon* (1870), 5 I. R. C. L. 45; *Faversham (Lord)* v. *Emerson* (1855), 11 Exch. 385.

(*m*) *Vooght* v. *Winch* (1819), 2 B. & Ald. 662. A party relying on a deed might open the estoppel by putting in issue the facts which the deed was intended to conclude (*Wilson* v. *Butler* (1838), 4 Bing. (N. C.) 748).

(*n*) *Treviban* v. *Lawrence*, *supra*.

(*o*) R. S. C., Ord. 19, rr. 4, 6, 15; *Coppinger* v. *Norton*, [1902] 2 I. R. 232, 244. As to the necessity of pleading "judgment recovered," see *Edevain* v. *Cohen* (1889), 43 Ch. D. 187, C. A.; as to divorce practice, *Robinson* v. *Robinson* (1877), 2 P. D. 75, 77; and see title HUSBAND AND WIFE.

(*p*) R. S. C., Ord. 21, r. 21.

(*q*) See R. S. C., Ord. 19, r. 12; and title PLEADING.

(*r*) *Coppinger* v. *Norton*, *supra*.

(*s*) *Re Defries*, *Norton* v. *Levy* (1883), 48 L. T. 703.

(*t*) *Coppinger* v. *Norton*, *supra*, at p. 242. This proposition appears to have been conceded in the case cited (see *ibid.*, at p. 237). The fact that in ejectment a defendant can raise all legal defences under a plea of possession seems to have

SECT. 4.—*Matters preventing Existence of Estoppel.*

SECT. 4. Matters preventing Existence of Estoppel.

SUB-SECT. 1.—*In General.*

488. Estoppels being frequently at least opposed to the admission of evidence of the truth have always been jealously regarded by the courts, and this practice found expression in the old maxim that "estoppels are odious" (*a*); and though this maxim hardly expresses the modern view, particularly with regard to estoppels by representation (*b*), yet the doctrine of estoppel by record is not to be extended beyond what there is authority for (*c*), and there are several matters which have always been and still are recognised as preventing the existence of such an estoppel.

Old maxim "estoppels are odious."

SUB-SECT. 2.—*Fraud.*

489. Fraud is an extrinsic, collateral act, which vitiates the most solemn proceedings of courts of justice (*d*). A judgment obtained by fraud or collusion, even, it seems, a judgment of the House of Lords (*e*), may be treated as a nullity (*f*). An exception to the generality of these propositions should probably be made where a purchaser has acquired title to property *bonâ fide* and for value upon the faith of a judgment *in rem* (*g*). Apart from this they may be accepted without qualification in favour of persons who were not party to the judgment, whether it was *in rem* (*h*) or *in*

No estoppel where judgment obtained by fraud.

been regarded as taking the case out of the ordinary rule that a plaintiff is not bound to anticipate a defence.

(*a*) See, for example, in *Baxendale* v. *Bennett* (1878), 3 Q. B. D. 525, C. A., *per* BRAMWELL, L.J., at p. 529.

(*b*) "A principle which courts of law have most usefully adopted" (*Cave* v. *Mills* (1862), 7 H. & N. 913, 927, 928; compare *Ashpitel* v. *Bryan* (1863), 3 B. & S. 474, 492). In *Howard* v. *Hudson* (1853), 2 E. & B. 1, Lord CAMPBELL, C.J., at p. 10, says: "This conclusion shuts out the truth and is odious." CROMPTON, J., at p. 13, differs on this point, and adds "In many cases I think it extremely equitable."

(*c*) *Howlett* v. *Tarte* (1861), 10 C. B. (N. S.) 813, *per* WILLIAMS, J., at p. 825.

(*d*) *Kingston's* (*Duchess*) *Case* (1776), 2 Smith, L. C., 11th ed., 731, *per* DE GREY, C.J., at p. 738. Lord COKE said it avoids all judicial acts (*ibid.*).

(*e*) *Bandon* (*Earl*) v. *Becher* (1835), 3 Cl. & Fin. 479, 511, approving the argument of WEDDERBURN, S.-G., in the last-mentioned case.

(*f*) *Shedden* v. *Patrick* (1854), 1 Macq. 535, *per* Lord BROUGHAM, at p. 619; compare *Boswell* v. *Coaks* (No. 2) (1894), 86 L. T. 365, n. Lord ST. LEONARDS inclined to the opinion that an application should be made to the House itself (*Shedden* v. *Patrick*, *supra*, at p. 627). As to the effect of fraud on a foreign judgment, see *Vadala* v. *Lawes* (1890), 25 Q. B. D. 310, C. A.; and title CONFLICT OF LAWS, Vol. VI., p. 287.

(*g*) See *Castrique* v. *Imrie* (1870), L. R. 4 H. L. 414, *per* BLACKBURN, J., at p. 435; see also *The Bellcairn* (1885), 10 P. D. 161; *Re Eyton*, *Bartlett* v. *Charles* (1890), 45 Ch. D. 458; *Smith* v. *Surridge* (1801), 4 Esp. 25 (sentence of foreign prize court pronounced without jurisdiction, but acquiesced in).

(*h*) See the examples given by DE GREY, C.J., of letters of administration fraudulently obtained and fraudulently revoked (*Kingston's* (*Duchess*) *Case*, *supra*, at p. 739; *Harrison* v. *Southampton Corporation* (1853), 4 De G. M. & G. 137, C. A. (decree of nullity of Ecclesiastical Court disregarded, because obtained by fraud and collusion, on the question of the legitimacy of the issue of the same marriage being raised fifty years later). In *Perry* v. *Meddowcroft* (1846), 10 Beav. 122, it was said that to make out such a case of fraud, collusion and concert between the parties must be established;

SECT. 4. Matters preventing Existence of Estoppel.

personam (*i*). On this principle the recovery of penalties, which it is not intended to enforce, in a friendly action instituted in order to prevent hostile actions is no bar to a second action by another party for penalties for the same offence (*k*).

Party to such judgment should get it set aside.

490. Theoretically it may be true that even a party to a judgment which has been obtained by fraud is entitled to ask the court to disregard it in subsequent proceedings. It has been laid down, however, that a party to a consent judgment obtained by fraud should, in order to avoid the estoppel, make application to set the judgment aside (*l*). And in any case, a party who has taken no proceedings to do so, or has failed in such proceedings, would have great difficulty in establishing the fraud as a matter of fact. The old Court of Chancery always exercised jurisdiction to set aside a decree obtained by fraud (*m*). And this can now be done by the High Court in an action in the nature of the old bill of review (*n*), even (apparently) when the judgment complained of has been affirmed by the House of Lords (*o*); but the fraud alleged must be specific and material, and such as raises a reasonable prospect of success (*p*), and must have been discovered since the judgment complained of was given, or the action will be stayed or dismissed as vexatious (*q*).

and see *Meddowcroft* v. *Huguenin* (1844), 4 Moo. P. C. C. 386. These cases were before the Matrimonial Causes Act, 1873 (36 & 37 Vict. c. 31) (whereby a decree of nullity is required to be a decree *nisi* in the first instance); but this does not seem to affect the principle. On the other hand, a decree of nullity by a foreign court having jurisdiction on the ground of the husband's domicil, cannot, so long as it stands unimpeached in the country where it was given, be impeached here, even on the ground of fraud, at all events by third parties (*Bater* v. *Bater*, [1906] P. 209, C. A., see p. 228). See title CONFLICT OF LAWS, Vol. VI., p. 269.

(*i*) *Bandon* (*Earl*) v. *Becher* (1835), 3 Cl. & Fin. 479, 511 (action by remainderman not party to former proceedings).

(*k*) *Girdlestone* v. *Brighton Aquarium* (1878), 3 Ex. D. 137 (following *Chalchman* v. *Wright* (1606), Noy, 118). The defence here was not estoppel, but, in substance, *autrefois convict*.

(*l*) *Parker* v. *Simpson* (1869), 18 W. R. 204; compare *Priestman* v. *Thomas* (1884), 9 P. D. 70; affirmed, *ibid.*, 210, C. A. An action is necessary for this purpose (*Ainsworth* v. *Wilding*, [1896] 1 Ch. 673).

(*m*) *Loyd* v. *Mansell* (1722), 2 P. Wms. 73.

(*n*) *Cole* v. *Langford*, [1898] 2 Q. B. 36; *Birch* v. *Birch*, [1902] P. 130, C. A.; *Priestman* v. *Thomas* (1883), not reported (see 9 P. D. 211); *Wyatt* v. *Palmer*, [1899] 2 Q. B. 106 (consent judgment); *White* v. *Ivory* (1910), *Times*, April 28th, CHANNELL, J. The doubt expressed by JAMES and THESIGER, L.JJ., in *Flower* v. *Lloyd* (1879), 10 Ch. D. 327, C. A., must now therefore be regarded as removed. But the validity of a judgment debt whereon an adjudication in bankruptcy has been founded can only be contested by the bankrupt in the bankruptcy court. So long as the adjudication stands, any right of action to set aside the judgment is a *chose in action* vested in the trustee (*Boaler* v. *Power*, [1910] 2 K. B. 229, C. A.). See also p. 333, *ante*.

(*o*) *Boswell* v. *Coaks* (No. 2) (1894), 86 L. T. 365, n., H. L.; *Shedden* v. *Patrick* (1854), 1 Macq. 535.

(*p*) *Birch* v. *Birch*, *supra*; *Boswell* v. *Coaks* (No. 2), *supra*; *Shedden* v. *Patrick*, *supra*, *per* Lord CRANWORTH, L.C., at p. 615; compare *White* v. *Hall* (1806), 12 Ves. 321 (colonial judgment).

(*q*) *Birch* v. *Birch*, *supra*; *Boswell* v. *Coaks* (No. 2), *supra*; compare *Cotter* v. *Barrymore* (*Earl*) (1733), 4 Bro. Parl. Cas. 203.

SUB-SECT. 3.—*Lack of Jurisdiction.*

SECT. 4. Matters preventing Existence of Estoppel.

No estoppel where no jurisdiction.

491. Wherever estoppel by record is said to arise out of a judgment, it is assumed that the court which pronounced the judgment had jurisdiction to do so. The lack of jurisdiction deprives the judgment of any effect, whether by estoppel or otherwise (*r*); and this rule applies even where the party alleged to be estopped himself sought the assistance of the court whose jurisdiction is impugned (*s*). A magistrate hearing a summons for the expenses of making up a new street under s. 150 of the Public Health Act, 1875 (*t*), or for trespass to land (*a*), and having jurisdiction for that purpose, may dismiss the summons on the express ground in the one case that the street was repairable by the inhabitants, or in the other that the defendant had established a title to the property; but though such finding is embodied in the order as drawn up, it creates no estoppel between the parties, for it relates to a matter which the magistrate had no jurisdiction directly and immediately to adjudicate upon, being at most incidentally cognisable, so far only as necessary to his decision on the actual question submitted (*b*). The absence of a condition necessary to found the jurisdiction to make an order, or give a decision, deprives the order or decision of any conclusive effect (*c*); but it is otherwise where

(*r*) *Rogers* v. *Wood* (1831), 2 B. & Ad. 245 (decree of court unknown to the law, composed of some members of the Court of Exchequer and other distinguished persons); *Dublin* (*Archbishop*) v. *Trimleston* (*Lord*) (1849), 12 I. Eq. R. 251.

(*s*) *Toronto Railway* v. *Toronto Corporation*, [1904] A. C. 809, 815, P. C.; see and distinguish *Wright* v. *London Omnibus Co.* (1877), 2 Q. B. D. 271; see also note (*h*), p. 337, *ante*.

(*t*) *R.* v. *Hutchings* (1881), 6 Q. B. D. 300, C. A.; followed in *Scott* v. *Lowe* (1902), 86 L. T. 421, a case under the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120).

(*a*) *A.-G. for Trinidad and Tobago* v. *Eriché*, [1893] A. C. 518, P. C.

(*b*) Compare *Dover* v. *Child* (1876), 1 Ex. D. 172 (magistrate's refusal to order delivery up of goods under Metropolitan Police Courts Act, 1839 (2 & 3 Vict. c. 71), s. 40, is not an adjudication on title, which he has no jurisdiction to make); *Re Vitoria, Ex parte Vitoria*, [1894] 2 Q. B. 387, C. A. (refusal of receiving order no adjudication on the debt); applied, *King* v. *Henderson*, [1898] A. C. 720, 730, P. C.

(*c*) *Reed* v. *Nutt* (1890), 24 Q. B. D. 669 (certificate of dismissal of charge of assault without a hearing on the merits (Offences Against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 44) is given without jurisdiction, and is no bar (under s. 45) to an action for the same cause); compare *Jungheim, Hopkins & Co.* v. *Foukelmann*, [1909] 2 K. B. 948 (arbitrator lacking qualification which was a condition of his appointment). The question of jurisdiction or no jurisdiction and its effect on estoppel is well illustrated by compensation cases. The verdict of a jury assessing compensation under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 50, and the signed judgment thereon of the sheriff, constitutes a record. The parties are not, however, estopped in subsequent proceedings as to the right to compensation, whether it turns on the claimant's title to the property (*R.* v. *London and North Western Rail. Co.* (1854), 3 E. & B. 443), or on the question whether any damage has been occasioned by the execution of the works (*Read* v. *Victoria Station and Pimlico Rail. Co.* (1863), 1 H. & C. 826), which matters the sheriff's jury has no jurisdiction to determine. But when once it is determined in an action on the judgment that any damage whatever has been sustained, the verdict of that jury is conclusive between the parties as to the amount (*Barber* v. *Nottingham Canal Co.* (1864), 15 C. B. (N. S.) 726; 747; *Read* v. *Victoria Station and Pimlico Rail. Co.*, *supra*).

SECT. 4. **Matters preventing Existence of Estoppel.**

the order is good on its face and the court adjudicating has jurisdiction to determine the existence or not of the condition, and the party denying its existence has neglected his opportunity of raising the objection at the hearing (*d*). Demurrers were frequently, under the old practice, allowed to pleas of *res judicata* on the ground that the latter did not show that the court adjudicating had jurisdiction to do so (*e*). The same principle has been applied where it has been sought to give effect, whether as a cause of action or a ground of defence, to foreign judgments (*f*).

SUB-SECT. 4.—*Truth appearing in same Record.*

No estoppel where truth appears on record relied on.

492. Where the truth appears in the same record (*g*) the question of estoppel can, it seems, hardly arise; for it is difficult to imagine a contention that a person was estopped from averring that which appeared, or could upon a correct construction be gathered, from the record relied on. The principle is illustrated by a modern decision of the Judicial Committee to the effect that the defendant is not estopped by the general terms of a judgment roll, drawn up at the instance of the plaintiff, but not in accordance with the written findings of the jury (*h*).

SUB-SECT. 5.—*Allegation not inconsistent with Record.*

No estoppel against allegation consistent with record.

493. That a party is not estopped from alleging that which is not inconsistent with a record seems also to be a truism. It is really only another way of stating that a judgment is conclusive only as to the point decided, and not as to matters which were neither put in issue nor admitted on the pleadings (*i*). As has already been pointed out (*k*), a judgment for the defendant may be consistent with the plaintiff having on another occasion a good cause of action for that which he failed to recover in the first instance. Thus, judgment for defendant in an action on a bill, on confession of

(*d*) *River Ribble Joint Committee* v. *Croston Urban District Council*, [1897] 1 Q. B. 251.

(*e*) *Harris* v. *Willis* (1855), 15 C. B. 710 (to plea of *res judicata* in Admiralty Court); *Briscoe* v. *Stephens* (1824), 2 Bing. 213 (in inferior court); see also *O'Grady* v. *Synan*, [1900] 2 I. R. 602, C. A.

(*f*) *Ferguson* v. *Mahon* (1839), 11 Ad. & El. 179 (Irish judgment); distinguished in *Reynolds* v. *Fenton* (1846), 3 C. B. 187, as to which see 1 Smith, L. C., 11th ed., at p. 792; *Price* v. *Dewhurst* (1838), 4 My. & Cr. 76 (judgment of foreign court purporting, without jurisdiction, to administer the estate of persons not domiciled in the foreign country); and see *Bank of Australasia* v. *Nias* (1851), 16 Q. B. 717, at p. 735. As to foreign judgments purporting to affect the matrimonial status of persons not domiciled within the jurisdiction of the courts pronouncing them, see p. 338, note (*g*), *ante;* and title CONFLICT OF LAWS, Vol. VI., p. 254.

(*g*) Co. Litt. 352 b. As to the truth appearing in the same deed as is relied on to support the estoppel, see *Morton* v. *Woods* (1869), L. R. 4 Q. B. 293, Ex. Ch.; and estoppel by deed, p. 367, *post.*

(*h*) *Want* v. *Moss* (1894), 70 L. T. 178, 179, P. C.; see *R.* v. *Carlile* (1831), 2 B. & Ad. 364, 365 (the minute of a verdict entered by the officer of the court "is considered by the court in which the proceeding takes place as evidence of the verdict, although the record may not have been regularly drawn up in proper form"); and compare *Colonial Bank* v. *Hepworth* (1887), 36 Ch. D. 36, 53.

(*i*) See pp. 355, 357, *post.*

(*k*) See p. 349, *ante.*

a plea of release under a composition deed, does not bar a second action on the same bill, based on an allegation of failure (subsequent to the confession) to pay an instalment, whereby the release became void (*l*). On the same principle judgment for a plaintiff is not necessarily conclusive on a matter which, though it might, if raised by way of defence or counterclaim, have afforded an answer to the action, can be and is made the subject of a later independent proceeding at the suit of the former defendant. Thus, a defendant who in foreclosure proceedings submitted to pay, and after decree paid what was found due, was not barred from subsequently proceeding by bill for repayment of part of the moneys on the ground that the transaction infringed the usury laws, that question not having been in dispute in the former suit, though a cross bill might have been filed (*m*). So, at common law, judgment for the plaintiff in an action for the price of goods is no answer to an action for damages for their inferior quality, though this might have been pleaded in reduction or extinction of the price (*n*).

SUB-SECT. 6.—*Matter on Record not then in Issue.*

Matter must have been in issue.

494. Apart from the effect of express and implied admissions in pleadings (*o*), no estoppel arises as to matters which were not in issue in the proceedings the record of which is relied upon (*p*). It

(*l*) *Hall* v. *Levy* (1875), L. R. 10 C. P. 154; *Hitchin* v. *Campbell* (1771), 2 Wm. Bl. 779; compare *Harris* v. *Mulkern* (1875), 1 Ex. D. 31; *Re Anglo-French Co-operative Society* (1880), 14 Ch. D. 533, 536; *Heath* v. *Weaverham (Township) Overseers*, [1894] 2 Q. B. 108; *R.* v. *Wye (Inhabitants)* (1838), 7 Ad. & El. 761; *Liverpool Corporation* v. *Chorley Waterworks Co.* (1852), 2 De G. M. & G. 852, C. A.; compare *Radcliffe* v. *Pacific Steam Navigation Co.*, [1910] 1 K. B. 685, C. A. (application to review under Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I.).

(*m*) *Moore* v. *Battie* (1759), Amb. 371, distinguished *Caird* v. *Moss* (1886), 33 Ch. D. 22, C. A., where after litigation involving the construction of an agreement between the parties as to the distribution of a fund in court, the court refused to entertain an action for rectification of the agreement, not because the question was *res judicata*, for it was not in issue, but because the court will not rectify an agreement which has been worked out, and *d fortiori* if the question might have been raised in, or contemporaneously with, the first action.

(*n*) *Davis* v. *Hedges* (1871), L. R. 6 Q. B. 687; distinguished in *Caird* v. *Moss*, *supra*; compare *Rigge* v. *Burbidge* (1846), 15 M. & W. 598, where the price had been paid into court in the first action; and *Hindley* v. *Haslem* (1878), 27 W. R. 61.

(*o*) See p. 357, *post*.

(*p*) See cases cited in notes (*l*), (*m*), (*n*), *supra*; *Blackham's Case* (1709), 1 Salk. 290; *Collins* v. *Gough* (1785), 7 Bro. Parl. Cas. 94; *St. Paul's (Minor Canons)* v. *Crickett* (1810), Wight. 30 (action for tithes for different years); *Jones* v. *Reynolds* (1836), 7 C. & P. 335 (successive actions for use and occupation); *Waine* v. *Crocker* (1862), 3 De G. F. & J. 421, C. A.; *Mackintosh* v. *Smith and Lowe* (1865), 4 Macq. 913; *Castrique* v. *Imrie* (1870), L. R. 4 H. L. 414, 434; *O'Grady* v. *Synan*, [1900] 2 I. R. 602, C. A.; *Cloutte* v. *Storey*, [1910] W. N. 163; compare *Mangena* v. *Wright*, [1909] 2 K. B. 958, at p. 975 (verdict for plaintiff on plea of justification, not conclusive as to fair comment and privilege, in action for repeating the libel); *Cleverley* v. *Gaslight and Coke Co.* (1907), 24 T. L. R. 93, H. L. (memorandum of agreement for weekly payments recorded under Workmen's Compensation Act, not conclusive as to cause of subsequent death); and see p. 332, *ante*. It was held by Sir J. P. WILDE that a prior verdict created no estoppel, even as to the same matters put in issue in a later suit, where the earlier and the later suit were triable on different principles, a

SECT. 4. Matters preventing Existence of Estoppel.

is not sufficient that they were decided by implication (*q*). On this principle a plaintiff who has two heads of claim, and takes a verdict for one only, full relief not being open to him on the other, is not barred in a subsequent action as to the latter (*r*). But where relief is properly asked of a competent court, and after trial is not noticed in a judgment granting other relief, or where in an action brought for several demands there is judgment for one only, the other relief is presumed to have been refused, and its refusal is a bar to a subsequent action for the same cause (*s*).

What evidence admissible to show what in issue.

495. In order to ascertain what was in issue between the parties in the earlier proceedings, the judgment itself must of course be looked at (*t*), and the verdict, if any, on which it is founded (*a*); and where there have been pleadings, these should also be examined (*b*), being in fact part of the record. The same principle applies where an issue has been directed by the court. In short, whatever goes to make up the record must be looked at (*c*); and no evidence is in such case admissible to contradict the record (*d*), or to show that more was in issue than appears upon it (*e*). But

different species of evidence being admissible in each (*Bancroft* v. *Bancroft* (1864), 3 Sw. & Tr. 597; compare *Sopwith* v. *Sopwith* (1861), 30 L. J. (P. M. & A.) 131).

(*q*) *Brandlyn* v. *Ord* (1738), 1 Atk. 571; *Newall* v. *Elliott* (1896), 1 H. & C. 797; *Ruck* v. *Ruck*, [1896] P. 152 (finding that A. misconducted herself with B. without correlative finding, not conclusive against B.). See, however, note (*l*), p. 339; and *Humphries* v. *Humphries*, [1910] 1 K. B. 796; affirmed [1910] 2 K. B. 531, C. A. (an issue as to the existence of an agreement having been affirmed in a former action between the same parties, the defendant cannot object that it does not satisfy the Statute of Frauds (29 Car. 2, c. 3); because, although that defence was not pleaded, and therefore could not be relied on in the former action, there was an opportunity of pleading it); see also note (*q*), p. 332, *ante*; and compare *Saunders* v. *Vautier* (1841), Cr. & Ph. 240.

(*r*) *Hadley* v. *Green* (1832), 2 Cr. & J. 374 (promissory note and money received for value of stone, subsequent action for damages for quarrying the stone), following *Seddon* v. *Tutop* (1796), 6 Term Rep. 607; compare *Bagot* (*Lord*) v. *Williams* (1824), 3 B. & C. 235; *Grundy* v. *Townsend* (1888), 36 W. R. 531, C. A. (prohibition of action for goods sold no bar to subsequent action on account stated); *Bollard* v. *Spring* (1887), 51 J. P. 501 (same principle applied in criminal proceedings); see title CRIMINAL LAW AND PROCEDURE, Vol. IX. p. 356, and notes (*m*), (*n*), p. 355, *ante*.

(*s*) *Blake* v. *O'Kelly* (1874), 9 I. R. Eq. 54; *Gregory* v. *Molesworth* (1747), 3 Atk. 626; and see *Henderson* v. *Henderson* (1843), 3 Hare, 100, 114.

(*t*) *Huffer* v. *Allen* (1866), L. R. 2 Exch. 15; *Shoe Machinery Co.* v. *Cutlan* [1896] 1 Ch. 667; *Irish Land Commission* v. *Ryan*, [1900] 2 I. R. 565, C. A.

(*a*) *Want* v. *Moss* (1894), 70 L. T. 178, P. C.

(*b*) *Houstoun* v. *Sligo* (*Marquis*) (1885), 29 Ch. D. 448, C. A.; *Re South American and Mexican Co., Ex parte Bank of England*, [1895] 1 Ch. 37, C. A.

(*c*) *Robinson* v. *Duleep Singh* (1878), 11 Ch. D. 798, C. A., where the question being as to the effect of a verdict on an issue directed out of Chancery under the old practice, it was laid down that in order to ascertain what had been determined not only the findings of the jury, but the decree, the pleadings, and the order directing the issues must be looked at.

(*d*) *Whittaker* v. *Jackson* (1864), 2 H. & C. 926; *Keane* v. *O'Brien* (1871) 5 I. R. C. L. 531 (attempt to add that verdict was by consent).

(*e*) *Sintzenick* v. *Lucas* (1793), 1 Esp. 43; the judge's reasons cannot, it seems, be looked at for the purpose of discovering the grounds of his decision (*A*... *Bank of Hindustan, China, and Japan, Alison's Case* (1873), 9 Ch. App. 1, 2...

where, after trial in a court where there are no pleadings, the record of that court is relied upon, oral evidence is admissible to show what facts were in issue and determined as the basis of the judgment, and such determination is conclusive between the same parties (*f*); though it seems doubtful whether before the Judicature Acts it was pleadable as an estoppel (*g*).

Judgment by default or consent.

496. Where, however, the former judgment was a judgment by default, and the plaintiff has delivered no pleading, the estoppel is limited to what appears on the face of the judgment itself (*h*). On the same principle, a defendant who has consented to judgment before delivery of any pleading is not estopped as against the plaintiff from subsequently setting up matters which might have constituted a defence, because they have never been in issue (*i*); but it is otherwise with a defendant who has consented to judgment after pleading in his defence the matters which he seeks to set up in the later proceeding (*k*).

Effect of statements in pleadings.

497. The rules as to how far parties are concluded by their allegations and admissions in pleadings are as follows:—The facts actually decided by an issue cannot again be litigated between the same parties, and are evidence between them, and conclusive for the purpose of terminating litigation. So are the material facts alleged by one party which are directly admitted by the opposite party, or indirectly admitted by making a traverse on some other facts, but only if the traverse is found against the party making it. But the statements of a party in a declaration or plea, though for the purpose of the case he is bound by them, ought not to be treated as confessions of the truth of the facts stated (*l*).

Re Allsop and Joy's Contract (1889), 61 L. T. 213, 215, *q.v.*, as to looking at the registrar's book to see what was done at the trial.

(*f*) *Flitters* v. *Allfrey* (1874), L. R. 10 C. P. 29, following *Routledge* v. *Hislop* (1860), 2 E. & E. 549.

(*g*) *Flitters* v. *Allfrey*, *supra*, at p. 41; and see *Irish Land Commission* v. *Ryan*, [1900] 2 I. R. 565, C. A., *per* HOLMES, L.J., at p. 580.

(*h*) *Irish Land Commission* v. *Ryan*, *supra*. As to effect of default of pleading, see *infra*.

(*i*) *Goucher* v. *Clayton* (1865), 34 L. J. (CH.) 239 (consent to injunction in patent action no estoppel against denying validity and infringement).

(*k*) *Thompson* v. *Moore* (1889), 23 L. R. Ir. 599, 631, 667, C. A. (validity and infringement denied in former proceeding).

(*l*) *Boileau* v. *Rutlin* (1848), 2 Exch. 665, *per cur.*, at p. 681; and see *Re Walters, Neison* v. *Walters* (1889), 61 L. T. 872; reversed on other points (1890), 63 L. T. 328, C. A. It was said in *Carter* v. *James* (1844), 13 M. & W. 137, that the omission to traverse an allegation made in one action does not estop the party pleading from traversing it in another, the admission implied being for the purpose of that action only; but this statement appears to be too general in view of the passage quoted in the text; see *Hutt* v. *Morrell* (1849), 3 Exch. 240, *per* POLLOCK, C.B., and PARKE, B., at p. 241, and the remarks in 2 Smith, L. C., 11th ed., p. 763; compare, however, the passage quoted in the next note. As to an omission to plead the Statute of Frauds, see *Humphries* v. *Humphries*, [1910] 1 K. B. 796; affirmed [1910] 2 K. B. 531, C. A.; and note (*l*), p. 339, *ante*. It was at one time thought that a corporation by suing on a contract which required a seal would be estopped from afterwards objecting in a cross action that the contract was not binding on them (*Fishmongers' Co.* v. *Robertson* (1843), 5 Man. & G. 131, 192). But this *dictum* was commented on in *Boileau* v. *Rutlin*, *supra*, and a

SECT. 4. Matters preventing Existence of Estoppel.

Default of pleading.

498. A party who has suffered judgment in default of defence is not estopped from pleading in a later action matters not inconsistent with the material averments in the statement of claim in the earlier one, *e.g.*, matters which might have been pleaded in confession and avoidance (*m*); and in any case an estoppel cannot be based on averments which are not a necessary part of the record, and are neither proved nor admitted (*n*).

Confession of defence.

But a plaintiff who has replied by confessing a defence of matters arising pending action (and the same rule would, it seems, apply to any other defence) is precluded from bringing a fresh action unless fresh circumstances arise; the matter is *res judicata* as to everything that might have been controverted at the time he so replied (*o*).

Payment into court, and taking out.

499. Where money has been paid into court in satisfaction of a particular cause of action without denial of liability, and taken out by the plaintiff, and judgment signed for his costs, it seems on the foregoing principles that the defendant is estopped from denying material averments in the statement of claim (*p*) and the plaintiff from denying the sufficiency of the amount (*q*); and the same

contrary opinion was expressed by Lord CAMPBELL, C.J., in delivering the judgment of the Queen's Bench in *Copper Miners' Co. of England* v. *Fox* (1851), 16 Q. B. 229, which opinion was treated as an overruling authority in *Kidderminster Corporation* v. *Hardwick* (1873), L. R. 9 Exch. 13, 21, 23. Under the modern system a party is not bound, even for the purpose of the case, by an alternative pleading (*McConnell* v. *Murphy* (1873), L. R. 5 P. C. 203, 220 (defendant not estopped by pleading an alternative construction from relying upon the true construction of a contract set out in his defence); see R. S. C., Ord. 19, r. 24; *Berdan* v. *Greenwood* (1878), 3 Ex. D. 251, 255; and title PLEADING).

(*m*) *Howlett* v. *Tarte* (1861), 10 C. B. (N. S.) 813; compare *Davis* v. *Hedges* (1871), L. R. 6 Q. B. 687; and *Rigge* v. *Burbidge* (1846), 15 M. & W. 598. The language of FITZGIBBON, L.J., in *Irish Land Commission* v. *Ryan*, [1900] 2 I. R. 565, C. A. at p. 572, "The ground and extent of an estoppel arising on a judgment by default must be found on the face of the judgment itself, and cannot be deduced from the pleading of the party who has obtained the judgment, when the defendant has said nothing and done nothing, and merely allowed judgment to go by default," if it means that material averments in the statement of claim cannot be looked at, goes further than necessary for the decision of the case and seems inconsistent with the judgments of BYLES and WILLIAMS, JJ., in *Howlett* v. *Tarte, supra*.

(*n*) *Irish Land Commission* v. *Ryan, supra, per* HOLMES, L.J., at p. 583.

(*o*) *Newington* v. *Levy* (1870), L. R. 6 C. P. 180, Ex. Ch., *per* BRAMWELL, B., at p. 189; compare *Hall* v. *Levy* (1875), L. R. 10 C. P. 154, and *Sandwich Corporation* v. *R.* (1847), 10 Q. B. 571, Ex. Ch. (return by corporation of compliance with writ of mandamus to assess compensation for a discharged officer in respect of certain specified offices estops them, in proceedings to compel them to give a bond for the amount assessed, from denying that he held those offices). On an interpleader issue, all grounds of claim or defence are open, and therefore a party cannot after failing at the trial to raise any such ground do so in subsequent proceedings (*Re Hilton, Ex parte March* (1892), 67 L. T. 594; compare *Williams* v. *Richardson* (1877), 36 L. T. 505).

(*p*) But not from setting up other matters which might have constituted a defence (*Rigge* v. *Burbidge* (1846), 15 M. & W. 598). *Secus* also when liability is denied (*Coote* v. *Ford*, [1899] 2 Ch. 93, C. A.).

(*q*) See *Sanders* v. *Hamilton* (1907), 96 L. T. 679 (plaintiff, who had by mistake claimed too little and taken it out of court when paid in by the defendant, an amendment to increase the claim being disallowed, and judgment thereupon entered for the defendant, was barred from bringing an action for the alleged balance); compare *Haddow* v. *Morton*, [1894] 1 Q. B. 565, C. A.

result would seem to follow where the plaintiff, having taken out the money, merely abandons the action, and no judgment is signed; but where a sum is paid into court generally in satisfaction of several causes of action, and the plaintiff pursues the latter course, he is not estopped from proceeding for a particular item unless it appears on inquiry that the sum paid in included that item (*r*).

SUB-SECT. 7.—*Record of other than Final Judgment.*

Interlocutory judgments.

500. As already stated, in order to give rise to an estoppel, the record must be that of a judgment which is final in substance if not in form—that is, not interlocutory merely (*s*). Thus the dismissal of an action for want of prosecution is no bar to a new action—it amounts to nothing (*t*); and this is so where such dismissal is by consent, if there was no compromise of the cause of action (*a*); and the acceptance of money paid into court with denial of liability creates no *res judicata*, and the parties are not precluded from reopening the matters in dispute, except so far as regards the damages for the particular cause of action in respect of which it is paid in (*b*). It has been seen that a verdict without judgment is ineffectual to raise an estoppel (*c*); *à fortiori* the discharge of a jury without finding on an issue submitted to them will not prevent the same issue being litigated again (*d*).

Sheriff's return.

501. A sheriff's return to a writ of execution occupies a somewhat peculiar position (*e*). It certainly is not a final judgment, nor indeed a judgment at all; but it has been said to be of such high regard that no averment can be admitted against it (*f*). This proposition, however, must be limited to the proceeding in which the return is made, for the same authority points out that

(*r*) *Holland* v. *Clark* (1842), 1 Y. & C. Ch. Cas. 151; compare *Bagot* (*Lord*) v. *Williams* (1824), 3 B. & C. 235 (judgment by default, and subsequent action for further sum).

(*s*) See p. 326, *ante*; *Re Greaves*, *Ex parte Whitton* (1880), 43 L. T. 480. The same principle applies to foreign judgments (*Nouvion* v. *Freeman* (1889), 15 App. Cas. 1); see title CONFLICT OF LAWS, Vol. VI., p. 282.

(*t*) *Byrne* v. *Frere* (1828), 2 Mol. 157, 180; compare *R.* v. *May* (1880), 5 Q. B. D. 382 (default of appearance on application to quash affiliation order); *Re Hampshire Co-operative Milk Co.*, *Purcell's Case* (1880), 29 W. R. 170.

(*a*) *Magnus* v. *National Bank of Scotland* (1888), 57 L. J. (CH.) 902; compare the old practice in Chancery of dismissing a bill without prejudice to the plaintiff's right to sue at law; see *Seymour* v. *Nosworthy* (1670), 1 Cas. in Ch. 155; *Rochester Corporation* v. *Lee* (1849), 1 Mac. & G. 467, 470; *Langmead* v. *Maple* (1865), 18 C. B. (N. S.) 255; compare *Collins* v. *Cave* (1858), 27 L. J. (EX.) 146 (bill dismissed for want of equity); *Peters* v. *Tilly* (1886), 11 P. D. 145 (failure of probate action for want of evidence of contents of will).

(*b*) *Coote* v. *Ford*, [1899] 2 Ch. 93, C. A.

(*c*) See p. 326, *ante*; *O'Connor* v. *Malone* (1839), 6 Cl. & Fin. 572, 596; *Bancroft* v. *Bancroft* (1864), 3 Sw. & Tr. 597, 599.

(*d*) *Carnegie* v. *Carnegie* (1886), 17 L. R. Ir. 430, C. A.; *R.* v. *Charlesworth* (1861), 1 B. & S. 460 (prosecution for misdemeanour); see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 356. Discontinuance without leave is no defence to a subsequent action (R. S. C., Ord. 26, r. 1). The withdrawal of a juror does not even put a legal end to the actual litigation (*Thomas* v. *Exeter Flying Post Co.* (1887), 18 Q. B. D. 822).

(*e*) See title EXECUTION.

(*f*) Com. Dig. (ed. 1822), tit. Retorn, G; *Harrington* v. *Taylor*, (1812), 15 East, 378, 383; *R.* v. *Howe* (1694), Comb. 295.

SECT. 4. Matters preventing Existence of Estoppel.

the remedy is by action for a false return (*g*), so that in subsequent proceedings it may be controverted. Thus a return of rescue is in that proceeding so far conclusive against the rescuer that it was the practice of the courts to grant a rule absolute for attachment in the first instance, without allowing him to show cause, and this was the *ratio decidendi* of a modern case (*h*). Indeed, it is said to be itself a conviction against the rescuer (*i*). But in an action for a false return he may show that he was not a rescuer in fact and recover damages on that footing (*j*).

The return was always conclusive in a proceeding by *sci. fa.* against the sheriff as to the value of the goods seized (*k*); and if he return goods to the value of the debt, and that they have been rescued, he must answer to the value returned (*l*): because the defendant is discharged by the seizure, and the plaintiff has no other remedy (*m*). It is also conclusive against him as to the amount of fees taken by his bailiff, since he thereby recognises the act done as his own (*n*).

But a return that he has seized the goods of the judgment debtor is not conclusive that the goods seized were the judgment debtor's, even against the sheriff himself, in an action by the creditor for a false return; because if that were not the case the creditor sustained no damage (*o*). Nor is a sheriff estopped by a return of *fieri feci* from showing that the execution debtor had a defeasible title which has been defeated by matter subsequent (*p*). It need hardly be added that a return which is true as far as it goes is not

(*g*) Com. Dig. (ed. 1882), tit. Retorn, G, citing (1772), Lofft, 372; *Davenant* v. *Salisbury* (*Bishop*) (1672), 1 Vent. 223,224; see title SHERIFFS AND BAILIFFS.

(*h*) *Gobby* v. *Dewes* (1833), 10 Bing. 112; *Brasyer* v. *Maclean* (1875), L. R. 6 P. C. 398, 405.

(*i*) Com. Dig. tit. Rescous, D, 6; *R.* v. *Pember* (1735), Lee *temp.* Hard. 112; 2 Dyer, 212 a, pl. 36; *Fawcet* v. *Catten* (1674), T. Jo. 39; note to *Mildmay* v. *Smith* (1671), 2 Saund. 343; 2 Wms. Saund. (ed. 1871), 739; *R.* v. *Philips* (1732), Barnes, 429.

(*j*) *Brasyer* v. *Maclean, supra.* In such an action the plaintiff need not prove malice or want of probable cause. In other respects it has some analogy to an action for maliciously instituting legal proceedings of such a kind as could not terminate in favour of the person complaining of them, who is therefore not required to prove such termination (*Steward* v. *Gromett* (1859), 7 C. B. (N. S.) 191); see title MALICIOUS PROSECUTION.

(*k*) The sheriff by his return is charged to the full value at all events, except the goods be perishable, or lost by the act of God (*Clerk* v. *Withers* (1704), 6 Mod. Rep. 290, *per* HOLT, C.J., at pp. 293, 296); see title SHERIFFS AND BAILIFFS.

(*l*) *Clerk* v. *Withers, supra*, at p. 299, following *Mildmay* v. *Smith, supra.*

(*m*) *Stimson* v. *Farnham* (1871), L. R. 7 Q. B. 175, 179, 180; *Slie* v. *Finch* (1618), 2 Roll. Rep. 57.

(*n*) Com. Dig. (ed. 1822), tit. Retorn, G. Therefore he was liable in civil proceedings under stat. (1587) 29 Eliz. c. 4 (repealed by Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 39), to treble damages at the suit of the party grieved, if it appeared by his return that greater fees had been taken than that statute allowed (citing ASHURST, J., *Woodgate* v. *Knatchbul* (1787), 2 Term Rep. 148, 154); distinguish *Scarfe* v. *Halifax* (1840) 7 M. & W. 288.

(*o*) *Stimson* v. *Farnham, supra*, dissenting from the *dictum* of Lord CAMPBELL, C.J., in *Remmett* v. *Lawrence* (1850), 15 Q. B. 1004, at p. 1010.

(*p*) *Standish* v. *Ross* (1849), 3 Exch. 527, following *Brydges* v. *Walford* (1817), 6 M. & S. 42.

to be taken to mean more than it says, so as to estop the sheriff from denying what he never affirmed (*q*).

SUB-SECT. 8.—*Estoppel against Estoppel.*

Estoppel against estoppel.

502. It has been said by Lord Coke (*r*), and the statement has been repeated in text-books of authority (*s*), that "estoppel against estoppel doth put the matter at large." In a recent case, however, the judge declined to act on this principle, for which he could "find no authority" other than text-books (*t*). The result of this decision is that an existing estoppel arising from a judgment *inter partes* is not affected by a subsequent judgment, even though it be *in rem*, at all events where the parties to the later judgment are different, or are not both representing the same interest as in the earlier proceedings (*a*). On the other hand, a high authority has suggested that had there been conflicting judgments *in rem* in the case under consideration as to the status of the same highway, the effect "might have been to set the whole matter at large" (*b*).

SUB-SECT. 9.—*Second Action begun before Judgment in First.*

Later action begun before determination of earlier.

503. A *lis pendens* without judgment creates no estoppel (*c*), and it seems that a judgment cannot take effect as a *res judicata*, or an estoppel unless it was given before the proceedings in which it is relied upon were commenced (*d*).

(*q*) *Scarfe* v. *Halifax* (1840), 7 M. & W. 288 (sheriff's return that he had levied of the plaintiff's chattels £67 does not affirm that £30 further, demanded for charges, was also the plaintiff's money). This is really an application of the maxim that "estoppels must be certain to every intent" (see p. 379, *post*); and see *Remmett* v. *Lawrence* (1850), 15 Q. B. 1004, 1010.

(*r*) Co. Litt. 352 b.

(*s*) See, for example, 2 Smith, L. C., 11th ed., p. 750.

(*t*) *Poulton* v. *Adjustable Cover and Boiler Block Co.*, [1908] 2 Ch. 430, C. A., *per* PARKER, J. The only authorities cited appear to have been *Priestman* v. *Thomas* (1884), 9 P. D. 70, 210, C. A., and *R.* v. *Hutchings* (1881), 6 Q. B. D. 300, C. A., of which the former, as the learned judge pointed out, did not rest on the doctrine in question, but upon the practice of the Probate Division as to the revocation of its own decrees; see note (*d*), p. 338, *ante*.

(*a*) *Poulton* v. *Adjustable Cover and Boiler Block Co.*, *supra*, where a party against whom judgment had been recovered for an injunction and an inquiry as to damages, in an action for infringement of a patent, the validity of which was in issue, having subsequently, suing as a member of the public, obtained an order (in the nature of a judgment *in rem*; see p. 328, *ante*) for revocation of the patent, was not allowed at the inquiry to set up the invalidity of the patent in extinction or reduction of damages; affirmed in C. A. on somewhat different grounds (*ibid.*).

(*b*) *R.* v. *Hutchings* (1881), 6 Q. B. D. 300, C. A., *per* Lord SELBORNE, L.C., at p. 303. As to the application of this doctrine to estoppel by representation, see *Dixon* v. *Kennaway & Co.*, [1900] 1 Ch. 833, *per* FARWELL, J., at p. 840; p. 381, *post*.

(*c*) *Hitchin* v. *Campbell* (1771), 2 Wm. Bl. 779, 830. But the pendency of another suit for the same cause might formerly be pleaded in abatement, not on the ground of estoppel, but for the prevention of vexatious litigation (see Bullen and Leake, Precedents of Pleadings, 3rd ed., p. 473, note (c); *Henry* v. *Goldney* (1846), 15 M. & W. 494). The object is now attained by application to stay; see *M'Henry* v. *Lewis* (1882), 22 Ch. D. 397, C. A.; and title PRACTICE AND PROCEDURE.

(*d*) *Houstoun* v. *Sligo* (*Marquis*) (1885), 29 Ch. D. 448, C. A. (Irish judgment); compare *The Delta* (1876), 1 P. D. 393 (foreign judgment).

Part III.—Estoppel Quasi of Record.

SECT. 1. **Judgments of Courts not of Record.**

SECT. 1.—*Judgments of Courts not of Record.*

Principle of estoppel extended to tribunals not of record.

504. The doctrine of estoppel by record has been extended by analogy to the decisions of all tribunals which have jurisdiction, whether by the law of this country (*e*), or by the consent of parties (*f*), or by the law of the country to whose tribunals the parties have, or may be presumed from their conduct to have, submitted themselves (*g*).

The estoppel which arises from the decisions of such tribunals has been conveniently named "estoppel quasi of record" (*h*). The number and importance of estoppels of this character has been much diminished by modern legislation. The ecclesiastical courts are not courts of record; and down to 1857 the jurisdiction as to grants of probate and letters of administration, and matrimonial causes (not being proceedings for damages for *crim. con.*, or for divorce *à vinculo* for causes other than nullity) belonged to them. The decrees of the courts created in that year with jurisdiction in these matters, and those of the High Court of Justice, to which that jurisdiction has been transferred, are matters of record (*i*) and fall within the rules already discussed.

Ecclesiastical courts.

But before the legislation referred to the final decrees of the ecclesiastical courts, whether relating to grants of probate and administration (*k*) or to matrimonial suits, were conclusive between the parties; and where they created or affected the status of a party, upon all persons, as being in the nature of judgments *in rem* (*l*); and the same principles are still applicable to the

(*e*) "The law hath respect, not only to courts of record and judicial proceedings there, but even to all other proceedings where the person who gives judgment or sentence hath judicial authority" (*Phillips* v. *Bury* (1694), 1 Ld. Raym. 5; see the judgment of Lord HOLT, C.J., 2 Term Rep. 346, at p. 357; compare *R.* v. *Grundon* (1775), 1 Cowp. 315).

(*f*) A decree to be admissible evidence must be that of a court known to the law of this country, or of competent jurisdiction, or must be founded on voluntary submission; see *Rogers* v. *Wood* (1831), 2 B. & Ad. 245, 256. The decision of an arbitrator upon the construction of an agreement which was referred to him for interpretation is conclusive between the parties in an action for subsequent breaches of the same agreement (*Gueret* v. *Audouy* (1893), 62 L. J. (Q. B.) 633, C. A.).

(*g*) As to foreign judgments, see title CONFLICT OF LAWS, Vol. VI., pp. 284, 286.

(*h*) This expression seems to have been originated by the late Mr. J. W. Smith; see 2 Smith, L. C., 11th ed., p. 773.

(*i*) See Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 23; Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 6; Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 16.

(*k*) *Noel* v. *Wells* (1668), 1 Lev. 235; *Allen* v. *Dundas* (1789), 3 Term Rep. 125; *Allen* v. *M'Pherson* (1847), 1 H. L. Cas. 191.

(*l*) *Bunting* v. *Lepingwell* (1585), 4 Co. Rep. 29 a; *Kenn's Case* (1606), 7 Co. Rep. 42 b, 43 b; *Da Costa* v. *Villa Real* (1734), 2 Stra. 961; *Harrison* v. *Southampton Corporation* (1853), 22 L. J. (CH.), 372; reversed on the ground of fraud and collusion (*ibid.*, 722, C. A.). A decree in a jactitation suit, not in affirmance of the marriage, merely operated *in personam*; see *Kingston's (Duch*

decrees of ecclesiastical courts in matters over which they retain their jurisdiction (*m*).

Admiralty courts.

505. The Admiralty Court was not a court of record (*n*), and the conclusiveness of its sentences rested on the general principle laid down by Lord Holt (*o*); but their conclusiveness (so far as the jurisdiction enabled them to give relief) (*p*) has never been doubted (*q*).

Courts-martial and naval courts.

506. It is assumed that the sentence of a court-martial might be pleaded by way of estoppel and relied on as conclusive between the parties (*r*); but there seems to be no direct decision upon the point (*s*). The order of a naval court under the powers conferred by the Merchant Shipping Act, 1894, is expressly made "in any subsequent legal proceedings conclusive as to the rights of the parties" (*t*). Therefore such an order made on the complaint of the master finding seamen guilty of wilful disobedience and neglect of duty, and ordering their discharge and forfeiture of their wages, is conclusive in subsequent proceedings between the seamen and their owners for wages and wrongful dismissal (*a*).

Domestic tribunals.

507. The principle of conclusiveness has been applied to decisions not of record in numerous cases, of which the following are examples:—A sentence of expulsion passed by a college (*b*); of deprivation by a college visitor (*c*); of trustees dismissing a

Case (1776), 2 Smith, L. C., 11th ed., 731, 738. The case of *Jones* v. *Bow* (1692), Carth. 225, appears to conflict with this view, but though the sentence there relied on is said to have been in a jactitation suit, its form, that there was no marriage, and that the parties might marry separately, suggests a nullity suit (compare the sentence in *Kenn's Case* (1606), 7 Co. Rep. 42 b, 43 b). There may, therefore, be some error in the report; see also *Meadows* v. *Kingston* (*Duchess*) (1775), Amb. 756.

(*m*) *R.* v. *Grundon* (1775), 1 Cowp. 315, 322; see cases as to sentences of deprivation cited by Lord HOLT, C.J., in *Phillips* v. *Bury* (1694), 2 Term Rep. 346, 354; *Kingston's* (*Duchess*) *Case*, *supra*.

(*n*) 3 Bl. Com., 4th ed., 69.

(*o*) See note (*e*), p 362, *ante*.

(*p*) See *Nelson* v. *Couch* (1863), 15 C. B. (N. S.) 99.

(*q*) *Hughes* v. *Cornelius* (1681), 2 Show. 232; and see *Lindo* v. *Rodney* (1749), cited 2 Doug. (K. B.), 612, 617.

(*r*) *Hannaford* v. *Hunn* (1825), 2 C. & P. 148, *per* ABBOTT, C.J., at p. 155; and see 2 Smith, L. C., 11th ed., 783.

(*s*) See *R.* v. *Suddis* (1801), 1 East, 306, 316, 317; *Grant* v. *Gould* (*Sir Charles*) (1792), 2 Hy. Bl. 69, 100. The civil courts have no jurisdiction to inquire into the sentences of courts administering "martial law," but this rests upon a different principle; see *A.-G. for the Cape of Good Hope* v. *Van Reenen*, [1904] A. C. 114, P. C.; *Tilonko* v. *A.-G. of Natal*, [1907] A. C. 93, P. C.

(*t*) 57 & 58 Vict. c. 60, s. 483 (2).

(*a*) *Hutton* v. *Ras Steam Shipping Co., Ltd.*, [1907] 1 K. B. 834, C. A. The discharge would seem to be in the nature of a judgment *in rem*, and so perhaps the forfeiture (which might be described as a condemnation) of their wages; but not so the finding of guilty (*Caine* v. *Palace Steam Shipping Co.*, [1907] 1 K. B. 670, C. A.; affirmed *sub nom. Palace Shipping Co., Ltd.* v. *Caine*, [1907] A. C. 386; and see note (*f*), p. 344, *ante*.

(*b*) *R.* v. *Grundon* (1775), 1 Cowp. 315. The court of the vice-chancellor of a university, is, by reason of his power to imprison, a court of record (*Kemp* v. *Neville* (1861), 10 C. B. (N. S.) 523).

(*c*) *Phillips* v. *Bury* (1694), 1 Ld. Raym. 5.

SECT. 1. Judgments of Courts not of Record.

schoolmaster (*d*); an order of the General Medical Council (*e*); the award of an arbitrator (*f*). So orders of commissioners of sewers (not made between the parties litigant) have been held admissible as evidence of reputation, on the express ground that they were adjudications of a court of competent jurisdiction over the subject-matter (*g*).

It seems hardly necessary to mention that an estoppel quasi of record will be prevented from arising by any of the matters which would prevent estoppel by record (*h*).

SECT. 2.—*Approbation and Reprobation.*

Party may not approbate and reprobate.

508. On the principle that a person may not approbate and reprobate, a species of estoppel has arisen which seems to be intermediate between estoppel by record and estoppel *in pais*, and may conveniently be referred to here. Thus a party cannot, after taking an advantage under an order (*e.g.*, payment of costs), be heard to say that it is invalid and ask to set it aside (*i*), or to set up to the prejudice of persons who have relied upon it a case inconsistent with that upon which it was founded (*k*); nor will he be allowed to

(*d*) *Doe* d. *Davy* v. *Haddon* (1783), 3 Doug. (K. B.) 310, 312.

(*e*) *Hill* v. *Clifford*, [1907] 2 Ch. 236, 251, C. A.; affirmed on other points, *sub nom. Clifford* v. *Timms*, [1908] A. C. 12; see Medical Act, 1858 (21 & 22 Vict. c. 90), s. 29; Dentists Act, 1878 (41 & 42 Vict. c. 33), s. 13; and title MEDICINE AND PHARMACY.

(*f*) *Gueret* v. *Audouy* (1893), 62 L. J. (Q. B.) 633, C. A., cited p. 362, *ante;* but the award must be in respect of the very matter in dispute. It is not sufficient that it can be made by inference a decision upon it. Where by the submission to arbitration the arbitrators required certain qualifications, a party who took part in the proceedings in ignorance of the fact that an arbitrator appointed by the other party was not qualified was held not to be estopped from denying the validity of the award (*Jungheim, Hopkins & Co.* v. *Foukelmann*, [1909] 2 K. B. 948; see p. 389, *post*). The verdict of a jury assessing compensation under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), and the signed judgment thereon of the sheriff, are constituted a record by s. 50 (*Newall* v. *Elliot* (1863), 1 H. & C. 797); and see note (*c*), p. 353, *ante.*

(*g*) *R.* v. *Leigh* (1839), 10 Ad. & El. 398, 411.

(*h*) See *Harrison* v. *Southampton Corporation* (1853), 4 De G. M. & G. 137, C. A. (fraud); *Harris* v. *Willis* (1855), 15 C. B. 710 (want of jurisdiction); *Blackham's Case* (1709), 1 Salk. 290 (matter not in issue); and other cases cited at pp. 351 *et seq.*, *ante.* As to estoppel by the judgments of foreign or colonial courts, including those of Scotland and Ireland, see title CONFLICT OF LAWS, Vol. VI., pp. 281—301. The following additional cases on the subjects there treated may also be referred to:—*Jeannot* v. *Fuerst* (1909), 100 L. T. 816 (submission to jurisdiction); *Emanuel* v. *Symon*, [1908] 1 K. B. 302, C. A.

(*i*) *Tinkler* v. *Hilder* (1849), 4 Exch. 187. In *Gandy* v. *Gandy* (1885), 30 Ch. D. 57, C. A., a husband who, after decree of judicial separation awarding the custody of children to his wife, had escaped an order for increase of alimony, on the ground, *inter alia*, that he was bound by a separation deed to provide for the children, was not allowed to contend that as a result of the order depriving him of their custody he had been released from his obligation under the deed; compare *Caird* v. *Moss* (1886), 33 Ch. D. 22, C. A.

(*k*) *Roe* v. *Mutual Loan Fund* (1887), 19 Q. B. D. 347, C. A. (a bankrupt having in his statement of affairs returned the defendants as secured creditors on the footing that their bill of sale was good, obtained the sanction of the court to a composition of 2*s.* 6*d.* in the £, thereby obtaining an advantage and inducing the creditors, including the defendants, to alter their position, was not allowed afterwards to say that the bill of sale was bad, and by suing the defendants

SECT. 2. Approbation and Reprobation.

go behind an order made in ignorance of the true facts to the prejudice of third parties who have acted on it (*l*). And conversely, it is contrary to good faith and equity for a person who, though not a party to the proceedings and not bound by the judgment therein, knowing all the circumstances and deliberately taking the benefit of the judgment, stood by when he might have taken steps, by becoming a party or otherwise, to controvert it, afterwards to raise the question determined by it a second time (*m*). But the mere fact of a man with two alternative remedies having in ignorance of his rights pursued one and received a payment thereby, will not prevent him from afterwards pursuing the other, if he is able and willing to restore what he has received so as to prevent any wrong being done to any person by his change of remedy (*n*). But a judgment creditor who, after succeeding in interpleader proceedings, takes out of court the money paid into court as representing the value of the goods to abide the event, cannot afterwards seize the same goods in respect of the unsatisfied balance of the same judgment debt, so as to get the value of the goods twice over (*o*).

Part IV.—Estoppel by Deed.

SECT. 1.—*In General.*

Estoppel by deed.

509. Estoppel by deed (*a*) is based on the principle that when a person has entered into a solemn engagement by deed under his

on that footing to obtaining a further advantage applying the *dicta* of HONYMAN, J., in *Smith* v. *Baker* (1873), L. R. 8 C. P. 350, at p. 357)); followed, *Comitti* v. *Maher* (1905), 94 L. T. 158; compare *Scarf* v. *Jardine* (1882), 7 App. Cas. 345, 353, 360; *Hone* v. *Boyle* (1891), 27 L. R. Ir. 137, C. A.; *Neale* v. *Electric and Ordnance Accessories Co., Ltd.*, [1906] 2 K. B. 558, C. A.; *McGlade* v. *Royal London Mutual Insurance Society, Ltd.*, [1910] 2 Ch. 169, C. A. (plaintiff cannot sue as member of a company on the footing that the resolution by which it was converted from a friendly society into a company was invalid).

(*l*) *Re Eyton, Bartlett* v. *Charles* (1890), 45 Ch. D. 458; compare *Re Bond, Ex parte Bacon* (1881), 17 Ch. D. 447, 451, C. A.

(*m*) *Re Lart, Wilkinson* v. *Blades*, [1896] 2 Ch. 788, 795; compare *Roberts* v. *Maddocks* (1843), 13 Sim. 549, 558, 559. See also *Tredegar* (*Lord*) v. *Windus* (1875), L. R. 19 Eq. 607 (a party having sued in equity on a policy alleging it to be void in law, and his suit having been dismissed on the merits, restrained from afterwards suing at law on the footing that the policy was legally valid); following *Phelps* v. *Prothero* (1855), 7 De G. M. & G. 722 (plaintiff after successfully suing in equity for specific performance restrained from suing at law for damages, but granted an inquiry in the equity suit for the same purpose, although the facts afforded no defence to an action at law, which was for relief different from that sought in equity; see *Phelps* v. *Prothero* (1855), 16 C. B. 370; compare *Bushby* v. *Ellis* (1853), 17 Beav. 279.

(*n*) *Re Collie, Ex parte Adamson* (1878), 8 Ch. D. 807, 818, C. A.; compare *Curtis* v. *Williamson* (1874), L. R. 10 Q. B. 57.

(*o*) *Haddow* v. *Morton*, [1894] 1 Q. B. 565, C. A.

(*a*) Co. Litt. 352 b; 2 Bl. Com. 295; Bac. Abr., tit. Leases and Terms for Years, O, ed. 1832, pp. 850 *et seq.*; Shep. Touch. 53 showing that estoppel is not confined to indentures, but may be raised by a deed poll. There is no case of estoppel by deed poll; but see *Right* d. *Jefferys* v. *Bucknell* (1831), 2 B. & Ad. 278, *per* Lord TENTERDEN, C.J., at p. 282; *Re Ghost's Trusts* (1883), 49 L. T. 588, 590.

SECT. 1. In General.

A rule of evidence.

hand and seal as to certain facts, he shall not be permitted to deny any matter which he has so asserted (*b*). It is a rule of evidence according to which certain evidence is taken to be of so high and conclusive a nature as to admit of no contradictory proof (*c*). The estoppel being a rule of common law, must be "certain to every intent" without any ambiguity (*d*); but the averment relied upon to work an estoppel may be contained in the recital or in any part of the deed (*e*).

Effect of recitals.

510. A person is bound by the recitals in a deed to which he is a party (*f*) whenever they refer to specific facts (*g*), and are certain, precise, and unambiguous (*h*). He is not bound by inferences which

In *Cropper* v. *Smith* (1884), 26 Ch. D. 700, C. A. (an action arising upon the assignment of a patent), COTTON, L.J., at p. 705, seems to assume that an estoppel may arise on a deed poll; BOWEN, L.J., however, at p. 708, held that there was no estoppel by deed "because the people who claim against [the patentee] are not parties or privies to the deed," but this principle would clearly apply to all deeds poll; FRY, L.J., at p. 713, expresses no opinion as to the validity of the argument "that estoppel may arise between the maker of a deed poll and all to whom it is addressed, in this case, all men." The court were unanimous that no estoppel arose on the facts, and on this they were affirmed (*Smith* v. *Cropper* (1885), 10 App. Cas. 249, 259), without reasons given; as to the meaning and effects of deeds in general, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 355.

(*b*) *Bowman* v. *Taylor* (1834), 2 Ad. & El. 278, *per* TAUNTON, J., at p. 291; *Bonner* v. *Wilkinson* (1822), 1 Dow. & Ry. (K. B.) 328; *Roberts* v. *Security Co., Ltd.* (1896), 13 T. L. R. 79, C. A., where contents of a deed were approved but afterwards execution was refused and the deed not recognised, no estoppel arose as to matters recited; *Foligno* v. *Martin* (1852), 22 L. J. (CH.) 502.

(*c*) Note 306 to Co. Litt. 352 b; *Simm* v. *Anglo-American Telegraph Co.* (1879), 5 Q. B. D. 188, *per* BRETT, L.J., at p. 206; *Low* v. *Bouverie*, [1891] 3 Ch. 82, 101, C. A.; and, among older cases, *Rainsford* v. *Smith* (1561), Dyer, 196 a; *Nash* v. *Turner* (1794), 1 Esp. 217; *Jones* v. *Williams* (1817), 2 Stark. 52; *Harding* v. *Ambler* (1838), 3 M. & W. 279.

(*d*) *Heath* v. *Crealock* (1874), 10 Ch. App. 22; *Re Holland, Gregg* v. *Holland* (1901), 85 L. T. 304. In ejectment by lessor to recover a cellar, it was held that plaintiff was not estopped by his lease from showing that the cellar was not comprised in it (*Doe* d. *Freeland* v. *Burt* (1787), 1 Term Rep. 701; see also *Doe* d. *Butcher* v. *Musgrave* (1840), 1 Mac. & G. 625).

(*e*) *Shelley* v. *Wright* (1737), Willes, 9; *Lainson* v. *Tremere* (1834), 1 Ad. & El. 792; *Bowman* v. *Taylor*, *supra*, at p. 293; *Crofts* v. *Middleton* (1855), 2 K. & J. 194. But *quære* whether the words coming after "in witness whereof" are part of the deed (*Pearce* v. *Morrice* (1834), 2 Ad. & El. 84). The statement of the date is no estoppel, because a deed operates from date of delivery (*Taylor* v. *M'Calmont* (1855), 4 W. R. 59).

(*f*) 1 Roll Abr., Estoppel, P, pl. 1, citing *Doddington's Case* (1594), 2 Co. Rep. 32 b, 33 b, 7; *Shelley* v. *Wright*, *supra*; *Lainson* v. *Tremere*, *supra*; *Bowman* v. *Taylor*, *supra*, *per* Lord DENMAN, C.J., at p. 290, expressly overruling Co. Litt. 352 b [h]; *Jones* v. *Williams* (1817), 2 Stark. 52; *Pearl Life Assurance Co.* v. *Johnson*, [1909] 2 K. B. 288, Div. Ct.

(*g*) *Salter* v. *Kidley* (1689), 1 Show. 58; *Bensley* v. *Burdon* (1830), 8 L. J. (O. S.) (CH.) 85, as explained in *Right* d. *Jefferys* v. *Bucknell* (1831), 2 B. & Ad. 278, *per* Lord TENTERDEN, C.J., at p. 282; *Bulley* v. *Bulley* (1874), 9 Ch. App. 739, 751. Recital of devise held to give rise to estoppel (*Clarke* v. *Hall* (1888), 24 L. R. Ir. 316, C. A., affirming S. C. 22 L. R. Ir. 383, *per* MORRIS, C.J., at p. 387). Recital that father entitled in fee binding a son party with father to mortgage deed (*Guardian Assurance Co.* v. *Avonmore* (*Viscount*) (1872), 6 I. R. Eq. 391); and see title BONDS, Vol. III., p. 90.

(*h*) *Right* d. *Jefferys* v. *Bucknell*, *supra*; *Heath* v. *Crealock* (1874), 10 Ch. App. 22, 30, C. A.

may be drawn from the statements in a deed (*i*), and a recital which is true so far as it goes, though incomplete, does not prevent the party from averring what is necessary to complete the truth (*k*).

No estoppel by implication.

511. Nothing is to be taken by way of "intendment," so that there is no such thing as an estoppel by something implied (*l*); and the averment relied upon to work an estoppel must be of something particular, not of a generality (*m*). A covenant that a man has a thing is not equivalent to a positive statement that he has it, and consequently a recital of title in order to work an estoppel must aver precisely that the person entitled is seised in fee or has the legal estate (*n*), and thus the operative words of an ordinary conveyance by grant create no estoppel (*o*).

Where the truth appears.

512. Where the truth appears by the same instrument there can be no estoppel (*p*), unless a clear intention is expressed in the deed to disregard the rule (*q*).

When estoppel can be set up.

513. And a person who knows the truth of the circumstances under which a deed has been executed, whether he has acquired

(*i*) *Crofts* v. *Middleton* (1855), 2 K. & J. 194, 204; *General Finance, Mortgage and Discount Co.* v. *Liberator Permanent Benefit Building Society* (1878), 10 Ch. D. 15; *Onward Building Society* v. *Smithson*, [1893] 1 Ch. 1, C. A.; *Williams* v. *Pinckney* (1897), 67 L. J. (CH.) 34, C. A.

(*k*) *Lovett* v. *Lovett*, [1898] 1 Ch. 82.

(*l*) *Bowman* v. *Taylor* (1834), 2 Ad. & El. 278, 292; *Right* d. *Jefferys* v. *Bucknell* (1831), 2 B. & Ad. 278, 282; compare *Doe* d. *Shelton* v. *Shelton* (1835), 3 Ad. & El. 265, 283, where it was held that a person executing a deed of conveyance is not estopped by recitals contained in anterior deeds which go to make up his title; and *Cutler* v. *Bower* (1848), 11 Q. B. 973, 988; *Gillett* v. *Abbott* (1838), 7 Ad. & El. 783.

(*m*) *Lainson* v. *Tremere* (1834), 1 Ad. & El. 792, *per* Lord DENMAN, C.J., at p. 801, quoting 1 Roll. Abr., Estoppel, P, pl. 1 (see p. 366, note (*f*), *ante*), and following *Salter* v. *Kidley* (1689), 1 Show. 58; and *Bensley* v. *Burdon* (1830), 8 L. J. (O. S.) (CH.) 85.

(*n*) *General Finance, Mortgage and Discount Co.* v. *Liberator Permanent Benefit Building Society*, *supra*, following *Right* d. *Jefferys* v. *Bucknell*, *supra*; *Heath* v. *Crealock* (1874), 10 Ch. App. 22, C. A., followed by *Williams* v. *Pinckney*, *supra*; *Re Horton*, *Horton* v. *Perks*, *Hoxton* v. *Clark* (1884), 51 L. T. 420, 423; compare *Doe* d. *North* v. *Webber* (1837), 3 Bing. (N. C.) 922; and *Rayson* v. *Adcock* (1863), 9 Jur. (N. S.) 800, for application of the principle in the case of copyholds.

(*o*) *Heath* v. *Crealock*, *supra*; compare *Crofts* v. *Middleton* (1855), 2 K. & J. 194, for the case of lease and release. In an innocent conveyance there can be no estoppel (*Lovett* v. *Lovett*, *supra*, *per* ROMER, J., at p. 88). As to the meaning of the words "give" or "grant" in a deed, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 48.

(*p*) *Right* d. *Jefferys* v. *Bucknell*, *supra*, following Co. Litt. 352 b; Com. Dig., Estoppel, E, 2; *Hermitage* v. *Tomkins* (1699), 1 Ld. Raym. 729; *Pargeter* v. *Harris* (1845), 7 Q. B. 708; *Saunders* v. *Merryweather* (1865), 3 H. & C. 902.

(*q*) *Jolly* v. *Arbuthnot* (1859), 4 De G. & J. 224; followed in *Morton* v. *Woods* (1869), L. R. 4 Q. B. 293, Ex. Ch. In this case it was held that where one party executes a deed whereby he attorns tenant to the other so as to give him a right of distress, he is estopped from denying the existence of that right although the instrument shows on its face that there is no reversion in the other party which would support it. A mortgagor's right of distress is now provided for under the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 18, so that the number of cases to which the above rule would apply is still further limited.

SECT. 1. In General.

such knowledge personally or through his agent, cannot set up an estoppel in his own favour, if the circumstances were such as to make the deed invalid between the original parties (*r*).

Principal and agent.

514. Estoppel may be set up against a principal by which he is concluded from repudiating alterations made by his agent in a deed subsequent to its execution by the principal, if in consequence of the alterations the person setting up the estoppel has altered his position (*s*). And he may even be estopped from relying upon the terms of a deed for its true interpretation when both his agent and the person setting up the estoppel have acted under the deed in a manner at variance with the exact terms of the deed (*t*).

SECT. 2.—*Upon whom binding.*

Effect of estoppel.

515. Estoppel only binds the parties (including their privies) (*a*), or one or other of them, to the deed containing the representation relied upon, and does not affect the rights of strangers to the deed (*b*), and for this reason it is said that estoppel by deed ought to be mutual or reciprocal. And a person may be a stranger to his own deed when he is suing, or being sued, not in his own right, but in right of another (*c*).

When a recital is intended to be a statement which all the parties to a deed have mutually agreed to admit as true, it is an estoppel upon all; but when it is intended to be the statement of one party only, the estoppel is confined to that party. The intention is a question of construction in each case (*d*).

(*r*) *Burgis* v. *Constantine*, [1908] 2 K. B. 484, C. A., *per* GORELL BARNES, P., at p. 492 (quoting and approving BIGHAM, J., in the court below), wherein the circumstances were such as to make the deed invalid between the original parties; compare *Heath* v. *Crealock* (1873), L. R. 18 Eq. 215, 242. In any case it is doubtful if a third party can set up an estoppel upon an invalid deed; see note (*h*), p. 369, *post*. If a person consents to join in a conveyance, being told generally there are objections, it must be taken that he has inquired into the nature of the objections, and he cannot afterwards raise any question as to the extent of his information; see *Cholmondeley* v. *Clinton* (1817), 2 Mer. 171, *per* GRANT, M.R., at p. 355, following *Braybroke* (*Lord*) v. *Inskip* (1803), 8 Ves. 417; *Joyce* v. *Rawlins* (1870), 40 L. J. (CH.) 105. This is properly part of the doctrine of notice.

(*s*) *Holdsworth* v. *Lancashire and Yorkshire Insurance Co.* (1907), 23 T. L. R. 521.

(*t*) *Ibid.*; *Hough* v. *Guardian Fire and Life Assurance Co.* (1902), 18 T. L. R. 273. Both these are cases on policies of insurance involving questions of agency, and the ground of the decision in each is the principle of estoppel *in pais* rather than any principle peculiar to estoppel by deed.

(*a*) As to privies, see p. 343, *ante*, and Co. Litt. 352 a. One claiming under a grantor is estopped from taking advantage of a technical defect in grant (*Howard* v. *Shrewsbury* (*Earl*) (1867), L. R. 3 Eq. 218). A person who executes a memorandum indorsed on a deed may be bound by recitals in the deed as if he were a party (*Doe* d. *Gainsford* v. *Stone* (1846), 3 C. B. 176).

(*b*) *Paine* v. *Jones* (1874), L. R. 18 Eq. 320; *Mowatt* v. *Castle Steel and Iron Works Co.* (1886), 34 Ch. D. 58, 63, C. A.; *Doe* d. *Marchant* v. *Errington* (1840), 6 Bing. (N. C.) 79; *Gaunt* v. *Wainman* (1836), 3 Bing. (N. C.) 69; *Cracknall* v. *Janson* (1879), 11 Ch. D. 1, C. A., *per* FRY, J., at p. 11.

(*c*) *Metters* v. *Brown* (1863), 1 H. & C. 686, 693, following *Doe* d. *Hornby* v. *Glen* (1834), 1 Ad. & El. 49, where it was held that an agreement entered into by an executor *de son tort* did not bind him after he had become rightful administrator.

(*d*) *Carpenter* v. *Buller* (1841), 8 M. & W. 209; *Young* v. *Raincock* (1849), 7

SECT. 3.—*Exceptions.*

SUB-SECT. 1.—*Fraud.*

Exceptions to creation of estoppel.

516. In so far as a deed is void on the ground that it was obtained by fraud, force, or other foul practice, or is a forgery, no estoppel can arise upon it (*e*). But upon the principle that no one can allege his own fraud in order to invalidate his own deed, it follows that a person will be precluded from opening an estoppel arising from admissions in a deed he has fraudulently obtained (*f*).

False representation of contents of deed.

517. Although the circumstances in which a deed has been executed may be such as to justify the plea as between the parties of "*non est factum*" (*g*), it is still a doubtful question whether, if there be a false representation respecting the contents of a deed, a person who is an educated person, and who might, by very simple means, have satisfied himself as to what the contents of the deed really were, may not, by executing it negligently, be estopped as between himself and a person who innocently acts upon the faith of the deed being valid, and who accepts an estate under it (*h*). So, too, it has been questioned whether a person can be permitted to rely on an estoppel by deed in his own favour when the party against whom the estoppel is being set up was induced to make the representations relied on by the fraud of a third party acting, or pretending to act, on behalf of the person setting up the estoppel as well as on his own behalf, even though the person setting up the estoppel was wholly innocent of any complicity in the fraud (*i*).

Illegality.

518. A difficult problem occurs in connection with deeds which are illegal or made for an illegal purpose, for in certain cases such

C. B. 310; followed in *Stroughill* v. *Buck* (1850), 14 Q. B. 781, and *Wiles* v. *Woodward* (1850), 5 Exch. 557. The good sense of the much-quoted *dictum* of Co. Litt. 47 b and 352 a, that estoppel by deed should be mutual, is questioned in Bac. Abr., Leases and Terms for Years, O, ed. 1832, p. 851, on the ground that an estoppel may arise upon a deed poll, and it is clearly inconsistent with the proposition in the text. The *dictum* serves, perhaps, to express the principle that there can be no operation of estoppel by deed collateral to the operation of the deed itself; see p. 372, *post*.

(*e*) 2 Bl. Com. 309; *Ruben* v. *Great Fingall Consolidated*, [1906] A. C. 439, 446. For the circumstances under which a deed may be shown to be void, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 404 *et seq.*

(*f*) *Montefiori* v. *Montefiori* (1762), 1 Wm. Bl. 363; *Doe* d. *Roberts* v. *Roberts* (1819), 2 B. & Ald. 367.

(*g*) As to the plea of "*non est factum*," see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 404; *Howatson* v. *Webb*, [1908] 1 Ch. 1, C. A., affirming S. C. [1907] 1 Ch. 537.

(*h*) *Hunter* v. *Walters* (1871), 7 Ch. App. 75, *per* MELLISH, L.J., at p. 87; approved by FARWELL, L.J., in *Howatson* v. *Webb*, *supra*, at p. 3, distinguishing *Swan* v. *North British Australasian Co.* (1862), 7 H. & N. 603, which applied to the case of a forged transfer of shares the principles of representation by conduct established by *Pickard* v. *Sears* (1837), 6 Ad. & El. 469, as explained by *Freeman* v. *Cooke* (1848), 2 Exch. 654; *Lloyds Bank, Ltd.* v. *Bullock*, [1896] 2 Ch. 192; *King* v. *Smith*, [1900] 2 Ch. 425; as to the execution of a deed, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 382 *et seq.*, and in the case of a blind or illiterate person, *ibid.*, p. 393.

(*i*) *Balkis Consolidated Co.* v. *Tomkinson*, [1893] A. C. 396, *per* Lord MACNAGHTEN, at p. 410, quoted by Lord DAVEY in *Ruben* v. *Great Fingall Consolidated*, *supra*; compare *Sheffield Corporation* v. *Barclay*, [1905] A. C. 392.

SECT. 3. Exceptions.

deeds may be set aside (*k*) and any estoppel arising therein will be opened (*l*). Moreover, where a statement is made in a deed for the purpose of concealing an illegal contract, the whole matter is opened on the ground that persons cannot be allowed to escape from the law by making a false statement (*m*).

Effect on parties.

Consequently under the Bills of Sale Acts there can be no estoppel so as to prevent a person asking the court to go behind the form of the instrument in order to discover the real nature of the transaction (*n*).

On the other hand, though a deed may be bad on the ground that it has been executed to effect a purpose made illegal by statute, yet as between the parties it may not be competent to either to set up its invalidity, on the principle that the policy of the law always is not to make contracts void to a greater extent than the mischief to be remedied renders necessary. Estoppel, it may be presumed, continues as an incident of only so much of the deed as the law preserves (*o*).

SUB-SECT. 2.—*Mistake.*

Mistake.

519. A mere mistake in a deed common to all parties, or on account of which no one has acted to his detriment or altered his position, will not create an estoppel (*p*). But it must be a genuine mistake, and not disputed by either party (*q*). What the court will hold to be a mistake so as to open an estoppel must depend upon the circumstances of each case. The reported cases do not afford any clear principle of distinction (*r*).

Must be genuine.

SUB-SECT. 3.—*Infants, Married Women, Corporations.*

No estoppel against infants.

520. There can be no estoppel by deed against an infant, because an infant's deed is never good (*s*); and though an infant may be

(*k*) *Collins* v. *Blantern* (1767), 1 Smith, L. C., 11th ed., 369.

(*l*) *Fairtitle* d. *Mytton* v. *Gilbert* (1787), 2 Term Rep. 169, 171; *Stratford and Moreton Rail. Co.* v. *Stratton* (1831), 2 B. & Ad. 518, 526; *Hill* v. *Manchester and Salford Water Works Co.* (1831), 2 B. & Ad. 544, 553; *Doe* d. *Preece* v. *Howells* (1831), 2 B. & Ad. 744; *Doe* d. *Chandler* v. *Ford* (1835), 3 Ad. & El. 649; *Prole* v. *Wiggins* (1836), 3 Bing. (N. C.) 230; *Doe* d. *Levy* v. *Horne* (1842), 3 Q. B. 757, 766.

(*m*) *Doe* d. *Williams* v. *Lloyd* (1839), 5 Bing. (N. C.) 741; *Horton* v. *Westminster Improvement Commissioners* (1852), 7 Exch. 780; *Re Holland, Gregg* v. *Holland* (1901), 85 L. T. 304, *per* FARWELL, J., at p. 308.

(*n*) *Madell* v. *Thomas & Co.*, [1891] 1 Q. B. 230, C. A.; compare *Bittleston* v. *Cooke* (1856), 25 L. J. (Q. B.) 281; *Kevan* v. *Mawson* (1871), 24 L. T. 395.

(*o*) *Phillpotts* v. *Phillpotts* (1850), 10 C. B. 85, *per* JERVIS, C.J., at p. 97, following *Bessey* v. *Windham* (1844), 6 Q. B. 166, approved by WATSON, B., in *Bowes* v. *Foster* (1858), 27 L. J. (EX.) 262; compare *Burkinshaw* v. *Nicolls* (1878), 3 App. Cas. 1004 (illegal issue of shares as fully paid up to a vendor to a limited company. The company was estopped as against a subsequent transferee from denying that the shares were fully paid up); *Hull Flax Co.* v. *Wellesley* (1860), 6 H. & N. 38; *Barrow Mutual Ship Insurance Co.* v. *Ashburner* (1885), 54 L. J. (Q. B.) 377, C. A.

(*p*) *Scholefield* v. *Lockwood* (1863), 33 L. J. (CH.) 106, *per* ROMILLY, M.R., at p. 110 (this was a case of mere clerical error. It was subsequently reversed, but not on this point); *Brooke* v. *Haymes* (1868), L. R. 6 Eq. 25 (a mistake of fact as to the amount of legacy duty payable, common to all parties).

(*q*) Compare *Harding* v. *Ambler* (1838), 3 M. & W. 279.

(*r*) *Skipwith* v. *Green* (1724), 8 Mod. Rep. 311; *Re Simpson, Ex parte Morgan* (1876), 2 Ch. D. 72, 93, C. A.; *Mellor* v. *Walmesley*, [1905] 2 Ch. 164, C. A., following *Roberts* v. *Karr* (1809), 1 Taunt. 495; and *Espley* v. *Wilkes* (1872), L. R. 7 Exch. 298; see title MISTAKE.

(*s*) *Smith* v. *Low* (1739), 1 Atk. 489.

SECT. 3. Exceptions.

sued upon a covenant by deed for the price of necessaries, the case must be treated exactly as if there had been no deed (*t*).

Married woman can be bound if competent party.

521. A married woman can be bound by an estoppel arising out of admissions made in a deed, provided she is competent to make the deed, in the same way as a *feme sole* (*a*). But a married woman who is entitled to property for her separate use without power of anticipation cannot get rid of the restraint by telling an untruth, whether or not under seal, so as to induce some third person to act on the faith of that untruth and to set up an estoppel against her, as, but for the peculiar incidents attached to such restraint, he would be entitled to do (*b*).

Corporation.

522. A corporate body cannot be estopped by deed or otherwise from showing as between itself and the other parties to the deed that it had no power to do that which it purported to have done (*c*). But trustees for a public purpose, including commissioners of a body corporate, are not by the nature of their office protected from becoming subject to estoppel as against the assignees of the original parties to the deed in question (*d*): the estoppel in such a case is of the nature of estoppel *in pais* rather than by deed (*e*).

SECT. 4.—*Operation of Deeds by Estoppel.*

Receipt for consideration money.

523. Where a deed of conveyance—whether by way of mortgage or otherwise—contains within itself a receipt for consideration money, or has a receipt indorsed upon it, the vendor or mortgagor (*f*) is estopped as between himself and a person who innocently acts upon the faith of such a representation from averring that a less sum or no sum at all has been received by him (*g*).

(*t*) *Cooper* v. *Simmons* (1862), 7 H. & N. 707, *per* MARTIN, B., at p. 719; followed in *Walter* v. *Everard*, [1891] 2 Q. B. 369, C. A., *per* Lord ESHER, M.R., at p. 373.

(*a*) *Re Fiddey* (*A Solicitor*), *Jones* v. *Frost* (1872), 7 Ch. App. 773.

(*b*) *Stanley* v. *Stanley* (1878), 7 Ch. D. 589; followed in *Bateman* (*Lady*) v. *Faber*, [1898] 1 Ch. 144, C. A.

(*c*) *Fairtitle* d. *Mytton* v. *Gilbert* (1787), 2 Term Rep. 169; *Blackburn and District Benefit Building Society* v. *Cunliffe, Brooks & Co.* (1885), 29 Ch. D. 902, C. A.; *British Mutual Banking Co.* v. *Charnwood Forest Rail. Co.* (1887), 18 Q. B. D. 714, C. A., *per* FRY, L.J., at p. 719; *Re Companies Acts, Ex parte Watson* (1888), 21 Q. B. D. 301, *per* CAVE, J., at p. 302.

(*d*) *Doe* d. *Levy* v. *Horne* (1842), 3 Q. B. 757, *per* Lord DENMAN, C.J., at p. 766; *Webb* v. *Herne Bay Commissioners* (1870), L. R. 5 Q. B. 642; *Higgs* v. *Assam Tea Co.* (1869), L. R. 4 Exch. 387; *Re Romford Canal Co., Pocock's Claim, Trickett's Claim, Carew's Claim*, [1883] W. N. 115.

(*e*) As to when the improper use of the corporate seal amounts to a forgery, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 392.

(*f*) There can, it is submitted, be no estoppel in favour of the purchaser or mortgagee who has not paid the purchase-money. But see *Bottrell* v. *Summers* (1828), 2 Y. & J. 407, *per* HULLOCK, B., at p. 412: "A general release is an estoppel in point of law, and that, notwithstanding the doubt expressed by Lord Mansfield, although no money is paid, an absolute release under seal will preclude the party from disputing the payment." Here, too, the principle is rather that of estoppel *in pais* than by deed. A receipt not under seal does not give rise to estoppel, except as to a person who has thereby been induced to alter his position; see *Graves* v. *Key* (1832), 3 B. & Ad. 313; *Skaife* v. *Jackson* (1824), 3 B. & C. 421; see note (*l*), p. 383, *post*.

(*g*) As to receipt clauses in deeds generally, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 464; *Rice* v. *Rice* (1854), 2 Drew. 73, 83; *Re*

SECT. 4.
Operation of Deeds by Estoppel.

And similarly where the solicitor for the vendor or for the mortgagor receives the consideration money (*h*), the vendor or the mortgagor is estopped from denying the authority of the solicitor to receive it (*i*).

Receipt by solicitor for vendor or mortgagor.

524. A mere covenant that a person has the power to convey an estate is not sufficient to raise an estoppel so as to prevent him from denying that he was seised in fee or had the legal estate (*k*).

Covenant as to power to convey.

Condition in bond.

525. In all cases where the condition of a bond has reference to any particular thing, the obligor shall be estopped from saying there is no such thing (*l*), but the estoppel must be certain to every intent (*m*).

No estoppel where action not founded on deed.

526. There can be no estoppel arising out of a deed where the action is not founded on the deed, but is wholly collateral to it (*n*). In such cases the recitals in the deed, though certainly evidence of the facts to which they relate, are not of so high and conclusive a nature as to admit of no contradictory proof, and evidence of the circumstances in which the admissions contained in the deed were made is receivable to show that the admission was inconsiderately made and not entitled to weight as proof of the fact it is used to establish (*o*).

Forsyth (1865), 11 Jur. (N. S.) 213; *Bickerton* v. *Walker* (1885), 31 Ch. D. 151, C. A.; *Lloyds Bank, Ltd.* v. *Bullock*, [1896] 2 Ch. 192; *Bateman* v. *Hunt*, [1904] 2 K. B. 530, C. A.; *Powell* v. *Browne* (1907), 24 T. L. R. 71, C. A.; compare *Harding* v. *Ambler* (1838), 3 M. & W. 279; and *Rimmer* v. *Webster*, [1902] 2 Ch. 163, *per* FARWELL, J., at p. 174, distinguishing *Carritt* v. *Real and Personal Advance Co.* (1889), 42 Ch. D. 263. Where the transaction is between a solicitor and his client, a subsequent purchaser who has knowledge of the fact is thereby put upon inquiry; see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 465.

(*h*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 56.

(*i*) *King* v. *Smith*, [1900] 2 Ch. 425.

(*k*) See cases in note (*n*) on p. 367, *ante*. As to covenants running with estates by estoppel, see title LANDLORD AND TENANT; and *Spencer's Case*, (1583), 1 Smith, L. C., 11th ed., 55, 95 *et seq.* As to how far a person is bound by covenants in a deed, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 475 *et seq.*

(*l*) *Lainson* v. *Tremere* (1834), 1 Ad. & El. 792, *per* Lord DENMAN, C.J., at p. 801, adopting 1 Roll. Abr., 872, Estoppel P, pl. 1, following *Strowd* v. *Willis*, (1594), Cro. Eliz. 362; *Rainsford* v. *Smith* (1561), Dyer, 196 a; *Shelley* v. *Wright* (1737), Willes, 9; *Burgis* v. *Constantine*, [1908] 2 K. B. 484, C. A.; see title BONDS, Vol. III., p. 90.

(*m*) *Kepp* v. *Wiggett* (1850), 10 C. B. 35, *per* WILLIAMS, J., at p. 53.

(*n*) *Carpenter* v. *Buller* (1841), 8 M. & W. 209; *Carter* v. *Carter* (1857), 3 K. & J. 617, 645; *Fraser* v. *Pendlebury* (1861), 31 L. J. (C. P.) 1; *Re Simpson, Ex parte Morgan* (1876), 2 Ch. D. 72, C. A.; compare *Trinidad Asphalte Co.* v. *Coryat*, [1896] A. C. 587, P. C., *per* Lord HOBHOUSE, at p. 592. Where pecuniary legatees who had not received legacies in full executed a release to the trustees acknowledging receipt of legacies, it was held that they were not estopped from claiming the balance, on the subsequent falling in of other funds (*Re Ghost's Trusts* (1883), 49 L. T. 588).

(*o*) *South Eastern Rail. Co.* v. *Watson* (1861), 6 H. & N. 520, 528; and compare *Burnand* v. *Rodocanachi* (1882), 7 App. Cas. 335, as to the limits of estoppel for determining the amount of a constructive total loss under a policy of insurance. As to the circumstances under which a cancelled deed may be used as evidence of the facts to which it relates, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 410.

SECT. 4. Operation of Deeds by Estoppel.

Estoppel by grant of lease or other interest in land.

527. A lease or other interest in land is created by estoppel when the grantor or lessor has nothing in the land at the time of the grant (*p*), and though a title by estoppel, such as the lessor or grantor in this case possesses, is only good against the person estopped by his own deed (namely, the lessee or the grantee), and imports from its very existence the idea of no real title at all, yet as against the person estopped it has all the elements of a real title (*q*).

A tenant therefore who holds under a lease by indenture is estopped from disputing his lessor's title or the title of the lessor's assignee (*r*).

Grant or lease of interest larger than estate of grantor.

528. When, however, the grantor or lessor has some interest in the land, but purports to grant or to lease a larger interest than he has, the grantee or the lessee does not hold by estoppel, for an interest passed, and his tenure is of that interest, whatever it may be; and consequently a tenant is not estopped at a date subsequent to the creation of the lease from proving that the lessor's title has determined, nor a grantee that the grantor's interest has ceased, in order to establish a title under the Statute of Limitations (*s*).

Doctrine applies to durability and not to quantity of estate.

But this doctrine only applies to the durability and not to the quantity of the estate, and where a grantor or lessor is properly entitled only to part of the premises demised, but not to the whole, then as no interest passed out of part of the demise the grantor or lessor has a good title by estoppel in respect of that part (*t*).

Subsequent acquisition of title by grantor or lessor.

529. Where the grantor or lessor subsequently acquires a title to the premises which he has purported to demise, the interest is said to feed the estoppel, and the grant or the lease then takes effect in interest and not by estoppel (*a*). But the grantor or the lessor

(*p*) Bac. Abr., tit. Leases and Terms for Years, O, ed. 1832, p. 850; *Walton* v. *Waterhouse* (1672), 2 Wms. Saund. 415 c, 419, notes; *Bristowe* v. *Pegge* (1785), 1 Term Rep. 758, n., *per* Lord MANSFIELD, C.J., at p. 760, n.; *Cuthbertson* v. *Irving* (1859), 4 H. & N. 742, 757; affirmed (1860), 6 H. & N. 135.

(*q*) *Davis* v. *Bank of England* (1824), 2 Bing. 393, 407; *Bensley* v. *Burdon* (1830), 8 L. J. (o. s.) (CH.) 85; *Richards* v. *Johnston* (1859), 4 H. & N. 660; *Richards* v. *Jenkins* (1887), 18 Q. B. D. 451, 456, C. A.; *Bank of England* v. *Cutler*, [1908] 2 K. B. 208, 234, C. A.

(*r*) See p. 402, *post*.

(*s*) Co. Litt. 45 a; *Walton* v. *Waterhouse*, *supra*; *Treport's Case* (1594), 6 Co. Rep. 15 a; *Rawlin's Case* (1587), Jenk. 254; *Doe* d. *Higginbotham* v. *Barton* (1840), 11 Ad. & El. 307; *Serjeant* v. *Nash*, *Field & Co.*, [1903] 2 K. B. 304, C. A., *per* COLLINS, M.R., at p. 312; and compare *Neave* v. *Moss* (1823), 1 Bing. 360; *Alchorne* v. *Gomme* (1824), 2 Bing. 54; *Fenner* v. *Duplock* (1824), 2 Bing. 10; *Doe* d. *Strode* v. *Seaton* (1835), 2 Cr. M. & R. 728; *Beer* v. *Beer* (1852), 12 C. B. 60, 81; *Delaney* v. *Fox* (1857), 2 C. B. (N. S.) 768, 774; *Langford* v. *Selmes* (1857), 3 K. & J. 220.

(*t*) *Williams* v. *Burrell* (1845), 1 C. B. 402, distinguishing *Andrew* v. *Pearce* (1805), 1 Bos. & P. (N. R.) 158; *Weeks* v. *Birch* (1893), 69 L. T. 759. Tenants in common having several and distinct estates cannot make a joint lease of the whole estate; but such lease shall be taken to be the lease of each for his respective share, and the cross confirmation of each for the part of the other with no estoppel on either part (*Beer* v. *Beer* (1852), 12 C. B. 60, *per* WILLIAMS, J., at p. 81, quoting Comyn's Landlord and Tenant, p. 22, following the authorities therein recited, namely, 1 Roll. Abr. 877, Estoppel, B, pl. 3, 4; Bac. Abr., Joint Tenants, H, pl. 1; *Mantle* v. *Wollington* (1607), Cro. Jac. 166; *Heatherley* d. *Worthing* v. *Weston* (1764), 2 Wils. 232; compare Co. Litt. 45 a.

(*a*) Co. Litt. 47 b; *Webb* v. *Austin* (1844), 7 Man. & G. 701, *per* TINDAL, C.J.,

SECT. 4. **Operation of Deeds by Estoppel.**

is estopped from saying that he had no interest at the time of the grant or lease (*b*).

Effect of estoppel as against (1) remainderman; (2) privies in estate of tenant for life.

530. Where possession has been acquired ostensibly under a conveyance or testamentary disposition creating a life interest in property to which the grantor had no title, and the intended tenant for life subsequently obtains against the true owner a title under the Statute of Limitations, he is estopped from setting up that title against anyone interested in remainder under the same instrument. This estoppel binds all persons who are privy in estate to such tenant for life, so that his heir-at-law is estopped against the remainderman or those claiming under him from denying that the instrument is valid (*c*).

Effect of ineffectual devise.

But when a testator had a good title to property in his lifetime, though no power of testamentary disposition, and nevertheless purported to devise such property, a person entering under such devise or, in case of intestacy, as heir-at-law is not estopped from setting up a title under the Statute of Limitations against the person properly entitled, or those claiming under him (*d*); nor is a tenant for life under an invalid devise, or those claiming under him, estopped from disputing the title of the remainderman under the same invalid devise (*e*), because the devise itself, and not merely the title, is invalid and of no effect.

Effect when there is neither title nor effectual devise.

It would appear that when the testator neither had a good title nor in fact purported to devise certain property, but a person enters ostensibly under the will or under a settlement purporting to be made in pursuance of the will, that person is estopped from setting up a title under the Statute of Limitations (*f*).

at p. 724; followed in *Cuthbertson* v. *Irving* (1859), 4 H. & N. 743, *per* MARTIN, B., at p. 754; *Booth* v. *Alcock* (1873), 8 Ch. App. 663, 667; *Rowbotham* v. *Wilson* (1857), 8 E. & B. 123, 145, Ex. Ch.; and see title EASEMENTS ETC., Vol. XI., p. 245. But in *Keate* v. *Phillips* (1881), 18 Ch. D. 560, at p. 577, this doctrine was not allowed to operate on a fraudulent conveyance by a trustee, so as to defeat the interest of the *cestui que trust*. Compare the doctrine of *Noel* v. *Bewley* (1829), 3 Sim. 103, *per* SHADWELL, V.-C., at p. 116: "If a person has conveyed a defective title and he afterwards acquires a good title, this court will make that good title available to make the conveyance effectual"; followed in *Re Bridgwater's Settlement, Partridge* v. *Ward*, [1910] 2 Ch. 342; compare *Smith* v. *Baker* (1842), 1 Y. & C. Ch. Cas. 223; *Re Hoffe's Estate Act*, 1885 (1900), 82 L. T. 556.

(*b*) *Hayne* v. *Maltby* (1789), 3 Term Rep. 438; *Rowbotham* v. *Wilson*, *supra*, *per* WATSON, B., at p. 145; *General Finance, Mortgage and Discount Co.* v. *Liberator Permanent Benefit Building Society* (1878), 10 Ch. D. 15; *Hamill* v. *Murphy* (1883), 12 L. R. Ir. 400. In the case of a conveyance by a contingent remainderman the happening of the contingency feeds the estoppel (*Doe* d. *Christmas* v. *Oliver* (1829), 5 Man. & Ry. (K. B.) 202; 2 Smith, L. C., 11th ed., 724; *Heath* v. *Crealock* (1873), L. R. 18 Eq. 215).

(*c*) *Hawksbee* v. *Hawksbee* (1853), 11 Hare, 230; *Anstee* v. *Nelms* (1856), 1 H. & N. 225, *per* MARTIN, B., at p. 232; *Asher* v. *Whitlock* (1865), L. R. 1 Q. B. 1; *Board* v. *Board* (1873), L. R. 9 Q. B. 48; *Dalton* v. *Fitzgerald*, [1897] 2 Ch. 86, C. A.

(*d*) *Paine* v. *Jones* (1874), L. R. 18 Eq. 320; *Re Anderson, Pegler* v. *Gillat*, [1905] 2 Ch. 70; compare *Dalton* v. *Fitzgerald*, [1897] 2 Ch. 86, *per* LINDLEY, L.J., at p. 92, explaining *Re Stringer's Estate, Shaw* v. *Jones-Ford* (1877), 6 Ch. D. 1, 10, C. A.

(*e*) *Re Stringer's Estate, Shaw* v. *Jones-Ford*, *supra*, at p. 10.

(*f*) *Dalton* v. *Fitzgerald*, *supra*, *per* LINDLEY, L.J., at p. 91, commenting on *Paine* v. *Jones*, *supra*.

Part V.—Estoppel in Pais.

SECT. 1.—*Its Early Signification.*

SECT. 1. Its Early Signification.

Acceptance or surrender of estate.

531. The nature and general characteristics of estoppel *in pais* have been already briefly described (*g*). This phrase has a much wider application now than it had in Coke's day. The acts *in pais* to which he referred as binding parties by way of estoppel were few, and were acts of notoriety not less formal and solemn than a deed, *e.g.*, livery, entry, acceptance of an estate (*h*). Thus, surrender by operation of law occurs where the owner of a particular estate has been a party to some act the validity of which he is by law afterwards estopped from disputing, and which would not be valid if his particular estate had continued to exist, *e.g.*, where a lessee accepts a new lease from his lessor (*i*), or assents to the grant of a new lease to a third person, to whom he gives up possession (*k*). But

(*g*) See p. 323, *ante*.

(*h*) *Lyon* v. *Reed* (1844), 13 M. & W. 285, 309, citing Co. Litt. 352 a; *Doe* d. *Nepean* v. *Budden* (1822), 5 B. & Ald. 626 (copyholder having done fealty cannot dispute lord's title to manor); compare *Goodtitle* d. *Faulkner* v. *Morse* (1789), 3 Term Rep. 366; *Morse* v. *Faulkner* (1792) 1 Anst. 11. To this class of matter *in pais* must apparently be referred the register, flag, and pass of a ship, which raise a presumption of nationality against which the owner is not permitted to aver (*Dionissis* v. *R.*, *The Laura* (1865), 3 Moo. P. C. C. (N. S.) 181).

(*i*) *Lyon* v. *Reed*, *supra*, at p. 306; Bac. Abr., tit. Leases and Terms for Years, S, 2; *Fulmerston* v. *Steward* (1554), Plowd. 102, 106; *Fenner* v. *Blake*, [1900] 1 Q. B. 426). The acceptance of a void lease will not work a surrender (*Davison* d. *Bromley* v. *Stanley* (1768), 4 Burr. 2210; *Roe* d. *Berkeley* (*Earl*) v. *York* (*Archbishop*) (1805), 6 East, 86); and though the acceptance of a voidable lease, which is afterwards made void according to the contract, may work an absolute surrender (see *Doe* d. *Rochester* (*Bishop*) v. *Bridges* (1831), 1 B. & Ad. 847, 860), the acceptance of such a lease, which is afterwards made void contrary to the intention of the parties, works a surrender, subject to the implied condition that it shall be void in case the new grant shall fail (*Doe* d. *Biddulph* v. *Poole* (1848), 11 Q. B. 713, 716, 718); and see *Doe* d. *Egremont* (*Earl*) v. *Courtenay* (1848), 11 Q. B. 702; *Easton* v. *Penny* (1892), 67 L. T. 290; *Knight* v. *Williams*, [1901] 1 Ch. 256, 257). The rule that a transfer of possession, actual or constructive, by a tenant to his landlord, either pursuant to express agreement or under such circumstances that an agreement to terminate the tenancy may be inferred, works a surrender by operation of law has also been referred to the doctrine of estoppel *in pais* (see 2 Smith, L. C., 11th ed., p. 837), either because such an act is inconsistent with the continuance of the tenancy (*Oastler* v. *Henderson* (1877), 2 Q. B. D. 575, C. A.), or on the ground of the notoriety of the act; see *Phené* v. *Popplewell* (1862), 12 C. B. (N. S.), *per* WILLES, J., at p. 340. The earlier decisions leave it in doubt whether they are not rather founded upon there having been an agreement which has been fully performed; see *Dodd* v. *Acklom* (1843), 6 Man. & G. 672, 682, explaining *Grimman* v. *Legge* (1828), 8 B. & C. 324; *Gore* v. *Wright* (1838), 8 Ad. & El. 118; and *Phené* v. *Popplewell*, *supra*, *per* BYLES, J., at p. 342; *Re Panther Lead Co.* (1896), 65 L. J. (CH.) 499. Whatever the principle, acceptance by the landlord of possession, actual or constructive, is essential (*Mollett* v. *Brayne* (1809), 2 Camp. 103; *Whitehead* v. *Clifford* (1814), 5 Taunt. 518; *Doe* d. *Huddleston* v. *Johnston* (1825), M'Cle. & Yo. 141; *Johnstone* v. *Huddlestone* (1825), 4 B. & C. 922, and cases cited *supra*; and see notes to *Thursby* v. *Plant* (1669) (1 Saund. 237); 1 Wms. Saund., ed. 1871, p. 296).

(*k*) *Nickells* v. *Atherstone* (1847), 10 Q. B. 944, following *Thomas* v. *Cook* (1818), 2 B. & Ald. 119; *Walker* v. *Richardson* (1837), 2 M. & W. 882; *Bees* v. *Williams* (1835), 2 Cr. M. & R. 581; *Stone* v. *Whiting* (1817), 2 Stark. 235; and dissenting from the observations of the Court of Exchequer in *Lyon* v. *Reed*

SECT. 1. Its Early Signification.

the mere consent of a lessee for years, who has sub-demised the land, in which therefore he retains only a reversion, to the grant by his lessor of a fresh lease to a stranger, does not amount to a surrender by operation of law of his reversion, so as to enable the stranger to recover rent from the sub-lessee (*l*).

SECT. 2.—*Estoppel by Representation.*

SUB-SECT. 1.—*In General.*

Estoppel by representation.

532. The branch of estoppel most frequently invoked in modern times, and presenting itself in infinite variety, is that form of estoppel *in pais* which is generally known as estoppel by representation (*m*). This form of estoppel *in pais* is not distinguishable in principle from what is sometimes spoken of in courts of equity as equitable estoppel: the principle is one equally of law and equity (*n*). The only distinctions seem to be that in equity it was apparently applied only to cases where a person had entered into a contract on the faith of the representations made, which might have been made either by a party to the contract or by a third person (*o*); and that whereas the common law phrase was that

(1844), 13 M. & W. 285, 308, 309, on *Thomas* v. *Cook* (1818), 2 B. & Ald. 119. The decisions in *Thomas* v. *Cook*, *supra*, and *Nickells* v. *Atherstone* (1847), 10 Q. B. 944, were treated as law in *Davison* v. *Gent* (1857), 1 H. & N. 744. The transfer of possession by the old tenant to the new pursuant to the grant of the new lease is the distinguishing element, absent in *Lyon* v. *Reed*, *supra*, and present in the other cases, which enables them all to be reconciled (*Wallis* v. *Hands*, [1893] 2 Ch. 75); and see *Reeve* v. *Bird* (1834), 1 Cr. M. & R. 31; *Easton* v. *Penny* (1892), 67 L. T. 290. The same result may in some cases be reached on the modern principles of estoppel by representation; see *Nickells* v. *Atherstone*, *supra*, at p. 949; *Fenner* v. *Blake*, [1900] 1 Q. B. 426 (see, however, the criticism in 2 Smith, L. C., 11th ed., p. 846, on the last-mentioned case, which is difficult to reconcile with *Wallis* v. *Hands*, *supra*). It seems that the doctrine of *Thomas* v. *Cook*, *supra*, does not apply to a lease for lives (an estate of freehold), though the case may be one in which the assenting party is compellable in equity to give effect to the new lease by a legal transfer of his interest, on the principle mentioned on p. 396, *post* (*Creagh* v. *Blood* (1845), 3 Jo. & Lat. 133, 152, 160, approving *Lyon* v. *Reed*, *supra*, and dissenting from *Lynch's Lessee* v. *Lynch* (1843), 6 I. L. R. 131). The surrender may be vitiated by the fraud of the tenant at whose request it was accepted, so that he remains liable for the rent (*Bruce* v. *Ruler* (1828), 2 Man. & Ry. (K. B.) 3). It is otherwise where the surrender is procured by innocent misrepresentation; but the latter, if amounting to a breach of contract, may give rise to a liability for damages, of which the rent is the measure (*Gray* v. *Owen*, [1910] 1 K. B. 622).

(*l*) *Lyon* v. *Reed*, *supra*.

(*m*) As recently as 1853 Lord CAMPBELL, C.J., and WIGHTMAN, J., doubted whether this was properly called estoppel; the former preferred the expression "conclusion" (*Howard* v. *Hudson* (1853), 2 E. & B. 1, 10, 11) see *Carr* v. *London and North Western Rail. Co.* (1875), L. R. 10 C. P. 307, 317. A very high authority has questioned the advantage of reducing the principles of estoppel by representation to rules (*Whitechurch* (*George*), *Ltd.* v. *Cavanagh*, [1902] A. C. 117, *per* Lord MACNAGHTEN, at p. 130; see also *Comitti* v. *Maher* (1905), 94 L. T. 158, *per* KEKEWICH, J., at p. 159); but the definition is undeniably useful in practice.

(*n*) *Jorden* v. *Money* (1854), 5 H. L. Cas. 185, *per* Lord CRANWORTH, L.C., at p. 210.

(*o*) In the early cases the contracts were all marriage contracts; see *Gale* v. *Lindo* (1687), 1 Vern. 475 (Lord JEFFREYS, L.C.); *Montefiori* v. *Montefiori* (1762), 1 Wm. Bl. 363 (Lord MANSFIELD, C.J.) (a common law case arising on the award

the person who made the representations was not allowed to deny their truth, the phrase of equity was that he must "make his representations good" (*p*).

Necessary elements of representation.

533. A representation to form the basis of an estoppel may be made either by statement or by conduct; and conduct includes negligence (*q*). But certain general propositions are applicable, in whatever manner the representation is made.

It must be of existing fact.

534. In order to found an estoppel a representation must be of an existing fact (*r*), not of a mere intention (*s*). In the case of something future there is no occasion to apply the rule as to estoppel, because the party to whom the representation is made has only to say

of an arbitrator); *Neville* v. *Wilkinson* (1782), 1 Bro. C. C. 543 (Lord THURLOW, L.C.). And see *Jorden* v. *Money* (1854), 5 H. L. Cas. 185. For later applications of the same doctrine in equity to other contracts, see *Burrowes* v. *Lock* (1805), 10 Ves. 470, as explained in *Low* v. *Bouverie*, [1891] 3 Ch. 82, C. A.; *Dalbiac* v. *Dalbiac* (1809) 16 Ves. 116, 125; *Piggott* v. *Stratton* (1859), 1 De G. F. & J. 33, C. A., where the representation was by a party to the contract; *Davies* v. *Davies* (1860), 6 Jur. (N. S.) 1320; *Mansel-Lewis* v. *Rees* (1910), 102 L. T. 237; compare *Edmands* v. *Best* (1862), 7 L. T. 279.

(*p*) Lord SELBORNE, L.C., defines "equitable estoppel by representation" in *Citizens' Bank of Louisiana* v. *First National Bank of New Orleans* (1873), L. R. 6 H. L. 352, at p. 360, in terms differentiated from the common law doctrine only by the use of these words, and cites in support of his definition decisions of common law courts usually cited in that connection, namely, *Jorden* v. *Money, supra; Pickard* v. *Sears* (1837), 6 Ad. & El. 469; and *Freeman* v. *Cooke* (1848), 2 Exch. 654; see also *Whitechurch (George), Ltd.* v. *Cavanagh*, [1902] A. C. 117, *per* Lord MACNAGHTEN, at p. 130; *Mills* v. *Fox* (1887), 37 Ch. D. 153, 164. In *Lovett* v. *Lovett*, [1898] 1 Ch. 82, ROMER, J., uses the expression "equitable estoppel" in contradistinction to "estoppel at law," by which it is quite clear from the context he means "estoppel by deed," to the recital and the operative part of which he refers. His proposition, founded on the definition by Lord SELBORNE, L.C., referred to above, that equitable estoppel is not applied in favour of a volunteer, is only another form of the common law rule that in order to take advantage of a representation as an estoppel, one must show that he has altered his position on the faith of it. See also title EQUITY, *ante*.

(*q*) *Freeman* v. *Cooke*, *supra*, at p. 664.

(*r*) A person who fraudulently represented himself to be a trader, was held to be estopped from denying he was a trader for the purpose of escaping bankruptcy (*Re Leslie, Ex parte Leslie* (1856), 25 L. J. (BCY.) 37, C. A.). One having only a partial interest in an estate, but contracting to sell as if he had the entire interest, was held to be estopped from denying as against the purchaser that he had the entire interest (*Mortlock* v. *Buller* (1804), 10 Ves. 292, 315, see *Meredith* v. *Saunders* (1814), 2 Dow, 514, H. L., *per* Lord ELDON, L.C., at p. 518). A vendor on contracting to sell land represented that there were no rectorial tithes. Subsequently, having discovered that he was himself the lay impropriator, he sued the purchaser for those tithes; held he was estopped by his representation from succeeding (*Mansel-Lewis* v. *Rees*, *supra*). *R.* v. *South Eastern Rail. Co.* (1910), 8 L. G. R. 401, C. A., affirming S. C. (1909), 7 L. G. R. 1171, appears at first sight to conflict with the proposition in the text. The report, however, is very brief; and the effect seems to be that a party to a written agreement may by a representation as to the meaning of an ambiguous expression, estop himself from averring that it has another meaning.

(*s*) *Jorden* v. *Money, supra*; approved, *Citizens' Bank of Louisiana* v. *First National Bank of New Orleans, supra; Maddison* v. *Alderson* (1883), 8 App. Cas. 467, 473, overruling *Loffus* v. *Maw* (1862), 3 Giff. 592; *Chadwick* v. *Manning*, [1896] A. C. 231, P. C.; *Whitechurch (George), Ltd.* v. *Cavanagh, supra; Coleman* v. *North* (1898), 47 W. R. 57, 58; compare *Farmeloe* v. *Bain* (1876), 1 C. P. D. 445; *Re Fickus, Farina* v. *Fickus*, [1900] 1 Ch. 331, 335.

SECT. 2. Estoppel by Representation.

"enter into a contract," and all difficulty is removed (*t*). It is true that the state of a man's mind is a fact, and in that sense a man who makes a false statement as to his intention makes a false representation of fact (*u*); but estoppel is not a cause of action, but a rule of evidence, available where there is a cause of action, to prevent a person from denying what he has once said (*v*): he is to be put in the same position as if the statement were true, but no worse (*w*); and had the statement of intention been true, he who made it would have been at liberty to change his mind. But the representation of an existing state of things as being of a continuous nature is more than a statement of intention, and one who has made such representation cannot, after getting rid of that state of things, take advantage of its removal to the prejudice of another who has acted on the representation (*x*).

May include representation of law.

535. A representation may be a representation of fact, although it involves and includes that which is also matter of law. Thus directors of a company, by drawing a bill in the company's name, may represent that there is a private Act of Parliament giving the company the requisite powers (*a*), or by issuing debentures that the company's powers are not exhausted (*b*). But a true statement of facts, accompanied by an erroneous inference of law, will not estop the person who made it from afterwards denying the correctness of that inference (*c*); and although one who has by a

(*t*) *Citizens' Bank of Louisiana* v. *First National Bank of New Orleans* (1873), L. R. 6 H. L. 352, *per* Lord SELBORNE, L.C., at p. 361, quoting *Jorden* v. *Money* (1854), 5 H. L. Cas. 185.

(*u*) "The state of a man's mind is as much a fact as the state of his digestion" (*Edgington* v. *Fitzmaurice* (1885), 29 Ch. D. 459, C. A., *per* BOWEN, L.J., at p. 483).

(*v*) *Low* v. *Bouverie*, [1891] 3 Ch. 82, C. A., *per* LINDLEY and BOWEN, L.JJ., at pp. 101, 105. Thus an innocent misrepresentation does not by estoppel become a cause of action (compare *Dickson* v. *Reuter's Telegram Co.* (1877), 3 C. P. D. 1, C. A.; *Brett* v. *Clowser* (1880), 5 C. P. D. 376); but it may become conclusive evidence of title in an action for conversion (*Knights* v. *Wiffen* (1870), L. R. 5 Q. B. 660), or of a contract (*Cornish* v. *Abington* (1859), 4 H. & N. 549; *Thomas* v. *Brown* (1876), 1 Q. B. D. 714, 722).

(*w*) See *Bishop* v. *Balkis Consolidated Co.* (1890), 25 Q. B. D. 512, C. A., *per* LINDLEY, L.J., at p. 521; *Beatty* v. *Ebury* (*Lord*) (1872), 7 Ch. App. 777 (affirmed on other grounds (1874), L. R. 7 H. L. 102); *Canterbury Corporation* v. *Cooper* (1908), 99 L. T. 612, *per* CHANNELL, J., at p. 615; affirmed (1909), 100 L. T. 597, C. A.). But it may happen that his hearer is indirectly put in a better position; see *Ogilvie* v. *West Australian Mortgage and Agency Corporation*, [1896] A. C. 257, P. C., *per* Lord WATSON, at p. 270; see p. 385, *post*.

(*x*) *Piggott* v. *Stratton* (1859), 1 De G. F. & J. 33, C. A. (grantor of leasehold property stated truly that his own lease restrained him from obstructing the view; he afterwards surrendered his lease and took a new one without the restraint); but was held to his statement as being a representation of a continuous restraint (distinguished on this point, *M'Evoy* v. *Drogheda Harbour Commissioners* (1867), 16 W. R. 34, 38.

(*a*) *West London Commercial Bank* v. *Kitson* (1884), 13 Q. B. D. 360, C. A.; compare *R.* v. *South Eastern Rail. Co.* (1910), 8 L. G. R. 401, C. A. (representation as to meaning of ambiguous expression).

(*b*) *Rashdall* v. *Ford* (1866), L. R. 2 Eq. 750, 754.

(*c*) *Morgan* v. *Couchman* (1853), 14 C. B. 100 (party who set out in an affidavit facts showing cross dealings between himself and another, describing them as "payment," not estopped from showing there was no payment).

fraudulent statement of the legal effect of an instrument obtained some advantage will not, it seems, be allowed to retain it (*d*), a mere misrepresentation of a matter of legal inference from facts which are known to both parties cannot, it is submitted, be a ground of estoppel (*e*).

It must be unambiguous.

536. A representation, to found an estoppel, must be clear and unambiguous; not necessarily susceptible of only one interpretation, but such as will reasonably be understood in the sense contended for, and for this purpose the whole of the representation must be looked at (*f*). This is merely an application of the old maxim applicable to all estoppels, that they "must be certain to every intent" (*g*). A statement, true as far as it goes, is not to be taken to mean more than it says. Thus a statement that there are certain incumbrances on a fund is not (in the absence of a duty to give full information) to be construed as a representation that there are no others (*h*). Again, the mere parting with possession does not estop the owner of a chattel (*i*) or of a title deed (*k*) from setting up his title against a purchaser for value. And this is so even where the possession was parted with for the fraudulent purpose of defeating creditors, provided it is not necessary for the owner to prove the fraudulent transaction as part of his title (*l*).

Result must not be *ultra vires*.

537. A party cannot by representation any more than by other means (*m*) raise against himself an estoppel so as to create a state of things which he is under a legal disability from creating.

(*d*) *Hirschfield* v. *London, Brighton and South Coast Rail. Co.* (1876), 2 Q. B. D. 1, 4, 5; *Molloy* v. *Mutual Reserve Life Insurance Co.* (1906), 94 L. T. 756, 760, C. A.

(*e*) *Beatty* v. *Ebury(Lord)* (1872), 7 Ch. App. 777, 802 (affirmed (1874), L. R. 7 H. L. 102 on other grounds), approving *Rashdall* v. *Ford* (1866), L. R. 2 Eq. 750, 754.

(*f*) *Low* v. *Bouverie*, [1891] 3 Ch. 82, C. A. (see especially *per* BOWEN, L.J., at p. 106), following *Freeman* v. *Cooke* (1848), 2 Exch. 654 (conflicting statements), approved, *Whitechurch (George), Ltd.* v. *Cavanagh*, [1902] A. C. 117, 145; *Re Lewis, Lewis* v. *Lewis*, [1904] 2 Ch. 656, C. A.; *Onward Building Society* v. *Smithson*, [1893] 1 Ch. 1 (representation contained in a deed).

(*g*) Co. Litt. 352 a.

(*h*) *Low* v. *Bouverie, supra;* compare *M'Kenzie* v. *British Linen Co.* (1881), 6 App. Cas. 82; *British Linen Co.* v. *Cowan* (1906), 8 F. (Ct. of Sess.) 704 (mere silence no estoppel unless duty to communicate); *Scarfe* v. *Halifax* (1840), 7 M. & W. 288 (sheriff's return that he had levied of the plaintiff's goods £67 does not affirm that £30 further, paid for charges, was the plaintiff's money).

(*i*) *Weiner* v. *Gill*, [1905] 2 K. B. 172, 183 (applying *Farquharson Brothers & Co.* v. *King, & Co.*, [1902] A. C. 325); affirmed, [1906] 2 K. B. 574; *Meggy* v. *Imperial Discount Co.* (1878), 3 Q. B. D. 711, C. A.; *Price* v. *Groom* (1848), 2 Exch. 542; see also *Kingsford* v. *Merry* (1856), 1 H. & N. 503, Ex. Ch.; considered in *Henderson & Co.* v. *Williams*, [1895] 1 Q. B. 521, C. A.; *Johnson* v. *Crédit Lyonnais Co.* (1877), 3 C. P. D. 32, C. A.; *Hollins* v. *Fowler* (1875), L. R. 7 H. L. 757, 764; *Truman* v. *Attenborough* (1910), 54 Sol. Jo. 682; and see as to unauthorised dealings by trustees, p. 393, *post.*

(*k*) *Brocklesby* v. *Temperance Building Society*, [1895] A. C. 173, *per* Lord HERSCHELL, L.C., at p. 180, following *Martinez* v. *Cooper* (1826), 2 Russ. 198; and see *Lloyds Bank, Ltd.* v. *Bullock*, [1896] 2 Ch. 192; *Colonial Bank* v. *Cady and Williams* (1890), 15 App. Cas. 267.

(*l*) *Bowes* v. *Foster* (1858), 2 H. & N. 779; followed, *Taylor* v. *Bowers* (1876), 1 Q. B. D. 291, 298, C. A.

(*m*) Compare note (*g*), p. 327, *ante.*

SECT. 2. Estoppel by Representation.

Thus, a corporate body cannot be estopped from denying that they have entered into a contract which it was *ultra vires* for them to make (*n*). No corporate body can be bound by estoppel to do something beyond its powers (*o*), or to refrain from doing what it is its duty to do (*p*); and the same principle applies to individuals. No person can by his conduct, or otherwise, waive or renounce a right to perform a public duty, or estop himself from insisting that it is right to do so (*q*). And a married woman protected by a restraint on anticipation cannot, either by deed or innocent representation, nor (it seems) even by fraudulent representation, or admission resulting in a judgment (*r*), estop herself from denying facts which, if true, would put an end to the restraint (*s*).

Irregularities.

538. A distinction must be made between acts which are *ultra vires* and those for the validity of which certain formalities are

(*n*) *Canterbury Corporation* v. *Cooper* (1909), 100 L. T. 597, C. A.; *British Mutual Banking Co.* v. *Charnwood Forest Rail. Co.* (1887), 18 Q. B. D., 714, C. A., *per* BOWEN, L.J., at p. 718; compare *Markham and Darter's Case*, [1899] 1 Ch. 414, 431 (affirmed without discussing this point [1899] 2 Ch. 480, C. A.); *A.-G.* v. *Dublin Corporation* (1841), 1 Dr. & War. 545. But although a man cannot be estopped from denying the existence of a contract which is prohibited, or made illegal, by Act of Parliament, this does not apply where penalties are attached if it is not made in a certain way. Therefore a member of a mutual insurance company may be estopped from pleading, in an action for calls, that they were for losses paid on contracts which were unstamped and not contained in a policy (*Barrow Mutual Ship Insurance Co.* v. *Ashburner* (1885), 54 L. J. (Q. B.) 377, C. A.); compare *Re Coltman, Coltman* v. *Coltman* (1881), 19 Ch. D. 64, C. A.

(*o*) *British Mutual Banking Co.* v. *Charnwood Forest Rail. Co.*, *supra*, *per* FRY, L.J., at p. 719. This principle was applied (but, with doubt, and as the Court of Appeal held in the circumstances, wrongly) by VAUGHAN WILLIAMS, J., in *Bishop* v. *Balkis Consolidated Co.* (1890), 25 Q. B. D. 77, 84; affirmed on other grounds, *ibid.*, p. 512, C. A.; see p. 411, *post*.

(*p*) *Islington Vestry* v. *Hornsey Urban Council*, [1900] 1 Ch. 695, C. A.

(*q*) *MacAllister* v. *Rochester* (*Bishop*) (1880), 5 C. P. D. 194. But a local authority may, by a notice which is *intra vires*, intended to be acted on or not at the receiver's option, conclusively elect to proceed in a particular way if it is not complied with (*Gould* v. *Bacup Local Board* (1881), 50 L. J. (M. C.) 44). STEPHEN, J., speaks of this as estoppel, but there was no representation of any fact.

(*r*) *Bateman* (*Lady*) v. *Faber*, [1898] 1 Ch. 144, C. A., *per* LINDLEY, M.R., at p. 149, *per* VAUGHAN WILLIAMS, L.J., at p. 151.

(*s*) *Ibid.*, *per* LINDLEY, M.R.; distinguished in *Macnaghten* v. *Paterson*, [1907] A. C. 483, P. C., but without touching the principle (see *ibid.*, at p. 492). At common law a married woman could not, by describing herself as widow on a negotiable instrument, estop herself from pleading coverture (*Cannam* v. *Farmer* (1849), 3 Exch. 698). But (apart from restraint on anticipation) a married woman who had contracted as a *feme sole* was estopped in equity from denying that she had charged her separate estate (*McHenry* v. *Davies* (1870), L. R. 10 Eq. 88; following *Johnson* v. *Gallagher* (1861), 3 De G. F. & J. 494, 521, C. A.); and, because of the fraud involved, a disability was not in equity an excuse for knowingly standing by and allowing money to be paid for an interest in property in ignorance of the true title (*Savage* v. *Foster* (1723), 9 Mod. Rep. 35); see p. 397, *post*, and title EQUITY, *ante*. On the same principle, an infant cannot (nor at common law could a married woman before the Married Women's Property Acts; see *Earle* v. *Kingscote*, [1900] 2 Ch. 585, C. A.) be made liable for a fraudulent representation, *e.g.*, that he is of age, inducing a contract (*Johnson* v. *Pye* (1665), 1 Sid. 258, cited in *Stikeman* v. *Dawson* (1847), 1 De G. & Sm. 90, 113; see titles HUSBAND AND WIFE; INFANTS AND CHILDREN.

necessary. In the latter case persons dealing without notice of any informality are entitled to presume *omnia rite esse acta* (*t*). Accordingly a company which, possessing the requisite powers, so conducts itself in issuing debentures as to represent to the public that they are legally transferable, cannot set up any irregularity in their issue against an equitable transferee for value who has no reason to suspect it (*a*).

Representation must not be induced by party complaining.

539. A representation will be deprived of any effect as an estoppel if the making of it has been contributed to by some breach of duty on the part of the person seeking to take advantage of it. This principle is not confined to cases of wilful misrepresentation by such persons. No representation can be relied on as an estoppel if induced by the concealment of any material fact on the part of the person who wishes to use it as such; and if the person to whom it is made knows something calculated to influence the other to hesitate or seek further information, and has withheld that knowledge, the representation ought not to be treated as an estoppel (*b*). And the same principle has been applied where there has been perfectly innocent conduct amounting to a misrepresentation (*c*), inviting the conduct relied on as an estoppel; but whether in this case it rests upon the doctrine of "estoppel against estoppel" (*d*), or upon

(*t*) *Royal British Bank* v. *Turquand* (1856), 6 E. & B. 327, Ex. Ch.; *Re Land Credit Co. of Ireland, Ex parte Overend, Gurney & Co.* (1869), 4 Ch. App. 460; *Mahony* v. *East Holyford Co.* (1875), L. R. 7 H. L. 869; *County of Gloucester Bank* v. *Rudry Merthyr Steam and House Coal Colliery Co.*, [1895] 1 Ch. 629, C. A.; *Biggerstaffe* v. *Rowatt's Wharf, Ltd.*, [1896] 2 Ch. 93, C. A.; distinguish *Premier Industrial Bank, Ltd.* v. *Carlton Manufacturing Co., Ltd., and Crabtree, Ltd.*, [1909] 1 K. B. 106.

(*a*) *Re Romford Canal Co., Pocock's Claim, Trickett's Claim, Carew's Claim* (1883), 24 Ch. D. 85, applying *Fountaine* v. *Carmarthen Rail. Co.* (1868), L. R. 5 Eq. 316 (irregularity cannot be set up against an original holder who has a right to presume that the issue was regular, which he would not have if the issue were *ultra vires*); *Webb* v. *Herne Bay Commissioners* (1870), L. R. 5 Q. B. 642, where the plaintiff was the legal assignee; compare *Higgs* v. *Assam Tea Co.* (1869), L. R. 4 Exch. 387, where the company having dealt with the plaintiff assignee on the footing that debentures were assignable free from equities, were estopped from asserting their right to set off calls due from the assignor. But though a company may be estopped from showing that the issue of certain debentures was invalid, the holders of admittedly valid debentures issued before the estoppel arose are not affected by it, and as against them the holders of the invalid debentures will be postponed, although their security purports to rank *pari passu* with the valid issue (*Mowatt* v. *Castle Steel and Iron Works Co.* (1886), 34 Ch. D. 58, 63, C. A.; distinguished, *Robinson* v. *Montgomeryshire Brewery Co.*, [1896] 2 Ch. 841, 849, where the validity of the debentures was not in question).

(*b*) *Whitechurch (George), Ltd.* v. *Cavanagh*, [1902] A. C. 117, *per* Lord BRAMPTON, at p. 145; approved and followed, *Porter* v. *Moore*, [1904] 2 Ch. 367 (trustee lulled into security before making erroneous statement that trust fund was unincumbered).

(*c*) This was one of the grounds of decision in *Simm* v. *Anglo-American Telegraph Co.* (1879), 5 Q. B. D. 188, C. A., as explained in *Balkis Consolidated Co.* v. *Tomkinson*, [1893] A. C. 396, by Lord HERSCHELL, L.C., at p. 406; see also *per* Lord MACNAGHTEN, at p. 411, approved by Lord DAVEY in *Ruben* v. *Great Fingall Consolidated*, [1906] A. C. 439, at p. 446; and see p. 410, *post*.

(*d*) See *Dixon* v. *Kennaway & Co.*, [1900] 1 Ch. 833, *per* FARWELL, J., at p. 840.

SECT. 2. **Estoppel by Representation.**

that of "implied warranty," or contract to indemnify, appears to be open to question (*e*).

Must be, or appear to be, intended to be acted on.

540. It is not necessary that the representation should be false to the knowledge of the party making it, though in the early cases this appears to have been the law (*f*), provided that (i.) it is intended to be acted upon in the manner in which it was acted upon, or (ii.) the person who makes it so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it in that manner (*g*); and it has been added that the doctrine of estoppel by representation ought not in most cases to be applied unless the representation is such as to amount to the contract or licence of the party making it (*h*). An unfounded assumption may form the basis of estoppel, though neither party believed it to be true, but both have knowingly acted upon a conventional hypothesis. "Where two parties agree that a commercial instrument shall be taken as founded on a certain fact, and the position of one by that agreement is altered, the other ought not to be admitted to deny it" (*i*).

(*e*) See *Ruben* v. *Great Fingall Consolidated*, [1906] A. C. 439, *per* Lord DAVEY, at p. 446, citing *Sheffield Corporation* v. *Barclay*, [1905] A. C. 392.

(*f*) *Gale* v. *Lindo* (1687), 1 Vern. 475; *Montefiori* v. *Montefiori* (1762), 1 Wm. Bl. 363; *Neville* v. *Wilkinson* (1782), 1 Bro. C. C. 543; cited in *Jorden* v. *Money* (1854), 5 H. L. Cas. 185, at p. 212.

(*g*) *Freeman* v. *Cooke* (1848), 2 Exch. 654, 663 (explaining the rule in *Pickard* v. *Sears* (1837), 6 Ad. & El. 469, 474), approved in *Jorden* v. *Money*, *supra*; *Sheffield and Manchester Rail. Co.* v. *Woodcock* (1841), 7 M. & W. 574, 583; *Howard* v. *Hudson* (1853), 2 E. & B. 1; *Swan* v. *North British Australasian Co.* (1863), 2 H. & C. 175, 181, Ex. Ch., and see *per* COCKBURN, C.J., at p. 188; *Citizens' Bank of Louisiana* v. *First National Bank of New Orleans* (1873), L. R. 6 H. L. 352, 360; *M'Kenzie* v. *British Linen Co.* (1881), 6 App. Cas. 82; *Sarat Chunder Dey* v. *Gopal Chunder Lala* (1892), 56 J. P. 741, P. C.; and see *Cornish* v. *Abington* (1859), 4 H. & N. 549, approved in *Thomas* v. *Brown* (1876), 1 Q. B. D. 714, 722; *Carr* v. *London and North Western Rail. Co.* (1875), L. R. 10 C. P. 307, 316, 317, approved in *Coventry* v. *Great Eastern Rail. Co.* (1883), 11 Q. B. D. 776, C. A.; *Seton* v. *Lafone* (1887), 19 Q. B. D. 68, C. A.; *Farquharson Brothers & Co.* v. *King & Co.*, [1901] 2 K. B. 697, 713, C. A. (reversed, [1902] A. C. 325, without touching this point); see *Re Bentley (Henry) & Co. and the Yorkshire Breweries, Ltd., Ex parte Harrison* (1893), 69 L. T. 204, C. A. The language of BRETT, J., in *Carr* v. *London and North Western Rail. Co.*, *supra*, imports that where the representation is false to the knowledge of the party making it, it is not necessary that he should intend it to be acted on. Although the intention, or conduct from which it may be reasonably inferred, is certainly necessary to found an action of deceit (see title TORT), this language is consistent with that used by PARKE, B., in *Freeman* v. *Cooke*, *supra*, who does not, however, lay down the rule in terms. The point is not, perhaps, important, since where a deliberately false statement is acted on there is usually little difficulty in inferring the intention that it should be, and where the intention is made out, and the intended result follows, the person who made the representation is not permitted to question that it contributed to the result (*Smith* v. *Kay* (1859), 7 H. L. Cas. 750, 759, 770; followed in *Gordon* v. *Street*, [1899] 2 Q. B., 641, 646, C. A.). A mere puffing exaggeration of value by a vendor in negotiating a sale is not, in the absence of fraud, a representation which he is afterwards estopped from denying (*Martin* v. *Douglas* (1867), 16 W. R. 268).

(*h*) *Freeman* v. *Cooke*, *supra*, at p. 664, approved in *Clarke and Chapman* v. *Hart* (1858), 6 H. L. Cas. 633, 656; applied in *Palmer* v. *Moore*, [1900] A. C. 293, 298, P. C. (representation of inability to contribute to expenses of a mine, agreement or licence to co-adventurers to work it for their own benefit).

(*i*) *Ashpitel* v. *Bryan* (1863), 3 B. & S. 474, *per* CROMPTON, J., at p. 492;

SECT. 2. Estoppel by Representation.

Must have been acted upon by the party to whom it was made.

541. The representation must have been acted upon as true (*k*) by the party to whom it was made (*l*) (including in this expression a member of the public, or of a class, where it was made to the public or to a class of persons, *e.g.*, to the customers of a particular firm (*m*)). A representation made to one person, and acted on by him, cannot be taken advantage of by another to whom it was not made and who has not acted on it (*n*). And it is not sufficient that the party complaining acted in a manner consistent with the truth of the representation if it appears that he was not influenced by it (*o*). But if he really has relied upon the truth of the representation it is no answer to say that if he had thought about it he must have known that it was untrue; the representation itself was what put him off his guard (*p*).

A representation does not, by reason of having been acted on, become irrevocable; there is nothing to prevent the party who made it from withdrawing it and requiring the other, for the future, to act as if it had not been made (*q*).

affirmed (1864), 5 B. & S. 723, Ex. Ch. (bill drawn and indorsed by arrangement between the parties in the name of a dead person); compare *Glenie* v. *Smith*, [1907] 2 K. B. 507; affirmed on somewhat different grounds, [1908] 1 K. B. 263, C. A.; and see the judgment in *M'Cance* v. *London and North Western Rail. Co.* (1864), 3 H. & C. 343, 345, Ex. Ch.

(*k*) In the class of cases last referred to, where the parties have agreed to assume a conventional state of facts, the words "as true" must be understood as meaning "as if it were true." In all other cases the truth of the representation must be relied upon.

(*l*) *Freeman* v. *Cooke* (1848), 2 Exch. 654; *Howard* v. *Hudson* (1853), 2 E. & B. 1; *Edmundson* v. *Thompson* (1861), 31 L. J. (EX.) 207. An ordinary receipt does not as between immediate parties estop the person who gave it from showing that the money was not paid (*Skaife* v. *Jackson* (1824), 3 B. & C. 421; *Graves* v. *Key* (1832), 3 B. & Ad. 313; *Bowes* v. *Foster* (1858), 2 H. & N. 779), though it might do so as against a third party who had acted in reliance on it; *Oliver* v. *Nautilus Steam Shipping Co.*, [1903] 2 K. B. 639, C. A., *per* VAUGHAN WILLIAMS, L.J., at p. 648; *Ellen* v. *Great Northern Rail. Co.* (1901), 17 T. L. R. 453, C. A. (receipt evidence of accord and satisfaction); *Huckle* v. *London County Council* (1910), 26 T. L. R. 580, 581; *King* v. *Smith*, [1900] 2 Ch. 425; distinguish, however, the cases of agents charging themselves in account, see p. 388, *post*. Compare *Moss* v. *London and North Western Rail. Co.* (1874), 22 W. R. 532 (payment to a contractor of money which is due on completion does not estop him from denying that the work was complete). It is not enough that a person to whom an untrue representation was made acted upon it as true after he had notice that it was not (*Dunston* v. *Paterson* (1857), 2 C. B. (N. S.) 495).

(*m*) See *Swan* v. *North British Australasian Co.* (1863), 2 H. & C. 175, Ex. Ch., *per* BLACKBURN, J., at p. 182.

(*n*) *Heane* v. *Rogers* (1829), 9 B. & C. 577, 586; *R.* v. *Ambergate etc. Rail. Co.* (1853), 1 E. & B. 372; *Miles* v. *McIlwraith* (1883), 8 App. Cas. 120, 134, P. C., approving *Freeman* v. *Cooke*, *supra*; *Farquharson Brothers & Co.* v. *King & Co.*, [1902] A. C. 325, 341; *Burgis* v. *Constantine*, [1908] 2 K. B. 484, 499, 500, C. A.

(*o*) *Lebeau* v. *General Steam Navigation Co.* (1872), L. R. 8 C. P. 88 (representation as to contents of case not relied on by master, who signed bills of lading "contents unknown"); *Markham and Darter's Case*, [1899] 1 Ch. 414, 430; affirmed without discussing this point, [1899] 2 Ch. 480, C. A.; *Cropper* v. *Smith*, (1884) 26 Ch. D. 700, C. A.; affirmed without discussion (1885), 10 App. Cas. 249 (statement as to novelty in petition for letters patent); and see *Russo-Chinese Bank* v. *Li Yau Sam*, [1910] A. C. 174, P. C.; *Mordaunt Brothers* v. *British Oil and Cake Mills, Ltd.* (1910), 54 Sol. Jo. 654.

(*p*) *Bloomenthal* v. *Ford*, [1897] A. C. 156, *per* Lord HERSCHELL, L.C., at pp. 168—170.

(*q*) *White* v. *Greenish* (1861), 11 C. B. (N. S.) 209, 232.

SECT. 2. **Estoppel by Representation.**

And in the manner intended.

It must have been acted on in the manner in which it was meant to be acted on, or in such manner as a reasonable man would suppose it was meant to be acted on (*r*). A railway company's advice note to a consignee is not intended to be acted upon by his selling the goods (*s*), but the company must be supposed to know that delivery orders in the usual form are documents with a mercantile meaning attached to them, and may have credit given to them as documents of title (*t*). So those who issue bills of lading must be supposed to contemplate that purchasers of the goods therein described will act upon the statements they find there (*a*).

Party misled must have suffered prejudice.

542. It is further necessary to estoppel by representation that in acting upon it the party to whom it was made should have altered his position to his prejudice (*b*). A representation made to a person after he has altered his position cannot give rise to an estoppel, though if made earlier, and acted on, it might have done so (*c*). But it is a sufficient alteration of position if he is induced by the representation to take no step to protect himself, or to retrieve his position until, owing to the insolvency of some person against whom he has a remedy, or for other reason, it is too late (*d*). The mere payment of money under a mistake of fact induced by the representation in circumstances where there is not the slightest difficulty in getting it back is not such damage or prejudice as will give rise to an estoppel (*e*); but the parting with money, and being out of it for a certain period of time, coupled with the trouble and possible expense of establishing the right to get it back, may

(*r*) *Freeman* v. *Cooke* (1848), 2 Exch. 654; *Gillman, Spencer & Co.* v. *Carbutt & Co.* (1889), 61 L. T. 281, 282, 283, C. A.

(*s*) *Carr* v. *London and North Western Rail. Co.* (1875), L. R. 10 C. P. 307, 317; compare *Farmeloe* v. *Bain* (1876), 1 C. P. D. 445.

(*t*) *Coventry* v. *Great Eastern Rail. Co.* (1883), 11 Q. B. D. 776, C. A.

(*a*) *Compania Naviera Vasconzada* v. *Churchill and Sim*, [1906] 1 K. B. 237, 247; *Howard* v. *Tucker* (1831), 1 B. & Ad. 712.

(*b*) *Freeman* v. *Cooke*, *supra*, at p. 663; *Newton* v. *Liddiard* (1848), 12 Q. B. 924; *Carr* v. *London and North Western Rail. Co.* (1875), L. R. 10 C. P. 307, 317, 318; *MacFarlane* v. *Giannacopulo* (1858), 3 H. & N. 860; *Re Collie, Ex parte Adamson* (1878), 8 Ch. D. 807, 817, C. A.; *Simm* v. *Anglo-American Telegraph Co.* (1879), 5 Q. B. D. 188, 208, C. A.; *Whitechurch (George), Ltd.* v. *Cavanagh*, [1902] A. C. 117, 135; *Bell* v. *Marsh*, [1903] 1 Ch. 528, 543, C. A.; *Imperial Bank of Canada* v. *Bank of Hamilton*, [1903] A. C. 49, P. C.; *Re Lewis, Lewis* v. *Lewis*, [1904] 2 Ch. 656, C. A.

(*c*) *Horsfall* v. *Halifax and Huddersfield Union Banking Co.* (1883), 52 L. J. (CH.) 599 (defendants after the plaintiff had made advances on the shares of one of its shareholders told him that they had no charge on them); *M'Kenzie* v. *British Linen Co.* (1881), 6 App. Cas. 82, 109 (supposed drawer of forged bill, on learning of the forgery after the bank had made advances, omitted to give prompt information); *Morrison* v. *Universal Marine Insurance Co.* (1873), L. R. 8 Exch. 197, Ex. Ch. (underwriters, after loss of ship became known, delayed repudiation of policy); compare *Bell* v. *Marsh*, [1903] 1 Ch. 528, C. A.

(*d*) *Knights* v. *Wiffen* (1870), L. R. 5 Q. B. 660; discussed, *Simm* v. *Anglo-American Telegraph Co.* (1879), 5 Q. B. D. 188, 212, C. A.; and followed, *Dixon* v. *Kennaway & Co.*, [1900] 1 Ch. 833; and see *Ogilvie* v. *West Australian Mortgage and Agency Corporation*, [1896] A. C. 257, P. C.

(*e*) *Carr* v. *London and North Western Rail. Co.*, *supra*, at pp. 317, 318, as explained in *Compania Naviera Vasconzada* v. *Churchill and Sim*, *supra*, per CHANNELL, J., at p. 250.

amount to an alteration of position to the payer's prejudice within the rule (*f*).

Estoppel is not measured by damage.

543. When prejudice or damage is made out, the other circumstances being such as to create an estoppel, its consequences are not necessarily measured by the amount of prejudice or damage sustained. Thus, if a customer of a bank is estopped from asserting that a cheque with which he has been debited is a forgery, by his neglect to give such timely information as would have enabled the bank to have recourse to the forger, the debit will stand for the whole amount, and not for so much only as would have been recovered from the forger had the customer not allowed the bank to remain in ignorance of the facts (*g*); and in an action of trover founded on an estoppel the plaintiff is entitled to the full value of the goods, though it may be more than the actual damage sustained by the representation (*h*); and one who, in an action against shipowners for delivery of goods in a damaged condition, succeeds by reason only that the latter are estopped from denying that the goods were "shipped in good order and condition," can recover the whole of the damage which on delivery the goods were found to have suffered, without regard to the fact that he has a right, which he may still exercise, to recover the same damages from the shippers (*i*).

Representation by agent.

544. A representation made by an agent will be as effectual for the purpose of estoppel as if it had been made by his principal; thus, a company may be estopped by representations made by its officer in the ordinary way of business (*k*). But it is equally clear that no estoppel can arise from the representation of an agent, unless it is within his actual or ostensible authority to make it (*l*). And the knowledge of the agent, acquired when acting within the scope of his authority, is that of his principal, so that the latter

(*f*) *Compania Naviera Vasconzada* v. *Churchill and Sim*, [1906] 1 K. B. 237, 250.

(*g*) *Ogilvie* v. *West Australian Mortgage and Agency Corporation*, [1896] A. C. 257, 270, P. C.; compare *M'Kenzie* v. *British Linen Co.* (1881), 6 App. Cas. 82, 100. As to the right to recall a representation before being further acted upon, see *White* v. *Greenish* (1861), 11 C. B. (N. S.) 209.

(*h*) *Henderson & Co.* v. *Williams*, [1895] 1 Q. B. 521, C. A.

(*i*) *Compania Naviera Vasconzada* v. *Churchill and Sim*, *supra*, at pp. 250, 251, following *Henderson & Co.* v. *Williams*, *supra*.

(*k*) See, *e.g.*, *Bishop* v. *Balkis Consolidated Co.* (1890), 25 Q. B. D. 512, C. A.; *Manchester and Oldham Bank* v. *Cook & Co.* (1883), 49 L. T. 674 (bank manager). See further as to estoppel on companies, p. 408, *post*.

(*l*) *Barnett* v. *South London Tramways Co.*, (1887), 18 Q. B. D. 815, C. A., quoting *Newlands* v. *National Employers Accident Association* (1885), 54 L. J. (Q. B.) 428, C. A.; approved, *Whitechurch (George), Ltd.* v. *Cavanagh*, [1901] A. C. 117, 124; *Ruben* v. *Great Fingall Consolidated*, [1906] A. C. 439 (all these cases relate to secretaries of companies, whose authority to make representations is very limited); *Postmaster-General* v. *Green* (1887), 51 J. P. 582 (post office clerk). The master of a ship has authority to make statements in a bill of lading as to the condition of the goods (*Compania Naviera Vasconzada* v. *Churchill and Sim*, *supra*; and whether freight is payable or not (*Howard* v. *Tucker* (1831), 1 B. & Ad. 712); but no one may assume that he has authority to sign for goods which have not been shipped (*Grant* v. *Norway* (1851), 10 C. B. 665); or to make representations as to their quality (*Cox* v. *Bruce* (1886), 18 Q. B. D. 147, C. A.).

SECT. 2. **Estoppel by Representation.**

cannot be heard to say that in making a representation, or pursuing a course of conduct relied on as such, he did so in ignorance of facts so known to the agent (*m*). But this knowledge will not be imputed when the agent has been acting in fraud of the principal for the benefit of himself and the party seeking to set up an estoppel (*n*).

SUB-SECT. 2.—*Estoppel by Statement.*

Estoppel by statement.

545. Estoppel by actual statement is probably less common than estoppel by conduct or negligence. Instances occur, however, in every department of affairs, and are too miscellaneous to classify (*o*).

(*m*) *Wing* v. *Harvey* (1854), 5 De G. M. & G. 265, C. A.; *Bawden* v. *London, Edinburgh, and Glasgow Assurance Co.*, [1892] 2 Q. B. 534, C. A.; followed, *Hough* v. *Guardian Fire and Life Assurance Co.* (1902), 18 T. L. R. 273; *Holdsworth* v. *Lancashire and Yorkshire Insurance Co.* (1907), 23 T. L. R. 521 (premiums retained by company, the collecting agent having knowledge of facts which would invalidate the policy); *Deeley* v. *Lloyds Bank*, [1910] 1 Ch. 648, 672, 680, C. A. (If the facts be known, ignorance of their legal consequence is immaterial.)

(*n*) *Re Biggar and Rock Life Assurance Co.* (1901), 85 L. T. 636; following *New York Life Insurance Co.* v. *Fletcher* (1886), 117 United States Reps. 519; see, generally, title AGENCY, Vol. I., pp. 158, 192, 202.

(*o*) The following cases, in addition to many already cited, may be referred to as examples:—*Richards* v. *Johnston* (1859), 4 H. & N. 660 (false statement as to ownership of goods); *Seton* v. *Lafone* (1887), 19 Q. B. D. 68, C. A. (erroneous statement by warehousemen that certain goods lay at their warehouse, and were liable to be sold for charges, whereupon the plaintiff bought back the warrant from the person who held it); *Woodley* v. *Coventry* (1863), 2 H. & C. 164; *Knights* v. *Wiffen* (1870), L. R. 5 Q. B. 660 (vendors of unappropriated goods estopped by statements recognising delivery orders as correct from denying that property passed); *M'Cance* v. *London and North Western Rail. Co.* (1861), 7 H. & N. 477; affirmed (1864), 3 H. & C. 343, Ex. Ch. (false declaration as to value of horses tendered for carriage. The grounds of decision in the two courts, though not inconsistent, were not the same); *Van Hasselt* v. *Sack, The Twentje* (1859), 13 Moo. P. C. C. 185 (shipping agents estopped by their accounts from appropriating certain freights to the prejudice of their principals, who, after settling with the owners on the footing of those accounts, became purchasers of the ship); *Harris* v. *Truman* (1882), 9 Q. B. D. 264, C. A. (agent who fraudulently represented that goods bought for himself were bought for his principals, and thereby obtained money to pay for them, estopped from saying that the goods were his, which estoppel bound his trustee in bankruptcy); *Middleton* v. *Pollock, Ex parte Wetherall* (1876), 4 Ch. D. 49 (solicitor after advising client that he had invested his money on mortgage, estopped from denying that it was part of a larger sum invested on mortgage in the solicitor's name, so that the client gained priority in administration); *Deutsche Bank* (*London Agency*) v. *Beriro & Co.* (1895), 73 L. T. 669, C. A. (bankers, agents for collection of bill of exchange, having advised their indorsers (also agents) that the bill had been collected, and paid them the supposed proceeds, estopped after the latter had credited their principals from proving that the money was paid by mistake); *Manchester and Oldham Bank* v. *Cook & Co.* (1883), 49 L. T. 674 (bank estopped by its manager's representation, he having authority to arrange loans, that the board had approved a proposed loan, made subject to their approval); *Keith* v. *Gancia* (*R.*) *& Co., Ltd.*, [1904] 1 Ch. 774, C. A. (representation in licence to assign that mortgagee, who had foreclosed, was the person in whom the reversion on a sub-lease created by the mortgagor, before the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), was vested, relying on which the sub-lessee had assigned, and his assignee had accepted the assignment). As to statements by warehousemen recognising the title of transferee of goods, see *Henderson & Co.* v. *Williams*, [1895] 1 Q. B. 521, C. A.; and p. 408, *post*. It has been held that a person who makes application for shares in a company

In bills of lading.

546. As a class, perhaps, the most important are those statements which occur in documents to which credit is given in mercantile dealings as the *indicia* of title to goods (*p*), and of which the bills of lading may be regarded as typical. Long before the Bills of Lading Act, 1855 (*q*), it had been held that a shipowner was estopped as against the assignee of a bill of lading by an erroneous statement therein that freight had been paid in advance (*r*), and the principle has recently been applied to the statement that goods had been shipped in good order and condition (*s*); and now by virtue of that Act there is a statutory estoppel on the master or other person signing the bill of lading, against a consignee or indorsee for value without notice, from denying the shipment of the goods thereby represented to have been shipped (*t*).

In transfers and conveyances.

547. Another important class of estoppels resulting from actual statement arises upon transfers of shares and conveyances of real property, containing an acknowledgment of the receipt of purchase-money, upon which purchasers for value without notice of non-payment are entitled to rely; these, however, belong rather to the subject of estoppel by deed (*a*).

a fictitious name, upon which application shares are granted, is estopped from denying that he is a shareholder, and liable to contribute as such (*Re Central Klondyke Gold Mining and Trading Co., Savigny's Case* (1898), 5 Mans. 336, following *Pugh and Sharman's Case* (1872), L. R. 13 Eq. 566 (application in name of person under disability)). But estoppel was not mentioned in the latter case; and it seems that it is not the true ground for the decisions, for the shareholder was prevented, not from contradicting, but from affirming, his original misrepresentation. The principle involved seems rather to be "*ut res magis valeat*" etc.; compare *Kelner* v. *Baxter* (1866), L. R. 2 C. P. 174. A person named in an invoice, not intended to be a contract, as the seller of goods, is not estopped against one who has not been misled from denying that he was so (*Holding* v. *Elliott* (1860), 5 H. & N. 117, dissenting from *Jones* v. *Littledale* (1837), 6 Ad. & El. 486).

(*p*) As to delivery orders, see *Coventry* v *Great Eastern Rail. Co.* (1883), 11 Q. B. D. 776, C. A.; *Henderson & Co.* v. *Williams*, [1895] 1 Q. B. 521, 525, 529, C. A.; *Woodley* v. *Coventry* (1863), 2 H. & C. 164; distinguish *Carr* v. *London and North Western Rail. Co.* (1875), L. R. 10 C. P. 307, 317; *Farmeloe* v. *Bain* (1876), 1 C. P. D. 445, 450, where it was pointed out that the documents relied on had no recognised mercantile significance.

(*q*) 18 & 19 Vict. c. 111, s. 3; see title SHIPPING AND NAVIGATION.

(*r*) *Howard* v. *Tucker* (1831), 1 B. & Ad. 712.

(*s*) *Compania Naviera Vasconzada* v. *Churchill and Sim*, [1906] 1 K. B. 237.

(*t*) This statutory estoppel does not bind the owner (*Brown* v. *Powell Coal Co.* (1875), L. R. 10 C. P. 562, applying *McLean and Hope* v. *Fleming* (1871), L. R. 2 Sc. & Div. 128), but the bill of lading is evidence (*Smith & Co.* v. *Bedouin Steam Navigation Co.*, [1896] A. C. 70), and may by agreement be conclusive evidence against him (*Lishman* v. *Christie* (1887), 19 Q. B. D. 333, C. A.). Nor is the master, in an action for lump sum freight against an indorsee, estopped by the statement of weight in the bill (at least where it is merely matter of measurement, which may vary after the goods are put on board) from proving that he delivered all the goods that were shipped (*Blanchet* v. *Powell's Llantivit Collieries Co.* (1874), L. R. 9 Exch. 74), though it might be otherwise in an action for short delivery (*ibid.*, p. 77). And in an action for non-delivery the person signing it is not estopped from showing that mere identification marks were incorrectly stated in the bill of lading. If the identity of the goods can be established by other means, such marks become immaterial (*Parsons* v. *New Zealand Shipping Co.*, [1901] 1 K. B. 548, C. A.); and see title SHIPPING AND NAVIGATION.

(*a*) *Rimmer* v. *Webster*, [1902] 2 Ch. 163, citing *Rice* v. *Rice* (1854), 2 Drew.

SECT. 2. **Estoppel by Representation.**

In agents' accounts.

548. A somewhat special case of estoppel by statement occurs in regard to agents accounting to their principals. An agent who in his account makes a false statement either increasing his apparent receipts (*b*), or reducing his apparent expenditure so as to swell the credit (*c*), or diminish the debit of his principals, does so at his peril, and is not at liberty, unless he shows that it was by mistake, afterwards to recover the amounts from them, and this though it does not appear that they have acted on his erroneous statement. If it is shown that they have done so, the same result follows on the ordinary principles of estoppel (*d*).

SUB-SECT. 3.—*Estoppel by Conduct.*

What conduct will create estoppel.

549. The question whether a course of conduct, negligent or otherwise, amounts to a representation, or is such as a reasonable man would take to be a representation meant to be acted on in a certain way, must vary with each particular case; and, with certain exceptions, no general rules can be laid down for answering it. The acceptance of money paid in consideration of the existence of a certain state of things often estops the receiver, in the absence of some cause unknown to him entitling him to terminate it, from denying the existence of that state of things, and affords conclusive evidence of a waiver of any objection to the contract or other matter in respect of which it is paid. Thus the acceptance of premiums with knowledge of circumstances entitling the insurer to avoid the policy estops him from averring that for that reason it is not a valid policy (*e*). But the acceptance of money is by no

73, 83; Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), ss. 55, 56; *Hunter* v. *Walters* (1871), 7 Ch. App. 75; *King* v. *Smith*, [1900] 2 Ch. 425; *Lloyds Bank, Ltd.* v. *Bullock*, [1896] 2 Ch. 192; see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 464. As to estoppel on a company by a statement on a certificate for shares that they were fully paid up, see *Bloomenthal* v. *Ford*, [1897] A. C. 156; *Christchurch Gas Co.* v. *Kelly* (1887), 51 J. P. 374; and see p. 410, *ante*. An acknowledgment of receipt of premium in a marine insurance policy effected by a broker is conclusive between insurer and assured but not between insurer and broker (Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 54); see title INSURANCE; see also p. 371, *ante*.

(*b*) *Shaw* v. *Picton* (1825), 4 B. & C. 715.

(*c*) *Cave* v. *Mills* (1862), 7 H. & N. 913, applying *Shaw* v. *Picton*, *supra*.

(*d*) *Skyring* v. *Greenwood* (1825), 4 B. & C. 281, 290; *Cave* v. *Mills*, *supra*; see also *Andrew* v. *Robinson* (1812), 3 Camp. 199. Insurance broker who, in accordance with the usage of Lloyd's, has settled a loss by allowance in account in such manner as to deprive his principal of all remedy against the underwriter, cannot as against his principal deny the receipt of the money. A banker may be estopped by an error in a pass-book, acted on before it is corrected, from denying the customer's right to draw against the apparent balance, but not necessarily from afterwards charging him with the amount of the overdraft (in other words, correcting the mistake) (*Holland* v. *Manchester and Liverpool District Banking Co.* (1909), 14 Com. Cas. 241). But the receipt of a pass-book, and its return without complaint by the customer to the bank, is not conclusive evidence against the customer of a settled account (*Kepitagalla Rubber Estates, Ltd.* v. *National Bank of India, Ltd.*, [1909] 2 K. B. 1010, following BOWEN, L.J., in *Vagliano Brothers* v. *Bank of England* (1889), 23 Q. B. D. 243, 263, C. A. (reversed on other points, *Bank of England* v. *Vagliano Brothers*, [1891] A. C. 107); see title BANKERS AND BANKING, Vol. I., p. 619.

(*e*) *Wing* v. *Harvey* (1854), 5 De G. M. & G. 265, C. A. (life); *Edwards* v. *Aberayron Mutual Ship Insurance Society* (1876), 1 Q. B. D. 563, Ex. Ch.; *Jo*

means the only conduct which may be relied on as conclusive evidence of waiver of an irregularity, or other ground of objection to a case set up (*f*). Thus a man who, acting as director of a company, takes part in confirming the allotment of shares to himself, cannot, in an action for calls, be heard to say that his appointment as director, or the allotment of shares, was irregular and *ultra vires* (*g*). A trustee in bankruptcy, who has allowed the bankrupt to go on trading in his own name, may be estopped as against execution creditors from claiming his property (*h*). And parties to litigation who have continued the proceedings with knowledge (*i*) of an irregularity of which they might have availed themselves, are estopped from afterwards setting it up (*j*); and, *à fortiori*, on a

v. *Bangor Mutual Shipping Assurance Society* (1889), 61 L. T. 727; and cases cited notes (*m*), (*n*), p. 386, *ante;* see also *Foster* v. *Mentor Life Assurance Co.* (1854), 3 E. & B. 48, where the question was as to effect of recital in a policy by deed poll; *Herman* v. *Royal Exchange Shipping Co.* (1884), Cab. & El. 413 (persons, after accepting freight on goods shipped under bills of lading in their printed forms, estopped from saying that the ship was not theirs and the master not their agent, and the contract not with them); *Re Coltman, Coltman* v. *Coltman* (1881), 19 Ch. D. 64, C. A. (surety for loan by friendly society could not object that it was *ultra vires*); *Exchange Bank of Yarmouth* v. *Blethen* (1885), 10 App. Cas. 293, P. C. (acceptance of payment under composition deed estops from denying execution); compare *Dunn* v. *Wyman* (1881), 51 L. J. (Q. B.) 623 (creditor not allowed to say deed was void). As to estoppels between landlord and tenant, see p. 402, *post;* and as to the effect of acceptance of rent, in waiving a forfeiture, and creating a tenancy from year to year, see *Goodright* d. *Walter* v. *Davids* (1778), 2 Cowp. 803; *Walrond* v. *Hawkins* (1875), L. R. 10 C. P. 342. As to acceptance of surrender after forfeiture by sub-letting, see *Great Western Rail. Co.* v. *Smith* (1876), 2 Ch. D. 235, C. A.; *Parker* v. *Jones*, [1910] 2 K. B. 32; and, generally, title LANDLORD AND TENANT.

(*f*) *E.g.*, *Thomas* v. *Brown* (1876), 1 Q. B. D. 714, 722 (estoppel by conduct in investigation of title from denying existence of contract); *Else* v. *Barnard* (1860), 2 L. T. 203 (purchaser estopped from objecting that sale was not by auction); *Burgoyne & Co.* v. *Godfree & Co.* (1904), 22 R. P. C. 168, C. A. (the conduct of a shipper in selling wine branded with his name prevents his complaining of the act of a purchaser in selling it as the shipper's wine); *Deeley* v. *Lloyds Bank*, [1910] 1 Ch. 648, 672, 680, C. A. (plaintiff, having induced defendants to release collateral security, estopped from saying that original security was discharged).

(*g*) *York Tramways* v. *Willows* (1882), 8 Q. B. D. 685, 699, C. A.; followed, *Faure Electric Accumulator Co.* v. *Phillipart* (1887), 58 L. T. 525; *Benson* v. *Hadfield* (1844), 4 Hare, 32 (insufficiency of board); *Jones* v. *North Vancouver Land and Improvement Co.*, [1910] A. C. 317, P. C.; compare *Hull Flax Co.* v. *Wellesley* (1860), 6 H. & N. 38 (receipt of dividends estoppel in action for calls; but here there was also estoppel by deed); *Re St. George's Steam Packet Co., Maguire's Case* (1894), 3 De G. & Sm. 31; *Barrow Mutual Ship Insurance Co.* v. *Ashburner* (1885), 54 L. J. (Q. B.) 377, C. A.; distinguish *Tyne Mutual Steamship Assurance Association* v. *Brown* (1896), 74 T. L. 283, where there was really no representation at all; see title COMPANIES, Vol. V., p. 325.

(*h*) *Engelback* v. *Nixon* (1875), L. R. 10 C. P. 645, as explained in *Wadling* v. *Oliphant* (1875), 1 Q. B. D. 145, 149; see title BANKRUPTCY, Vol. II., p. 166.

(*i*) The knowledge is essential: thus, a party is not estopped by appearing and conducting proceedings before the other party's arbitrator, in ignorance that he was not properly qualified, from afterwards denying his jurisdiction, and this though his own arbitrator is not qualified either; but he would not be allowed to deny the jurisdiction of the latter (*Jungheim, Hopkins & Co.* v. *Foukelmann*, [1909] 2 K. B. 948, 956); and see *Toronto Railway* v. *Toronto Corporation*, [1904] A. C. 809, 815, P. C. (objection of want of jurisdiction not waived by party having set the tribunal in motion).

(*j*) *Tyerman* v. *Smith* (1856), 6 E. & B. 719; *Andrews* v. *Elliott* (1855), 5

SECT. 2. Estoppel by Representation.

somewhat different principle, such a party cannot take advantage of an error to which he has himself contributed (*k*).

Agency by estoppel.

550. The doctrine of estoppel by conduct is constantly applied where one person has held out another as his agent to do a certain class of acts, either by allowing him to appear as his agent when he was not so (*l*), or as having a greater authority than he in fact has (*m*), or by omitting to give notice that his authority has been withdrawn. Whenever, for example, a company through their directors hold a person out to the world as their agent for a particular purpose, ratifying his conduct as such, the purpose being one which the constitution of the company enables them to authorise, they cannot afterwards dispute acts done by him within the scope of such countenanced agency (*n*). But in order that a person may

E. & B. 502; affirmed (1856), 6 E. & B. 338, Ex. Ch.; and see R. S. C., Ord. 70, r. 2; compare *Haines* v. *East India Co.* (1856), 11 Moo. P. C. C. 39 (party in custody under *ca. sa.* who acquiesced in arrangement whereby he was released on the ground of ill health, but remain under sheriff's supervision, estopped from denying that he was all the time in custody); see also p. 364, *ante*, and cases there cited.

(*k*) *Meredith* v. *Hodges* (1807), 2 Bos. & P. (N. R.) 453; *Price* v. *Harwood* (1811), 3 Camp. 108; *Walker* v. *Willoughby* (1816), 6 Taunt. 530; *Reeves* v. *Slater* (1827), 7 B. & C. 486; *Cox* v. *Cannon* (1838), 4 Bing. (N. C.) 453; *Fisher* v. *Magnay* (1844), 5 Man. & G. 778; and see *Jungheim, Hopkins & Co.* v. *Foukelmann*, [1909] 2 K. B. 948, 957; compare *Hewlett* v. *London County Council* (1908), 24 T. L. R. 331.

(*l*) As in *Cornish* v. *Abington* (1859), 4 H. & N. 549; *Waller* v. *Drakeford* (1853), 1 E. & B. 749; compare *Miles* v. *Furber* (1873), L. R. 8 Q. B. 77. As to partnership by estoppel, see *Mollwo, March & Co.* v. *Court of Wards* (1872), L. R. 4 P. C. 419, 435, P. C.; Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 14. As to agency by estoppel, see title AGENCY, Vol. I., p. 158.

(*m*) *Trickett* v. *Tomlinson* (1863), 13 C. B. (N. S.) 663; *Re Bentley (Henry) & Co. and Yorkshire Breweries, Ex parte Harrison* (1893), 69 L. T. 204, C. A.; see also *Little* v. *Spreadbury* (1910), 102 L. T. 829; distinguish *Re Consort Deep Level Gold Mines, Ltd., Ex parte Stark*, [1897] 1 Ch. 575, C. A. There can be no such holding out to one who knows the precise limits of the agent's authority, even though the principal's methods are such as to facilitate frauds by the agent (*Russo-Chinese Bank* v. *Li Yau Sam*, [1910] A. C. 174, P. C.). A patentee may be estopped by holding out an agent as authorised to sell a patented article free from conditions from insisting as against a purchaser from the agent that he had no such authority (*Incandescent Gas Light Co.* v. *Cantelo* (1895), 12 R. P. C. 262, as explained in *Badische Anilin und Soda Fabrik* v. *Isler*, [1906] 1 Ch. 605, *per* BUCKLEY, J., at p. 611; affirmed, [1906] 2 Ch. 443, C. A.).

(*n*) *Wilson* v. *West Hartlepool Harbour and Rail. Co.* (1864), 34 Beav. 187, 193; affirmed (1865), 2 De G. J. & Sm. 475, C. A., on the ground of particular ratification only. Where the agent is a managing director he may be presumed to have, in the company's commercial business, all the powers which he purports to exercise, provided the articles, of which all the world must be taken to have notice (*Mahony* v. *East Holyford Mining Co.* (1875), L. R. 7 H. L. 869, 893; and see *Whitechurch (George), Ltd.* v. *Cavanagh*, [1902] A. C. 117, 141), enable them to be given to him (*Biggerstaff* v. *Rowatt's Wharf, Ltd.*, [1896] 2 Ch. 93, C. A.; distinguished, *Premier Industrial Bank, Ltd.* v. *Carlton Manufacturing Co., Ltd., and Crabtree, Ltd.*, [1909] 1 K. B. 106), having regard to the requirements as to negotiable instruments of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 77. But he cannot be presumed to have powers in relation to what will confer a title to its shares (*Whitechurch (George), Ltd.* v. *Cavanagh*, *supra*, p. 130). The payment of a single bill accepted without authority will not estop the party paying from denying a similar signature to a second bill (*Morris* v. *Bethell* (1869), L. R. 5 C. P. 47); *secus*, where a course of business has been made to appear (*Barber* v. *Gingell* (1800), 3 Esp. 60).

be bound by the unratified contract of an agent without real authority it must appear that his supposed authority was ostensible to the other contracting party, and relied on by him when he made his contract. It is not enough that the agent has at one time had authority which was secretly withdrawn (*o*), or that he has authority to contract with certain individuals (*p*), if these facts were not known to the other party.

Liability as partner.

551. Agency by estoppel is the foundation of the liability of a retired partner to those who have contracted with the firm in ignorance of his retirement, and on the faith of his continuing authority (*q*); and where a new partner has joined the firm in his place, those who afterwards contract with it in ignorance of the change have the option of looking either to the members of the new firm, who are liable as the real principals in the transaction, or to the members of the old one, who are liable by estoppel; but members of the old firm and the new firm are not jointly liable; the other contracting parties cannot sue both, and having once made their election, with full knowledge, are concluded by it (*r*).

Factors Act, 1889.

552. A statutory extension of the doctrine of agency by estoppel has been effected by the Factors Acts (consolidated by the Factors Act, 1889 (*s*)). These have established an exception to the rule that mere parting with possession of a chattel or a document of title does not estop the owner from setting up his title against a purchaser. Their effect is to enable a "mercantile agent," acting in the ordinary course of his business as such, who is with the consent of the owner in possession of goods or documents of title to goods, to make a valid disposition of them by way of pledge, sale, or exchange, to persons taking in good faith, and without notice of any want of authority (*t*). And for this purpose a consent once given is available, after it is withdrawn, to a person having no notice of withdrawal, and extends to documents obtained in exchange for goods or other documents held with such consent (*u*).

Other cases.

553. Corresponding provisions have been made for the protection of persons dealing with others who are intrusted with goods for consignment or sale (*a*); with vendors who are suffered to retain

(*o*) *Miles* v. *McIlwraith* (1883), 8 App. Cas. 120, 133, P. C., approving *Freeman* v. *Cooke* (1848), 2 Exch. 654, 664; compare *Burgis* v. *Constantine*, [1908] 2 K. B. 484, 499, 500, C. A.; *Edmundson* v. *Thompson* (1861), 31 L. J. (EX.) 207.

(*p*) *Farquharson Brothers & Co.* v. *King & Co.*, [1902] A. C. 325, 333.

(*q*) *Freeman* v. *Cooke, supra;* Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 36; and see title PARTNERSHIP. Conversely, an agent who signs a bill in a firm's name may, by having held himself out as a partner, render himself personally liable on it (*Gurney* v. *Evans* (1858), 3 H. & N. 122); see also title AGENCY, Vol. I., pp. 159, 215.

(*r*) *Scarf* v. *Jardine* (1882), 7 App. Cas. 345; followed, *Jones* v. *Ashwin* (1883), Cab. & El. 159; compare *Fell* v. *Parkin* (1882), 52 L. J. (Q. B.) 99.

(*s*) 52 & 53 Vict. c. 45.

(*t*) *Ibid.*, s. 2 (1), 5.

(*u*) *Ibid.*, s. 2 (2), (3).

(*a*) *Ibid.*, s. 7.

SECT. 2. **Estoppel by Representation.**

possession of goods or documents of title (*b*); and buyers who are given premature possession of them (*c*).

Estoppel as to scope of authority.

554. A further development of the doctrine of agency by estoppel is that one who provides an authorised agent with the *indicia* of an authority in excess of his actual authority cannot, as against persons who have, in dealing with him *bonâ fide*, altered their position on the faith of such *indicia*, deny that he had the larger authority. This rule has been illustrated in the case of negotiable instruments. Thus, if a man signs a blank stamped paper and hands it to an agent with authority to fill it up as a promissory note or bill of exchange for a limited sum, and the agent inserts a larger sum, but not exceeding what the stamp will cover, he will be estopped as against a *bonâ fide* holder for value who has taken the instrument after completion (*d*) from denying the agent's authority to fill it up for that amount (*e*). The same principle is applicable where a negotiable instrument is issued with any material part left in blank (*f*), and has been embodied, though perhaps not in its entirety, in the Bills of Exchange Act, 1882 (*g*), which establishes a statutory estoppel in favour of a "holder in due course" to whom the completed instrument is negotiated (*h*). Similarly, where an owner or pledgee of goods hands a delivery order with blanks in it to an agent with authority to fill them up, he will be estopped as against the warehouseman who has acted on it from proving that the authority was subject to a limit which has been exceeded (*i*).

(*b*) Factors Act, 1889 (52 & 53 Vict. c. 45), s. 8; Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 25 (1), amending the law as laid down in *Johnson* v. *Crédit Lyonnais Co.* (1877), 3 C. P. D. 32, C. A.

(*c*) Factors Act, 1889 (52 & 53 Vict. c. 45), s. 9; Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 25 (2); compare *Gillman, Spencer & Co.* v. *Carbutt & Co.* (1889), 61 L. T. 281, C. A.; but *quære* whether this case would be followed having regard to the difference between the sections cited, and Factors Act, 1877 (40 & 41 Vict. c. 39), s. 5, for which they were substituted; *M'Ewan* v. *Smith* (1849), 2 H. L. Cas. 309, on which it was founded, was decided long before the date of the last-mentioned enactment; see title SALE OF GOODS.

(*d*) See *France* v. *Clark* (1884), 26 Ch. D. 257, 262, C. A.; *London and South Western Bank* v. *Wentworth* (1880), 5 Ex. D. 96.

(*e*) *Lloyds Bank, Ltd.* v. *Cooke*, [1907] 1 K. B. 794, C. A., applying *Brocklesby* v. *Temperance Building Society*, [1895] A. C. 173; and see *Swan* v. *North British Australasian Co.* (1863), 2 H. & C. 183, 185, Ex. Ch.; *Young* v. *Grote* (1827), 4 Bing. 253, as explained in *Scholfield* v. *Londesborough* (*Earl*), [1896] A. C. 514, by Lord HALSBURY, L.C., at p. 522; *Collis* v. *Emett* (1790), 1 Hy. Bl. 313; *Russel* v. *Langstaffe* (1780), 2 Doug. (K. B.) 514; *Schultz* v. *Astley* (1836), 2 Bing. (N. C.) 544.

(*f*) *France* v. *Clark*, *supra*; *Foster* v. *Mackinnon* (1869), L. R. 4 C. P. 704, 712; and see *Crutchly* v. *Mann* (1814), 5 Taunt. 529. As to the effect of executing a blank form of transfer, see *France* v. *Clark*, *supra*, at p. 263; *Bentinck* v. *London Joint Stock Bank*, [1893] 2 Ch. 120, C. A.

(*g*) 45 & 46 Vict. c. 61.

(*h*) *Ibid.*, s. 20 (2). In *Herdman* v. *Wheeler*, [1902] 1 K. B. 361, it was held that a note was not "negotiated" to a payee so as to give him the benefit of this section; and in *Lewis* v. *Clay* (1897), 67 L. J. (Q. B.) 224, that a payee being an immediate party to the note was not a "holder in due course." The former of these cases was much considered in *Lloyds Bank, Ltd.*, v. *Cooke*, *supra* (see especially the judgment of MOULTON, L.J.); and neither of them, so far as it dealt with these points, can now be relied on with confidence.

(*i*) *Union Credit Bank* v. *Mersey Docks and Harbour Board*, [1899] 2 Q. B.

SECT. 2. Estoppel by Representation.

Authority to deal with goods.

555. And although, as has been seen, mere parting with possession of a chattel (*j*), or of a document of title (*k*) other than a negotiable instrument (*l*), does not estop the owner from setting up his title against a purchaser for value, it is otherwise where an owner either by giving authority to some person to deal with goods as his own (*m*), or by neglect of some duty of precaution which he owes to those who may deal with that person, enables him to hold himself out as having not the possession only, but the property (*n*). Where, for example, a person hands to another a document, purporting on its face to be transferable by delivery, he thereby represents that it will pass with a good title to anyone who takes it in good faith and for value, and is estopped as against such from denying its negotiability (*o*).

To deal with securities.

556. The principles under discussion have frequently been applied to dealings by trustees and others in whom property is legally vested for special purposes. A trustee is not an agent: the fact that he has the legal estate is not a representation that he has authority to deal with it by mortgage or sale, which will prevent the *cestui que trust* from setting up his equitable title against that of a borrower or purchaser without notice of the trust, for trusts are an ordinary incident of life. Such persons can protect themselves by getting in the legal estate, but not on any ground

205, applying *Young* v. *Grote* (1827), 4 Bing. 253, as explained by Lord HALSBURY, in *Scholfield* v. *Londesborough (Earl)*, [1896] A. C. 514; and dissenting from the "*semble*" in the head-note to *Swan* v. *North British Australasian Co.* (1863), 2 H. & C. 183, Ex. Ch., in so far as it states that estoppel by executing instruments in blank is confined to negotiable instruments.

(*j*) *Weiner* v. *Gill*, [1905] 2 K. B. 172, 183; affirmed, [1906] 2 K. B. 574, C. A.; see p. 379, *ante*; if it were otherwise, as pointed out by BRAY, J., there would have been no necessity for the Factors Acts; *Truman* v. *Attenborough* (1910), 54 Sol. Jo. 682.

(*k*) *Kingsford* v. *Merry* (1856), 1 H. & N. 503, Ex. Ch.; see note (*i*), p. 379, *ante*.

(*l*) *Miller* v. *Race* (1759), 1 Burr. 452; Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 38 (2).

(*m*) See *Weiner* v. *Harris*, [1910] 1 K. B. 285, C. A., *per* FARWELL, L.J., at p. 295.

(*n*) *Henderson & Co.* v. *Williams*, [1895] 1 Q. B. 521, 525, 529, C. A.; *Babcock* v. *Lawson* (1879), 4 Q. B. D. 394; affirmed, but not on this point (1880), 5 Q. B. D. 284, C. A.; *National Mercantile Bank* v. *Hampson* (1880), 5 Q. B. D. 177; *Low* v. *McGill* (1864), 10 L. T. 495; compare *per* MARTIN, B., *Higgons* v. *Burton* (1857), 26 L. J. (EX.) 342, 343; *Waller* v. *Drakeford* (1853), 1 E. & B. 749; *Kingsford* v. *Merry*, *supra*, seems to have been decided on a view of the facts which did not sufficiently regard this aspect of them; see *Henderson & Co.* v. *Williams*, *supra*, at pp. 526, 527. See also *France* v. *Clark* (1884), 26 Ch. D. 257, 264, C. A.; *Fine Art Society* v. *Union Bank of London* (1886), 17 Q. B. D. 705, C. A., *per* Lord ESHER, M.R., at p. 710.

(*o*) *Goodwin* v. *Robarts* (1876), App. Cas. 476; *Rumball* v. *Metropolitan Bank* (1877), 2 Q. B. D. 194. This proposition was one of the grounds of decision in both these cases; in neither, however, was it a necessary ground, as the documents were in each case held to be in fact negotiable; and its correctness was doubted in *Colonial Bank* v. *Cady and Williams* (1890), 15 App. Cas. 267, by Lord BRAMWELL, at p. 282; compare *Re South Essex Estuary Co., Ex parte Chorley* (1870), L. R. 11 Eq. 157 (company having transferred Lloyd's bonds to a contractor with the intention that they should be assignable, estopped from disputing his title as against a purchaser from him); and see *Crouch* v. *Crédit Foncier of England* (1873), L. R. 8 Q. B. 374, 384 (the decision in which case was

SECT. 2. Estoppel by Representation.

of estoppel (*p*). But where a person has been intrusted with title deeds with authority to raise money on them, the owner of the deeds cannot take advantage of any limitation of amount which he placed upon the authority to raise money, as against a lender who had no notice of it and who has relied on the deeds (*q*); and this result is not affected by the fact that the borrower resorted to forgery for the purpose of carrying out the transaction, provided the lender is not compelled to rely on the forged document for his security (*r*). And the same principle has been applied where the person intrusted with the deeds having authority not to borrow, but to deal with them by way of sale, uses them to obtain an advance for himself (*s*).

Representations implied from signature to negotiable instruments.

557. The commercial law attributed to those who put their names to negotiable instruments certain representations as necessarily implied from their conduct in doing so, and as every *bonâ fide* holder of such instruments is deemed to have given faith to the signatures on the bill when he took it, each of the previous signatories is estopped as against him from denying the truth of those representations. This branch of estoppel is now embodied in the Bills of Exchange Act, 1882, the provisions of which have been fully dealt with elsewhere, and it is not necessary to repeat them (*a*).

Estoppel by accrediting fictitious bill.

558. The act of a man in signing as acceptor a fictitious document in the shape of a bill of exchange expressed to be

treated as overruled by *Goodwin* v. *Robarts*, *supra*, in *Bechuanaland Exploration Co.* v. *London Trading Bank*, [1898] 2 Q. B. 658); see title BILLS OF EXCHANGE ETC., Vol. II., pp. 568, 569.

(*p*) *Shropshire Union Railways and Canal Co.* v. *R.* (1875), L. R. 7 H. L. 496, *per* Lord CAIRNS, L.C., at pp. 507—509; *Rimmer* v. *Webster*, [1902] 2 Ch. 163, 170; *Burgis* v. *Constantine*, [1908] 2 K. B. 484, 503, C. A.

(*q*) *Brocklesby* v. *Temperance Building Society*, [1895] A. C. 173, following *Perry Herrick* v. *Attwood* (1857), 2 De G. & J. 21, also followed, *Robinson* v. *Montgomeryshire Brewery Co.*, [1896] 2 Ch. 841; *Briggs* v. *Jones* (1870), L. R. 10 Eq. 92; *Marshall* v. *National Provincial Bank of England* (1892), 66 L. T. 525; compare *McHenry* v. *Davies* (1870), L. R. 10 Eq. 88.

(*r*) *Brocklesby* v. *Temperance Building Society*, *supra*, at p. 184.

(*s*) *Rimmer* v. *Webster*, *supra*. FARWELL, J., puts the disability of the true owner to set up his title on the ground of negligence, but it seems rather to rest on a breach of duty to persons who may be invited to deal with his agent. In this case the transferor was also estopped by his acknowledgment in the transfer of the receipt of full purchase-money, as to which see p. 371, *ante*; *Lloyds Bank, Ltd.* v. *Bullock*, [1896] 2 Ch. 192. Distinguish *Burgis* v. *Constantine*, *supra*, where the authority had come to an end without being exercised.

(*a*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), ss. 54 (2), 55, 88 (2); see title BILLS OF EXCHANGE ETC., Vol. II., pp. 517, 518, 520. Reference may also be made to the following cases: *Collis* v. *Emett* (1790), 1 Hy. Bl. 313 (drawer of bill payable to fictitious payee); *Drayton* v. *Dale* (1823), 2 B. & C. 293 (capacity of payee of note to indorse); *Ashpitel* v. *Bryan* (1864), 5 B. & S. 723, Ex. Ch. (drawing and indorsement in name of dead person, to knowledge of acceptor); *Cooper* v. *Meyer* (1830), 10 B. & C. 468, 471 (acceptor and drawer's signature); *Pitt* v. *Chappelow* (1841), 8 M. & W. 616 (capacity of drawer); *Sanderson* v. *Collman* (1842), 4 Man. & G. 209, 219 (general principle stated); *Phillips* v. *Im Thurn* (1865), 18 C. B. (N. S.) 694, 701 (acceptance for honour); *MacGregor* v. *Rhodes* (1856), 6 E. & B. 266 (indorser and prior indorsement); *Beeman* v. *Duck* (1843), 11 M. & W. 251; and *Garland* v. *Jacomb* (1873), L. R. 8 Exch. 216, Ex. Ch. (capacity of drawer to indorse, but not the actual indorsement).

payable at his bank, so accredits the document as genuine that the banker is entitled as his agent to be indemnified by his customer against the consequences of payment to a person presenting the document with the apparent indorsement of the supposed payee; and the case is strengthened where, besides attaching his signature to the bill, the customer has advised the bank that it is coming forward for payment (*b*).

Protection of persons dealing with agent as principal.

559. As, on the one hand, a person may estop himself from denying that a transaction entered into by an ostensible agent was for his account, so on the other a principal may be precluded from asserting that fact; and the rule (*c*) that one who purchases from or otherwise gives credit to an agent, under the belief induced by the conduct or authority of the principal that the agent is dealing on his own account, is entitled to set off his debt against the agent's debt to him rests on the doctrine of estoppel (*d*).

Acquiescence inferred from silence.

560. Mere silence or inaction is not, in the absence of a duty to speak, such conduct as amounts to a representation (*e*). But it may be the duty of one whose consent to a particular act is required not to stand by, when he knows it has been done without his consent, so long as to induce others to do that from which otherwise they might have abstained; and he cannot afterwards question the legality of the act, to the prejudice of those who have so given faith to the fair inference to be drawn from his conduct (*f*).

A duty to speak arises whenever a person knows that another

(*b*) *Bank of England* v. *Vagliano Brothers*, [1891] A. C. 107, distinguishing *Robarts* v. *Tucker* (1851), 16 Q. B. 560, Ex. Ch. (payment of a genuine bill with a forged indorsement, to which the customer had not contributed), and applying *Ireland* v. *Livingston* (1872), L. R. 5 H. L. 395; see titles AGENCY, Vol. I., p. 164; BANKERS AND BANKING, Vol. I., p. 614.

(*c*) *George* v. *Clagett* (1797), 7 Term Rep. 359; 2 Smith, L. C., 11th ed., p. 138; see title AGENCY, Vol. I., p. 210. So an agent may estop himself from denying that he contracted as principal (*Gurney* v. *Evans* (1858), 3 H. & N. 122).

(*d*) *Cooke* v. *Eshelby* (1887), 12 App. Cas. 271, *per* Lord WATSON, at p. 278, quoting BOWEN, L.J., in S. C. (not reported); *dubitante*, Lord FITZGERALD. The rule was acted on in *Montagu* v. *Forwood*, [1893] 2 Q. B. 350, in favour of one who collected average contributions for an apparent principal who was indebted to him, applying *George* v. *Clagett*, *supra*; *Rabone* v. *Williams* (1785), 7 Term Rep. 360, n.; recognised in *Fish* v. *Kempton* (1849), 7 C. B. 687.

(*e*) *Proctor* v. *Bennis* (1887), 36 Ch. D. 740, 761, C. A. (patentee not bound to give notice of his patent rights unless he knows another person is acting and spending his money in ignorance of them); *Polak* v. *Everett* (1876), 1 Q. B. D. 669, 675, C. A., *per* BLACKBURN, J.; *Barton* v. *London and North Western Railway* (1889), 24 Q. B. D. 77 (not answering letter); *Re Lewis*, *Lewis* v. *Lewis*, [1904] 2 Ch. 656, C. A. (executor not bound to disclose gift over to himself); *Sheridan* v. *New Quay Co.* (1858), 4 C. B. (N. S.) 618, 648, 649; *Re Walker* (1910), 26 T. L. R. 260 (mere attendance of dissenting creditors at meeting called by trustee under deed of assignment does not estop from relying on deed as act of bankruptcy); compare *Provincial Insurance Co. of Canada* v. *Leduc* (1874), L. R. 6 P. C. 224.

(*f*) *Cairncross* v. *Lorimer* (1860), 3 Macq. 827, 829 (members of congregation precluded from maintaining an action for property which had been enjoyed by a Free Church minister, inducted with their acquiescence); compare *Rule* v. *Jewell* (1881), 18 Ch. D. 660, following *Prendergast* v. *Turton* (1841), 1 Y. & C. Ch. Cas. 98; on appeal (1843), 13 L. J. (CH.) 268, which was distinguished in *Clarke and Chapman* v. *Hart* (1858), 6 H. L. Cas. 633, the principle being approved, see *per* Lord WENSLEYDALE, at p. 670, citing also *Norway* v. *Rowe* (1812), 19 Ves. 144 (irregular forfeiture of shares in cost-book mining company); compare *Jones*

SECT. 2. **Estoppel by Representation.**

is acting on an erroneous assumption of some authority given or liability undertaken by the former, or is dealing with or acquiring an interest in property in ignorance of his title to it (*g*). It is the duty of a man who knows that another is relying on a document bearing a counterfeit of his signature to give notice of the forgery without delay (*h*). So the receipt of an invoice indicating that a tradesman has been supplying goods in the erroneous belief that the recipient has authorised their purchase imposes on him the duty of at once correcting the error (*i*). *A fortiori*, it is the duty of a man who by his own mistake has led another into an erroneous belief to correct it as soon as the mistake has been discovered (*k*). And one who culpably stands by and allows another to hold himself out to the world as the owner of property, and thereby to sell it to a *bonâ fide* buyer, cannot afterwards assert his title against the latter (*l*). On a similar, but not identical principle, for they founded on their jurisdiction to relieve against fraud (*m*), courts of equity would not permit an owner of property who had knowingly allowed another person to enter into a contract for its purchase, or for the advance of money upon

Equitable doctrine of standing by.

v. *North Vancouver Land and Improvement Co.*, [1910] A. C. 317, P. C. But in order that a person may be precluded by acquiescence from asserting his legal rights against another, it is necessary that he should be fully aware of the course which the latter is pursuing (*Lynch* v. *Commissioners of Sewers of City of London* (1885), 32 Ch. D. 72, C. A.). In considering whether silence or inaction is such as to give rise to an estoppel, it must be remembered that there is a distinction between executed and executory interests; where the assistance of a court of equity is invoked by a person for the purpose of giving effect to the latter the court will refuse relief if there is anything that amounts to *laches* on his part. It is far otherwise where executed interests are concerned (*Clarke and Chapman* v. *Hart* (1858), 6 H. L. Cas. 633, *per* Lord CHELMSFORD, L.C., at pp. 655, 656, citing with approval the limitations laid down in *Freeman* v. *Cooke* (1848), 2 Exch. 654, 664).

(*g*) *Stroud* v. *Stroud* (1844) 7 Man. & G. 417.

(*h*) *M'Kenzie* v. *British Linen Co.* (1881), 6 App. Cas. 82, 109 (but he may excuse himself for delay by showing that the other is in no worse position in consequence of it (*ibid.*)); and see *Ogilvie* v. *West Australian Mortgage and Agency Corporation*, [1896] A. C. 257, P. C.; *Ewing (William) & Co.* v. *Dominion Bank*, [1904] A. C. 806, P. C.; and title BILLS OF EXCHANGE ETC., Vol. II., p. 512.

(*i*) *Cornish* v. *Abington* (1859), 4 H. & N. 549.

(*k*) *Skyring* v. *Greenwood* (1825), 4 B. & C. 281 (army agents erroneously crediting customer with money not received); compare *Ashby* v. *Day* (1886), 54 L. T. 408, C. A. (duty of directors, guarantors of company's liability, to communicate change in the identity of the company; so that they were estopped from insisting that the guarantee had been put an end to by the change).

(*l*) *Gregg* v. *Wells* (1839), 10 Ad. & El. 90; *Low* v. *McGill* (1864), 10 L. T. 495; *Richards* v. *Johnston* (1859), 4 H. & N. 660; *Waller* v. *Drakeford* (1853), 1 E. & B. 749. The difficulty arises in applying the principle, and determining what standing by is culpable. "Culpably" is not equivalent to "knowingly," though knowingly to stand by would be culpable, and in most cases fraudulent. It appears to mean "under circumstances creating a duty in the true owner to guard against the person in possession making a dishonest use of his opportunities"; see note (*t*), p. 398, *post*. See on the one hand *Henderson & Co.* v. *Williams*, [1895] 1 Q. B. 521, C. A.; and on the other *Kingsford* v. *Merry* (1856), 1 H. & N. 503, Ex. Ch.; and *Farquharson Brothers & Co.* v. *King & Co.*, [1902] A. C. 325.

(*m*) *Willmott* v. *Barker* (1880), 15 Ch. D. 105; and see *Proctor* v. *Bennis* (1887), 36 Ch. D. 740, C. A., *per* BOWEN, L.J., at p. 761, as to the difference between estoppel and the equitable doctrine of acquiescence; and compare *De Bussche* v. *Alt* (1878), 8 Ch. D. 286, 314, C. A. (acquiescence must be before the act complained of is done, and before a cause of action accrues).

it (*n*), in ignorance of the former's title, afterwards to set up that title to the prejudice of the purchaser; and, because it was founded on fraud, the rule applied equally when the person guilty of it was under the disability of infancy or coverture (*o*); nor would they allow one who had stood by with the knowledge that another was expending money on his land under a mistaken belief as to his own rights, and in ignorance of those of the true owner, afterwards to assert his title without at least making compensation for the money so expended, or otherwise doing equity to him who had laid it out (*p*).

Estoppel on right of election.

561. The effect of silence or inaction in concluding a person has been considered in cases where there is a right of election between two courses. Here, again, mere silence does not amount to an election, but it is the duty of one who has to make an election not to lie by so long as to lead some other person, whether the party against whom the election is to be made or another, to alter his position in the belief that the first named has elected to let things remain as they are; and by so doing he will be precluded from making a different election (*q*).

In this connection reference may be made to marine insurance cases. Underwriters on receiving notice of abandonment may elect whether to accept or reject it. In this case mere silence is equivalent to rejection, so they need not give notice of it; but they may so conduct themselves as to be precluded from denying that they have accepted (*r*).

Again, a person who gives credit to an agent whom he knows to have a principal behind him is entitled, though he does not know the latter's name, to rely on his credit, and, on discovering who he is, may elect whether to look to the principal or the agent; but if he has by his conduct led the principal to believe that he looked to the agent alone for payment, and has thereby induced him either to pay

(*n*) In *Edmands* v. *Best* (1862), 7 L. T. 279, the contract was for a mortgage of chattels.

(*o*) *Savage* v. *Foster* (1723), 9 Mod. Rep. 35; *Mills* v. *Fox* (1887), 37 Ch. D. 153, 167; notes to *Burrowes* v. *Locke* (1805), 10 Ves. 470; 1 White & Tud. L. C., 7th ed., at p. 469; and note (*s*), p. 380, *ante*.

(*p*) *Oxford's* (*Earl*) *Case* (1615), 1 Rep. Ch. 1; 1 White & Tud. L. C., 7th ed., 730; notes to *Burrowes* v. *Locke*, *supra*; *Ramsden* v. *Dyson* (1866), L. R. 1 H. L. 129, 140, 141, 168. Where to the knowledge of the owner a person builds on the land in reliance upon an invalid lease, or a supposed right to call for a lease, the owner who knowingly allowed him to go on in that belief will be compelled to make it good (*ibid.*, at p. 142). See this subject fully treated under title EQUITY, pp. 166, 167, *ante*; also *Mold* v. *Wheatcroft* (1859), 27 Beav. 510; *Sheridan* v. *Barrett* (1879), 4 L. R. Ir. 223.

(*q*) *Clough* v. *London and North Western Rail. Co.* (1871), L. R. 7 Exch. 26, 35, Ex. Ch.; applied, *Morrison* v. *Universal Marine Insurance Co.* (1873), L. R. 8 Exch. 197, 204, Ex. Ch.; *Lindsay Petroleum Co.* v. *Hurd* (1874), L. R. 5 P. C. 221; *Aaron's Reefs* v. *Twiss*, [1896] A. C. 273, 290, 294; and see *Chynoweth's Case* (1880), 15 Ch. D. 13, C. A. (company estopped by delay and acting on fraudulent transfer from refusing to recognise it); *Brailey* v. *Rhodesia Consolidated, Ltd.*, [1910] 2 Ch. 95 (defective notice of dissent from reconstruction scheme): *Forman & Co. Proprietary* v. *Ship "Liddesdale,"* [1900] A. C. 190, P. C.; *Civil Service Musical Instrument Association* v. *Whiteman* (1899), 68 L. J. (CH.) 484.

(*r*) *Provincial Insurance Co. of Canada* v. *Leduc* (1874), L. R. 6 P. C. 224, 237; *Hudson* v. *Harrison* (1821), 3 Brod. & Bing. 97; Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 62 (5); see title INSURANCE.

SECT. 2. **Estoppel by Representation.**

the agent or to leave money in his hands, he is precluded from afterwards suing the principal (*s*).

SUB-SECT. 4.—*Estoppel by Negligence.*

Duty to use due care essential.

562. Before anyone can be estopped by a representation inferred from negligent conduct, there must be a duty to use due care towards the party misled, or towards the general public of which he is one. A person who does not lock up his goods, which are consequently stolen, may be said to be negligent as regards himself, but inasmuch as he neglects no duty which the law casts upon him, he is not in consequence estopped from denying the title of those who may have purchased those goods from the thief, unless it be in market overt (*t*).

(*s*) *Macfarlane* v. *Giannacopulo* (1858), 3 H. & N. 860; *Irvine* v. *Watson* (1880), 5 Q. B. D. 102, 414, C. A., *per* BOWEN, J., at p. 105, following *Heald* v. *Kenworthy* (1855), 10 Exch. 739, 746, and commenting on the *dicta* in *Thomson* v. *Davenport* (1829), 9 B. & C. 78; *Wyatt* v. *Hertford* (*Marquis*) (1802), 3 East, 147. Where the creditor contracted with the agent in ignorance that he had a principal, so that he gave him exclusive credit in the first instance, the principal is relieved of liability, without the intervention of any misleading conduct on the part of the creditor, if before recourse is had to him he has settled in account with his agent (*Armstrong* v. *Stokes* (1872), L. R. 7 Q. B. 598, as explained by BOWEN, J., in *Irvine* v. *Watson*, *supra*, an authority which, however, seems to be still open to review (*Irvine* v. *Watson*, *supra*, at pp. 417, 421)); see title AGENCY, Vol. I., pp. 209, 210.

(*t*) *Swan* v. *North British Australasian Co.* (1863), 2 H. & C. 175, Ex. Ch., *per* BLACKBURN, J., at p. 181 (the exception is not a case of estoppel), quoting PARKE, B., in *Freeman* v. *Cooke* (1848), 2 Exch. 554, 657; approved, *Arnold* v. *Cheque Bank* (1876), 1 C. P. D. 578, 587; *Johnson* v. *Crédit Lyonnais Co.* (1877), 3 C. P. D. 32, 42, C. A.; *Bell* v. *Marsh*, [1903] 1 Ch. 528, 541, C. A.; see also *Bank of Ireland* (*Governor & Co.*) v. *Evans' Charities in Ireland* (*Trustees*) (1855), 5 H. L. Cas. 389, 410; *Scholfield* v. *Londesborough* (*Earl*), [1896] A. C. 514, 522, 537; *Union Credit Bank* v. *Mersey Docks and Harbour Board*, [1899] 2 Q. B. 205, 214; *Longman* v. *Bath Electric Tramways, Ltd.*, [1905] 1 Ch. 646, 735, C. A.; *Smith* v. *Prosser*, [1907] 2 K. B. 161, 746, C. A.; *Hall* v. *West-End Advance Co.* (1883), Cab. & El. 161, 165; and the judgments in *Re North British Australasian Co.*, *Ex parte Swan* (1859), 7 C. B. (N. S.) 400, where the court was equally divided; compare *Le Lievre* v. *Gould*, [1893] 1 Q. B. 491, 497, C. A.; *Way* v. *Great Eastern Rail. Co.* (1876), 1 Q. B. D. 692, 695.

Much of the difficulty in applying the law of estoppel by negligence has arisen from a too literal acceptance of the broad principle laid down by ASHURST, J., in *Lickbarrow* v. *Mason* (1787), 1 Smith, L. C., 11th ed., 693, at p. 701, Ex. Ch. & H. L.; 2 Term Rep. 63, at p. 70, "that wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such person to occasion the loss must sustain it." That case turned not upon estoppel, but upon the negotiable element of bills of lading, by reason of which the property they represented (though not any contract) was transferable by indorsement; but the decision might be supported on the ground of estoppel (indeed, ASHURST, J., though he does not use the expression, treats the bill of lading as being "negotiable by estoppel," just as the scrip was, according to the second ground of the decision, negotiable in *Goodwin* v. *Robarts* (1876), 1 App. Cas. 476), the bill of lading having been issued by the shipper with the intention that it should be acted on by a purchaser from the consignee, and it having been acted on by him in the manner intended by the shipper. Having regard to the facts before the Court, and to the rest of his judgment, the principle was stated by ASHURST, J., with sufficient accuracy for the purposes of that case; and it has been properly applied in many cases (see *e.g.*, *Nash* v. *de Freville*, [1900] 2 Q. B. 72, 83, C. A.; *Rimmer* v. *Webster*, [1902] 2 Ch. 163, 173; and compare *Babcock* v. *Lawson* (1879), 4 Q. B. D. 394, 401, and *Burgis* v. *Constantine*, [1908] 2 K. B. 484, C. A.). On the other hand, there have been

SECT. 2. Estoppel by Representation.

Persons who issue documents with a certain mercantile meaning attached to them, *e.g.*, delivery orders, owe a duty to merchants and others likely to deal with those documents to use due care in their issue; and a railway company, or warehouseman, issuing duplicate orders for the same goods may be estopped from denying that they had two parcels, to the prejudice of one who has advanced money on the faith of the duplicate (*a*). So, if in the course of business a man volunteers a statement upon which in the like course another may probably act, it is his duty to take reasonable care that the statement is correct (*b*).

No duty of special precaution against dishonesty.

563. But a corporation, which permits its secretary to have the custody of its seal, is not guilty of such negligence as will estop it against persons who have acted on unauthorised transfers executed by him under that seal from denying that they are forgeries; for it owes no duty to such persons in that regard (*c*).

occasions when a too literal acceptance of its terms has led to error (see *e.g.*, the dissentient judgment of KEATING, J., in *Swan* v. *North British Australasian Co.* (1863), 2 H. & C. 175, Ex. Ch.; *Farquharson Brothers & Co.* v. *King & Co.*, [1901] 2 K. B. 697, C. A.; reversed, [1902] A. C. 325), and the necessity for some qualification has been frequently recognised (see the judgment of FARWELL, J., in *Rimmer* v. *Webster*, [1902] 2 Ch. 163, at p. 169; *Farquharson Brothers & Co.* v. *King & Co.*, *supra*, *per* VAUGHAN WILLIAMS, L.J., at p. 713, and [1902] A. C. 325, *per* Lord LINDLEY, at p. 342; *Hall* v. *West-End Advance Co.* (1883), Cab. & El. 161, *per* WATKIN WILLIAMS, J., at p. 165). Lord HALSBURY (see *Farquharson Brothers & Co.* v. *King & Co.*, [1902] A. C. 325, 332, and *Henderson & Co.* v. *Williams*, [1895] 1 Q. B. 521, C. A., at p. 529) evidently prefers the expression of SAVAGE, C.J., in *Root* v. *French* (1835), 13 Wendell, 570, at p. 572: "When one of two innocent persons must suffer from the fraud of a third, he shall suffer who, *by his indiscretion*, has enabled such person to commit the fraud." The words in italics add an important qualification to the proposition laid down by ASHURST, J. But it is apparent, having regard to the principles stated in the text, and the numerous authorities referred to in the notes, that even they do not make it universally true. Probably the various conditions necessary to establish a case of estoppel by statement or by conduct cannot be more succinctly stated, having regard to the necessity of combining elasticity with precision, than in the judgments of PARKE, B., in *Freeman* v. *Cooke* (1848), 2 Exch. 654, and BLACKBURN, J., in *Swan* v. *North British Australasian Co.*, *supra*.

(*a*) *Coventry* v. *Great Eastern Rail. Co.* (1883), 11 Q. B. D. 776, C. A.

(*b*) *Seton* v. *Lafone* (1887), 19 Q. B. D. 68, C. A. (erroneous statement by defendant warehousemen that goods which in fact had been parted with lay at their warehouse, and were liable to be sold for charges. Plaintiff thereupon bought the warrant for the goods, and defendants were estopped from averring that they had not got them when they made the statement).

(*c*) *Bank of Ireland* (*Governor & Co.*) v. *Evans' Charities in Ireland* (*Trustees*) (1855), 5 H. L. Cas. 389 (explaining, at pp. 411, 414, *Coles* v. *Bank of England* (1839), 10 Ad. & El. 437, as a case of ratification); followed, *Merchants of the Staple of England* (*Mayor etc.*) v. *Bank of England* (*Governor & Co.*) (1887), 21 Q. B. D. 160, C. A.; compare *Arnold* v. *Cheque Bank* (1876), 1 C. P. D. 578 (alleged negligence in custody of draft, and in not sending separate letter of advice); *Bechuanaland Exploration Co.* v. *London Trading Bank*, [1898] 2 Q. B. 658 (negotiable instrument stolen by secretary who kept key); *Patent Safety Gun Cotton Co.* v. *Wilson* (1880), 49 L. J. (Q. B.) 713 (no duty to the public not to employ clerk who has been guilty of dishonesty; or while doing so, to lock up cheques); *Lewes Sanitary Steam Laundry Co.* v. *Barclay & Co.* (1906), 95 L. T. 444; *Kepitigalla Rubber Estates, Ltd.* v. *National Bank of India, Ltd.*, [1909] 2 K. B. 1010 (alleged negligence in custody of rubber stamp, the property of one director, and in not checking pass-book).

SECT. 2. **Estoppel by Representation.**

So the acceptor of a bill of exchange owes no duty to subsequent holders to take precautions to prevent the amount from being fraudulently increased (*d*), and though, having regard to the contractual relation between them, there may be a duty owing by the customer of a bank to his banker, such that if the former, by any act of his (*e*), or by neglect of some act usual in the course of dealing between them, induces the banker to act on a forged document, he may be prevented from setting up his own act or neglect to the prejudice of the latter (*f*), yet it is not negligence for the customer merely to sign a cheque in such form that somebody else can tamper with it (*g*). The protection against forgery is not the vigilance of parties excluding the possibility of committing it, but the law of the land (*h*).

Negligence must be in the transaction, and proximate cause of misleading.

564. A second essential condition of estoppel by negligence is that the negligence must be in the transaction itself, and a third, which is so closely connected with the second that it is impossible to treat them separately, is that the negligence must not only be calculated to have the misleading effect attributed to it, but must be the proximate or real cause of that result (*i*).

(*d*) *Scholfield* v. *Londesborough* (*Earl*), [1896] A. C. 514.

(*e*) *E.g.*, by advising forged bills as coming forward for payment (*Bank of England* v. *Vagliano Brothers*, [1891] A. C. 107).

(*f*) *Scholfield* v. *Londesborough* (*Earl*), *supra*, *per* Lord HALSBURY, L.C., at pp. 523, 524, *per* Lord WATSON, at p. 537 ; and see *Bank of England* v. *Vagliano Brothers*, *supra*, *per* Lord SELBORNE, at pp. 123, 124.

(*g*) *Colonial Bank of Australasia, Ltd.* v. *Marshall*, [1906] A. C. 559, P. C.; and see *Scholfield* v. *Londesborough* (*Earl*), *supra*, at p. 532. The judgments in *Young* v. *Grote* (1827), 4 Bing. 253, and *Halifax Union* v. *Wheelwright* (1875), L. R. 10 Exch. 183, so far as they affirmed the contrary of the proposition stated in the text, must now be considered as overruled; see *Smith* v. *Prosser*, [1907] 2 K. B. 735, 746, *per* VAUGHAN WILLIAMS, L.J. *Young* v. *Grote*, *supra*, can only be supported on the ground stated by Lord HALSBURY in *Scholfield* v. *Londesborough* (*Earl*), *supra*, at p. 523; *Imperial Bank of Canada* v. *Bank of Hamilton*, [1903] A. C. 49, P. C. The same principle has been applied to a delivery order addressed to a warehouseman (*Union Credit Bank* v. *Mersey Docks and Harbour Board*, [1899] 2 Q. B. 205 (a very instructive case, illustrating both aspects of *Young* v. *Grote*, *supra*, and showing where it may be relied on as authority, and where it fails)). The judgment in *Colonial Bank of Australasia, Ltd.* v. *Marshall*, *supra*, and some of the *dicta* on which it is founded, have, however, been severely criticised ; see Law Quarterly Review (1907), Vol. XXIII., p. 390.

(*h*) *Colonial Bank of Australasia, Ltd.* v. *Marshall*, *supra*, at p. 568, quoting BOVILL, C.J., *Société Générale* v. *Metropolitan Bank* (1873), 27 L. T. 849, 856; compare *Kepitigalla Rubber Estates, Ltd.* v. *National Bank of India, Ltd.*, [1909] 2 K. B. 1010, 1023.

(*i*) *Bank of Ireland* (*Governor & Co.*) v. *Evans' Charities in Ireland* (*Trustees*) (1855), 5 H. L. Cas. 389, *per* PARKE, B., at p. 410, in delivering the opinions of the judges; *Swan* v. *North British Australasian Co.* (1862), 7 H. & N. 603, 633 (proposition of WILDE, B., as qualified by BLACKBURN, J., S. C. (1863), 2 H. & C. 175, at p. 182, Ex. Ch.); *Carr* v. *London and North Western Rail. Co.* (1875), L. R. 10 C. P. 307, 318: *Kepitigalla Rubber Estates, Ltd.* v. *National Bank of India, Ltd.*, *supra*. The expression "proximate cause" used in the 4th proposition in that case was explained in *Seton* v. *Lafone* (1887), 19 Q. B. D. 68, C. A., by BRETT, M.R., at p. 71, with the approval of the other members of the C. A., to mean "real cause." See also note (*t*), p. 398, *ante*, and succeeding notes; *Swan* v. *North British Australasian Co.*, *supra*; see the effect stated, p. 412, *post*, following *Bank of Ireland* (*Governor & Co.*) v. *Evans' Charities in Ireland* (*Trustees*), *supra*; and *Tayler* v. *Great Indian Peninsular*

On this principle, as well as on the grounds mentioned in the preceding paragraph, a bank having certified (as drawn against sufficient assets) a cheque with blank spaces in it which enabled the drawer afterwards to increase the amount for which it was drawn, was not estopped from denying to a *bonâ fide* holder that it was certified only for the original sum (*k*). And the appointment by a company of a secretary known to have once committed forgery, and trusting him with the company's books, who takes advantage of his position to forge a cheque on the company's bankers, is not sufficiently in the transaction; nor is it the proximate cause of the bank's parting with its money, so as to give rise to an estoppel (*l*).

Neglect in preparation or custody of negotiable instruments.

565. The principles under consideration have been frequently applied in cases where there has been want of care, or of precaution, which in the result turned out to have been necessary, in the custody of negotiable instruments. The conduct of a person who leaves a cheque signed in blank in an unlocked drawer, from which it is stolen by a thief who fills it up (*m*), or who when preparing a draft for post omits to forward a separate letter of advice, which would enable the intended receiver of the draft to stop payment in the event of its being abstracted and an indorsement being forged (*n*), is not the proximate cause of the loss which ensues, and does not estop him from setting up the facts. So giving a blank note for safe custody pending instructions, and with no present authority to issue it, to an agent who issues it without having received such instructions, does not render the maker liable by estoppel (*o*). On *à fortiori* grounds a person whose signature is, by fraudulent statements that he is signing for some different purpose, obtained to a document which is in fact a promissory note, so that he has no idea of actually or potentially binding himself by contract, is not estopped as against a holder in due course, either

Rail. Co. (1859), 4 De G. & J. 559, C. A. (transfer signed with blanks is not, when filled up, the transferor's deed, and he is not estopped from saying so against persons who take it with any of the blanks remaining, for they must be taken to know of the invalidity), disapproving, at p. 182, *Coles* v. *Bank of England* (1839), 10 Ad. & El. 437; and followed in *Hall* v. *West-End Advance Co.* (1883), Cab. & El. 161 (mortgagee of life policy handed it to mortgagor for verbal alterations, and forgot to get it back again); *Longman* v. *Bath Electric Tramways, Ltd.*, [1905] 1 Ch. 646, C. A. (company permitting transferor of shares to obtain possession of certificates, whereby he was enabled to make a second and fraudulent transfer of them).

(*k*) *Imperial Bank of Canada* v. *Bank of Hamilton*, [1903] A. C. 49, P. C., following *Scholfield* v. *Londesborough (Earl)*, [1896] A. C. 514; see *Kepitigalla Rubber Estates, Ltd.* v. *National Bank of India, Ltd.*, [1909] 2 K. B. 1010; and p. 399, *ante*.

(*l*) *Lewes Sanitary Steam Laundry Co.* v. *Barclay & Co.* (1906), 95 L. T. 444, citing from Lord HALSBURY'S judgment in *Bank of England* v. *Vagliano Brothers*, [1891] A. C. 107, at p. 115, "The carelessness of the customer, or his neglect to take precautions, unconnected with the act itself, cannot be put forward by the banker as justifying his own default."

(*m*) *Baxendale* v. *Bennett* (1878), 3 Q. B. D. 525, C. A. It seems that it would be otherwise if the instrument had been completed before it was stolen; see *Ingham* v. *Primrose* (1859), 7 C. B. (N. S.) 82, 85.

(*n*) *Arnold* v. *Cheque Bank* (1876), 1 C. P. D. 578.

(*o*) *Smith* v. *Prosser*, [1907] 2 K. B. 735, C. A. As already pointed out, where there is authority to issue for any amount, the estoppel arises (*Lloyd's Bank, Ltd.* v. *Cooke*, [1907] 1 K. B. 794, C. A.; see p. 392, *ante*).

SECT. 2. **Estoppel by Representation.**

by the Bills of Exchange Act or at common law, from proving the true circumstances (*p*).

Different considerations apply where the document relied on as a negotiable instrument has been completed (*q*) by the defendant, or handed to an agent with authority to fill it up and issue it. In these cases an estoppel, as has been seen, arises most usually from the authority which may be presumed to have been given (*r*). It may, however, arise from negligence. A person who pays what is due on a negotiable instrument, not apparently overdue, owes a duty to the public to obtain it from the holder, or to see that it is cancelled; and if after payment he leaves it in the hands of the holder, he will be estopped, as against a subsequent *bonâ fide* holder for value, from showing that it has been paid (*s*).

SECT. 3.—*Estoppel between Particular Persons.*

SUB-SECT. 1.—*Landlord and Tenant.*

Estoppel binds lessor and lessee.

566. Generally, a tenant is estopped from disputing the title at the time of the demise of the landlord by whom he has been let into possession (*a*). This estoppel is not confined to leases by deed (*b*), and applies to tenancies from year to year, at will, or on sufferance, as well as to leases for years (*c*); and anyone holding under a

(*p*) *Lewis* v. *Clay* (1897), 67 L. J. (Q. B.) 224 (defendant informed that he was witnessing something which he was not allowed to see), following *Foster* v. *Mackinnon* (1867), L. R. 4 C. P. 704.

(*q*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 21 (2); *Ingham* v. *Primrose* (1859), 7 C. B. (N. S.) 82, 85, but the decision in this case was dissented from by BRETT, L.J., in *Baxendale* v. *Bennett* (1878), 3 Q. B. D. 525, C. A.

(*r*) See p. 392, *ante*.

(*s*) *Nash* v. *de Freville*, [1900] 2 Q. B. 72, C. A.; "Estoppel is the foundation of the rights arising upon the unauthorised transfer of negotiable instruments" (*ibid.*, *per* COLLINS, L.J., at p. 89, citing *Russel* v. *Langstaffe* (1780), 2 Doug. (K. B.) 514; *Schultz* v. *Astley* (1836), 2 Bing. (N. C.) 544); *Ingham* v. *Primrose*, *supra* (acceptor, on bill being returned to him after issue, having torn it in two, intending to cancel it, but in such manner that it might have been done for safe transmission by post, held liable to a *bonâ fide* holder; *aliter*, where the bill was torn in four pieces (*Scholey* v. *Ramsbottom* (1810), 2 Camp. 485). But this was not the view of the Court of Exchequer in *Marston* v. *Allen* (1841), 8 M. & W. 494, 504).

(*a*) *Rawlin's Case* (1587), Jenk. 254; *Syllivan* v. *Stradling* (1764), 2 Wils. 208; *Friend* v. *Eastabrook* (1777), 2 Wm. Bl. 1152; notes to *Veale* v. *Warner* (1669), 1 Wms. Saund. 323, 327 (1871 ed., pp. 575, 580); *Cooke* v. *Loxley* (1792), 5 Term Rep. 4; *Barwick* d. *Richmond Corporation* v. *Thompson* (1798), 7 Term Rep. 488; *Doe* d. *Knight* v. *Smythe* (*Lady*) (1815), 4 M. & S. 347; *Parry* v. *House* (1817), Holt (N. P.), 489; *Alchorne* v. *Gomme* (1824), 2 Bing. 54; *A.-G.* v. *Hotham* (*Lord*) (1823), Turn. & R. 209, 219; *Fleming* v. *Gooding* (1834), 10 Bing. 549; *Cooper* v. *Blandy* (1834), 1 Bing. (N. C.) 45; *Doe* d. *Manvers* (*Earl*) v. *Mizem* (1837), 2 Mood. & R. 56; *Doe* d. *Tresidder* v. *Tresidder* (1841), 10 L. J. (Q. B.) 160; *Delaney* v. *Fox* (1857), 2 C. B. (N. S.) 768, 774; *Cuthbertson* v. *Irving* (1859), 4 H. & N. 742 (affirmed (1860), 6 H. & N. 135, Ex. Ch.), *per* MARTIN, B., at p. 757; *Duke* v. *Ashby* (1862), 7 H. & N. 600; *Serjeant* v. *Nash, Field & Co.*, [1903] 2 K. B. 304, C. A.

(*b*) *Phipps* v. *Sculthorpe* (1817), 1 B. & Ald. 50; *Doe* d. *Jackson* v. *Wilkinson* (1824), 3 B. & C. 413; *Cook* v. *Whellock* (1890), 24 Q. B. D. 658, C. A.

(*c*) *Doe* d. *Bailey* v. *Foster* (1846), 3 C. B. 215, *per* CRESSWELL, J., at p. 229, following *Doe* d. *Johnson* v. *Baytup* (1835), 3 Ad. & El. 188. R., who ha possession but no title, let by parol to defendant for two years. Within th

SECT. 3. Estoppel between Particular Persons.

tenant, or defending as landlord in an action of ejectment, is bound by it (*d*).

Similarly the lessor is estopped from repudiating a lease under which possession has been given or a tenancy which he has acknowledged, and the assignee of the lessor's interest is estopped from denying anything which the lessor is estopped from denying (*e*).

Except in the case of leases void by statute.

But when a lease is void by statute a person entering under such a lease enters without any title whatever, and there is nothing by way of estoppel to prevent the full operation of the Statute of Limitations (*f*) in his favour (*g*).

A tenant is not estopped either before or after the expiration of the term from showing that his lessor's title has determined (*h*).

period R. assigned by deed to plaintiff. After the period plaintiff brought ejectment against defendant. It was held that the defendant was estopped from denying title of R. (*Ward* v. *Ryan* (1875), 10 I. R. C. L. 17, Ex. Ch.; see *Doe* d. *Biddle* v. *Abrahams* (1816), 1 Stark. 305).

(*d*) *Palmer* v. *Ekins* (1728), 2 Ld. Raym. 1550; *Taylor* v. *Needham* (1810), 2 Taunt. 278, 282; *Doe* d. *Knight* v. *Smythe* (*Lady*) (1815), 4 M. & S. 347; *Doe* d. *Manton* v. *Austin* (1832), 9 Bing. 41; *Doe* d. *Bullen* v. *Mills* (1834), 2 Ad. & El. 17; *Doe* d. *Manvers* (*Earl*) v. *Mizen* (1837), 2 Mood. & R. 56; *Doe* d. *Willis* v. *Birchmore* (1839), 9 Ad. & El. 662; *Doe* d. *Spencer* (*Earl*) v. *Beckett* (1843), 4 Q. B. 601; *Doe* v. *Challis* (1851), 17 Q. B. 166, *per* COLERIDGE, J., at p. 168; *London and North Western Rail. Co.* v. *West* (1867), L. R. 2 C. P. 553; comparo *Williams* v. *Heales* (1874), L. R. 9 C. P. 177.

(*e*) This is an example of the *dictum* that estoppels must be mutual and reciprocal (Co. Litt. 47 b, 352 a, and see Bac. Abr., tit. Leases and Terms for Years, O, ed. 1832, p. 852, as to whether a lease by estoppel can be created by deed poll); *Webb* v. *Austin* (1844), 7 Man. & G. 701, 724; *Cuthbertson* v. *Irving* (1859), 4 H. & N. 742; *Weller* v. *Spiers* (1872), 26 L. T. 866, *per* COCKBURN, C.J., at p. 867; and compare *Darlington* v. *Pritchard* (1842), 4 Man. & G. 783, *per* TINDAL, C.J., at p. 793; *Green* v. *James* (1840), 6 M. & W. 656, *per* ALDERSON, B. (in argument), at p. 660 and (judgment) p. 662. Compare, too, *Doe* d. *Downe* (*Viscount*) v. *Thompson* (1847), 9 Q. B. 1037, in which it was held that where a lease was granted by a mortgagor in such a way as to be good only by estoppel, the assignee of the mortgagee, though he received rent from the tenant, was not bound by the estoppel, "as he derived his estate from persons who were not privies to nor in any way estopped by the lease"; and *Doe* d. *Prior* v. *Ongley* (1850), 10 C. B. 25; see also note (*e*), p. 388, *ante*, and title LANDLORD AND TENANT.

(*f*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 2; this section, on which *Magdalen Hospital* (*President and Governors*) v. *Knotts*, cited in next note, was decided, was repealed by Real Property Limitation Act, 1874 (37 & 38 Vict. c. 59), s. 9, but was re-enacted by s. 1 of that Act with the substitution of twelve years for twenty as the statutory limit.

(*g*) *Magdalen Hospital* (*President and Governors*) v. *Knotts* (1879), 4 App. Cas. 324, and according to Bac. Abr., tit. Leases and Terms for Years, O, ed. 1832, p. 852, the doctrine of estoppel does not apply to Crown leases "because the King cannot be estopped, for it cannot be presumed the King would do wrong to any person, and therefore being deceived in his grant makes it absolutely void," but there seem to be no cases on the point.

(*h*) Co. Litt. 47 b; *England* d. *Syburn* v. *Slade* (1792), 4 Term Rep. 682; *Doe* d. *Lowden* v. *Watson* (1817), 2 Stark. 230; *Fenner* v. *Duplock* (1824), 2 Bing. 10; *Hill* v. *Saunders* (1825), 4 B. & C. 529; *Doe* d. *Jackson* v. *Ramsbotham* (1815), 3 M. & S. 516; *Doe* d. *Higginbotham* v. *Barton* (1840), 11 Ad. & El. 307; *Downs* v. *Cooper* (1841), 2 Q. B. 256, where Lord DENMAN, C.J., further held that the landlord must also be estopped from treating as his tenant a person whom he has required to enter into that relation with another instead of himself; *Langford* v. *Selmes* (1857), 3 K. & J. 220, 229; *Gibbins* v. *Buckland* (1863), 1 H. & C. 736; *Clark* v. *Adie* (No. 2) (1877), 2 App. Cas. 423, *per* Lord BLACKBURN, at p. 435; *Wogan* v. *Doyle* (1883), 12 L. R. Ir. 69; *Serjeant* v. *Nash, Field & Co.*, [1903]

SECT. 3. Estoppel between Particular Persons.

Lessee may show that lessor's title has determined.

But if the tenant came into possession under the lessor, the better opinion would seem to be that he must surrender possession before he disputes the lessor's title (*i*); it has, however, been held that it is not necessary that he should actually go out of possession (*k*) unless he claims to be entitled to the premises in his own right (*l*), and that it is sufficient that he should come to a new arrangement with the person who really has the title to hold under him (*m*), or that he should be evicted by a person having title paramount (*n*).

Estoppel binds licensor and licensee.

567. There is no distinction, so far as concerns the law of estoppel, between a licensee and a tenant, and a licensee who has obtained possession by aid of the licence, before he can show that his licensor's title has determined, must first surrender possession of the premises (*o*). But the mere fact of a person bringing goods on to demised premises by the tenant's licence does not estop him from disputing the validity of the instrument of demise under which the tenant holds (*p*).

Tenant may dispute title of assignee of the lessor.

568. Where the person claiming as landlord is not the person by whom the tenant was let into possession, evidence may be received to show that the relation of landlord and tenant does not in fact exist (*q*). Thus in the case of an assignee of the

2 K. B. 304, 312, C. A.; and, as to the nature of leases by estoppel, see p. 373, *ante*.

(*i*) *Doe* d. *Knight* v. *Smythe* (*Lady*) (1815), 4 M. & S. 347; *Bayley* v. *Bradley* (1848), 5 C. B. 396, *per* WILDE, C.J. (in argument), at p. 400, commenting on Co. Litt. 47 b; compare *Doe* d. *Johnson* v. *Baytup* (1835), 3 Ad. & El. 188; *Gibbins* v. *Buckland* (1863), 1 H. & C. 736. To the contrary, see *England* d. *Syburn* v. *Slade* (1792), 4 Term Rep. 682. In *Balls* v. *Westwood* (1809), 2 Camp. 11, Lord ELLENBOROUGH, C.J., held that a person cannot show that his landlord's title has expired without solemnly renouncing possession, but subsequently in *Doe* d. *Lowden* v. *Watson* (1817), 2 Stark. 230, he held that the defendant in an action of ejectment might show an alteration in his landlord's title. See also *Claridge* v. *Mackenzie* (1842), 4 Man. & G. 143, 152, and *Anon.* (1505), Keil. 65; *Knight* v. *Clarke* (1885), 15 Q. B. D. 294, C. A., where it was held that a writ of possession will be granted to a landlord against a tenant in an action of ejectment, even though the landlord's title has expired before the trial of the action, unless the defendant can show affirmatively that it will be unjust and futile to issue the writ (following *Gibbins* v. *Buckland*, *supra*); and compare *Doe* d. *Clun* (*Bailiff etc.*) v. *Clarke* (1809), Peake, Add. Cas. 239.

(*k*) *Mountnoy* v. *Collier* (1853), 1 E. & B. 630, *per* COLERIDGE, J., at p. 636.

(*l*) *Bayley* v. *Bradley*, *supra*.

(*m*) *Mountnoy* v. *Collier*, *supra*; compare *Gibbins* v. *Buckland*, *supra*.

(*n*) *Doe* d. *Higginbotham* v. *Barton* (1840), 11 Ad. & El. 307; *Cuthbertson* v. *Irving* (1859), 4 H. & N. 742 (affirmed (1860), 6 H. & N. 135, Ex. Ch.), *per* MARTIN, B., at p. 757. It has been held that a constructive eviction is sufficient for this purpose (*Poole Corporation* v. *Whitt* (1846), 15 M. & W. 571, *per* POLLOCK, C.B., at p. 577); but doubt has been thrown on this owing to the risk of collusion between a tenant and a third party with the object of depriving the lessor of his rights (*Delaney* v. *Fox* (1875), 2 C. B. (N. S.) 768, *per* COCKBURN, C.J., at p. 775, distinguishing *Watson* v. *Lane* (1856), 11 Exch. 769, and discussing *Poole Corporation* v. *Whitt*, *supra*).

(*o*) *Doe* d. *Johnson* v. *Baytup* (1835), 3 Ad. & El. 188.

(*p*) *Tadman* v. *Henman*, [1893] 2 Q. B. 168.

(*q*) *Cornish* v. *Searell* (1828), 8 B. & C. 471; *Claridge* v. *Mackenzie* (1842), 4 Man. & G. 143; compare *Ford* v. *Ager* (1863), 2 H. & C. 279. In *Fenner* v. *Duplock* (1824), 2 Bing. 10, it was held that a tenant who on the expiration

lessor, though he is to all intents and purposes in the same situation as the lessor, and takes the benefit of and is bound by a lease by estoppel, the lessee is not estopped from showing that the lessor had no such title as he could pass to the assignee, or that the person claiming to be the assignee is not in fact the true assignee (*r*).

Payment of rent not conclusive admission of title.

Again, payment of rent to a person by whom the tenant was not let into possession is only *primâ facie* evidence of a tenancy, and a tenant is not estopped by such payment from disputing the title of the person to whom such payment has been made (*s*); he may show that rent was paid *de bene esse* (*a*), or through a mistake (*b*), or in consequence of a misrepresentation by the person receiving the rent (*c*), but in any case he must show a better title in someone else, and he is not allowed simply to impeach the title of the person to whom he has paid rent (*d*).

his term entered into a new tenancy with the original lessor, being ignorant of the fact that in the meantime the lessor's title had determined, was not estopped from subsequently disputing the lessor's title at the time of the fresh demise. But it is not easy to understand the principle upon which this decision was based.

(*r*) *Barwick* d. *Richmond Corporation* v. *Thompson* (1798), 7 Term Rep. 488; *Parker* v. *Manning* (1798), 7 Term Rep. 537; *Rennie* v. *Robinson* (1823), 1 Bing. 147; *Carvick* v. *Blagrave* (1820), 4 Moore (C. P.), 303; *Doe* d. *Colemere* v. *Whitroe* (1822), Dow. & Ry. (N. P.) 1; *Seymour* v. *Franco* (1828), 7 L. J. (O. S.) (K. B.) 18; *Jew* v. *Wood* (1841), Cr. & Ph. 185; *Gouldsworth* v. *Knights* (1843), 11 M. & W. 337, 343; *Doe* d. *Marlow* v. *Wiggins* (1843), 4 Q. B. 367, 375; *Sturyeon* v. *Wingfield* (1846), 15 M. & W. 224; *Cuthbertson* v. *Irving* (1859), 4 H. & N. 742 (affirmed (1860), 6 H. & N. 135, Ex. Ch.), *per* MARTIN, B., at p. 757, a case of an assignment of a lease by a mortgagor in possession. After death of lessor who purported to demise as tenant in fee, held lessee not estopped from showing that he was only tenant for life (*Weld* v. *Baxter* (1856), 1 H. & N. 568, Ex. Ch.).

(*s*) *Williams* v. *Bartholomew* (1798), 1 Bos. & P. 326, *per* BULLER, J., at p. 328; *Doe* d. *Clun* (*Bailiff etc.*) v. *Clarke* (1809), Peake, Add. Cas. 239; *Rogers* v. *Pitcher* (1815), 6 Taunt. 202; *Gravenor* v. *Woodhouse* (1822), 1 Bing. 38, 43; *Fenner* v. *Duplock* (1824), 2 Bing. 10, where a new lease was taken from the original lessor, but the tenant was not estopped; *Gregory* v. *Doidge* (1826), 3 Bing. 474; *Cooper* v. *Blandy* (1834), 1 Bing. (N. C.) 45; *Waddilove* v. *Barnet* (1836), 2 Bing. (N. C.) 538; *Brook* v. *Biggs* (1836), 2 Bing. (N. C.) 572; *Doe* d. *Harvey* v. *Francis* (1837), 2 Mood. & R. 57; *Doe* d. *Plevin* v. *Brown* (1837), 7 Ad. & El. 447; *Hall* v. *Butler* (1839), 10 Ad. & El. 204; *Doe* d. *Higginbotham* v. *Barton* (1840), 11 Ad. & El. 307, *per* Lord DENMAN, C.J., at p. 313; *Jew* v. *Wood* (1841), Cr. & Ph. 185, *per* Lord COTTENHAM, L.C., at p. 194; *Doe* d. *Marlow* v. *Wiggins* (1843), 4 Q. B. 367; *Hitchings* v. *Thompson* (1850), 5 Exch. 50, as explained by Lord CRANWORTH in *A.-G.* v. *Stephens* (1855), 6 De G. M. & G. 111, 141; and see also *ibid.* at p. 136; *Knight* v. *Cox* (1856), 18 C. B. 645; *Carlton* v. *Bowcock* (1884), 51 L. T. 659; *Serjeant* v. *Nash, Field & Co.*, [1903] 2 K. B. 304, C. A.

(*a*) *Serjeant* v. *Nash, Field & Co.*, *supra*.

(*b*) *Rogers* v. *Pitcher*, *supra*; *Fenner* v. *Duplock*, *supra*; *Doe* d. *Plevin* v. *Brown*, *supra*; *Gravenor* v. *Woodhouse*, *supra*; *Hall* v. *Butler*, *supra*; *Cooper* v. *Blandy*, *supra*; *Doe* d. *Higginbotham* v. *Barton*, *supra*; *Hitchings* v. *Thompson*, *supra*.

(*c*) *Hall* v. *Butler*, *supra*; *Carlton* v. *Bowcock*, *supra*.

(*d*) *Carlton* v. *Bowcock*, *supra*; compare *Cooper* v. *Blandy*, *supra*. In replevin "receipt of rent is title" (*Johnson* v. *Mason* (1794), 1 Esp. 89, *per* Lord KENYON, at p. 91). But *quære* whether the *dictum* as reported goes beyond the facts of that case.

SECT. 3. **Estoppel between Particular Persons.**

Submission to a distress an admission of title.

569. On the other hand, submission to a distress constitutes an acknowledgment of a tenancy. The landlord after distraining cannot bring an ejectment for a cause accruing before the distress, and the occupier, if he does not replevy, is precluded from denying the title of the landlord (*e*). But payment of rent under threat of a distress is not a conclusive admission of title in the distrainor (*f*). Further, where a demise operates as an assignment of the lessor's term, so as to leave no reversion in the lessor, and consequently no right to distrain, the estoppel by which the lessee is precluded from denying his lessor's title does not prevent him denying the lessor's right to distrain (*g*).

But where in a deed, by which the relation of landlord and tenant is created, the want of legal estate in the lessor is apparent, the lessee is bound by the ordinary rule of estoppel between lessee and lessor, and cannot say that a distress is invalid on account of the want of the legal estate (*h*).

SUB-SECT. 2.—*Bailor and Bailee.*

Bailee estopped from denying bailor's title.

570. An estoppel somewhat similar to that between landlord and tenant arises from the relation of bailor and bailee. A bailee, as a general rule, is estopped from denying the title of the bailor (*i*) from whom he received the goods, and he is equally estopped from denying the title of one to whom he has attorned as his bailee, undertaking to hold the goods for him (*k*). But, as in the case of a tenant, the estoppel ceases if the bailee is evicted by title paramount (*l*), for if the true owner demands the goods, and the bailee refuses to deliver them to him, he is guilty of conversion (*m*). And, on the same principle, a bailee who has not actually had the goods taken out of his possession can set up the title of a third party against a claim by his bailor (*n*), but only if he defends upon the right and

(*e*) *Panton* v. *Jones* (1813), 3 Camp. 372; *Cooper* v. *Blandy* (1834), 1 Bing. (N. C.) 45.

(*f*) *Knight* v. *Cox* (1856), 18 C. B. 645.

(*g*) *Preece* v. *Corrie* (1828), 5 Bing. 24; *Lewis* v. *Baker*, [1905] 1 Ch. 46, 51.

(*h*) *Morton* v. *Woods* (1869), L. R. 4 Q. B. 293, Ex. Ch.

(*i*) *Biddle* v. *Bond* (1865), 6 B. & S. 225, *per* BLACKBURN, J., at p. 231, applying MARTIN, B., in *Cheesman* v. *Exall* (1851), 6 Exch. 341, 346. As to estoppel of a bailee, see title BAILMENT, Vol. I., p. 562; and as to estoppel between principal and agent, title AGENCY, Vol. I., p. 192.

(*k*) *Holl* v. *Griffin* (1833), 10 Bing. 246; *Henderson & Co.* v. *Williams*, [1895] 1 Q. B. 521, C. A., *per* LINDLEY and SMITH, L.JJ.

(*l*) *Biddle* v. *Bond* (1865), 6 B. & S. 225, 232; citing *Shelbury* v. *Scotsford* (1602), Yelv. 22; *Hardman* v. *Willcock* (1832), 9 Bing. 382, n., where, as BLACKBURN, J., points out, the finding of fraud in the bailor was not necessary to the decision; approved in *Rogers, Sons & Co.* v. *Lambert & Co.*, [1891] 1 Q. B. 318, C. A., *per* LOPES, L.J., at p. 328, and *Ross* v. *Edwards & Co.* (1895), 73 L. T. 100, P. C.; *Sheridan* v. *New Quay Co.* (1858), 4 C. B. (N. S.) 618 (common carriers who had been employed by the purchaser from one who had no title, delivered the goods to the true owner on his request, and were allowed to set up his title); see *ibid.*, at p. 650, where the statement of the law in Story, ss. 266, 282, is commented on.

(*m*) *Wilson* v. *Anderton* (1830), 1 B. & Ad. 450, 456 (bailee of shipmaster, holding for supposed lien for freight, liable to owner of goods).

(*n*) *Biddle* v. *Bond*, *supra* (auctioneer intrusted with goods improperly seized under a distress, having been served with notice of claim by the true owner, but too late to stop their sale, was allowed to set up his title

title and by the authority of the third party (*o*). The act of the third party in forbidding the bailee to part with the goods and requiring them to be retained for him is sufficient evidence of authority for this purpose (*p*). But it is not enough that the bailee has become aware of a third person's title; he cannot set up the title of a person who has made no claim, or has abandoned it, for that would enable him to retain the goods for himself (*q*). Nor is it enough that an adverse claim is made, so that he may be entitled to interplead (*r*).

against the bailor in an action for the proceeds), approved in *Rogers, Sons & Co.* v. *Lambert & Co.*, cited in next note; compare *Dixon* v. *Yates* (1833), 5 B. & Ad. 313, 340; see also *Ogle* v. *Atkinson* (1814), 5 Taunt. 759, 761; *Cheesman* v. *Exall* (1851), 6 Exch. 341; *Thorne* v. *Tilbury* (1858), 3 H. & N. 534; *European and Australian Royal Mail Co.* v. *Royal Mail Steam Packet Co.* (1861), 30 L. J. (C. P.) 247.

(*o*) *Biddle* v. *Bond* (1865), 6 B. & S. 225, at p. 234, approving the judgment of POLLOCK, C.B., in *Thorne* v. *Tilbury*, *supra*, at p. 537, qualifying the head-note in *Ogle* v. *Atkinson*, *supra* (in which case the judgment of GIBBS, C.J., at p. 761, is quite in accordance with the statement in the text), and followed in *Rogers, Sons & Co.* v. *Lambert & Co.*, [1891] 1 Q. B. 318, C. A., where the bailee was admittedly defending in his own interest only; compare *Warren* v. *Baring Brothers & Co., Ltd.* (1910), 54 Sol. Jo. 720.

(*p*) This proposition is involved in the decisions in *Biddle* v. *Bond*, *supra*; *Thorne* v. *Tilbury*, *supra* (appointment of administrator who, thereby becoming entitled to the goods, claimed them); *European and Australian Royal Mail Co.* v. *Royal Mail Steam Packet Co.*, *supra* (bailment of ship, subsequent mortgage by bailor, and demand of possession by mortgagee). The two last-mentioned cases illustrate the proposition of LOPES, L.J., that the bailee may, like a tenant, show that the bailor's title has expired since the bailment; but *quære* whether he could do so if the person who acquired the title made no claim. See next note.

(*q*) *Biddle* v. *Bond*, *supra*, at p. 234; *Betteley* v. *Reed* (1843), 4 Q. B. 511, 517; *Roberts* v. *Ogilby* (1821), 9 Price, 269 (insurance agent cannot deny his principal's title to moneys received for him on the ground that other persons are interested). The decision and the language of the judges in *Cheesman* v. *Exall* (1851), 6 Exch. 341, indicate that in case of a pledge a greater latitude may be allowed to the pledgee. They founded their decision on the proposition that "a pledgor impliedly undertakes that the property pledged is his own, and may safely be returned to him," see *per* POLLOCK, C.B., and PARKE, B., at pp. 343, 344; POLLOCK, C.B., added, "and if it turns out not to be so, the pledgee may restore it to its lawful owner." In that case the pledgee of property, pledged with him for the purpose of avoiding an execution, was allowed to set up the title of third parties, although, so far as appears in the report, no claim had been made by them. This aspect of the case does not appear to have been referred to in any subsequent case; but in view of the cases cited in note (*o*), *supra*, it must be regarded with caution. A mortgagor of real property is never allowed to set up the title of a third person against his mortgagee, *per* Lord MANSFIELD in *Doe* d. *Bristow* v. *Pegge* (1785), 1 Term Rep. 758, n., 760, n. As to estoppel against principal by admission of agency, see title AGENCY, Vol. I., p. 192.

(*r*) *Biddle* v. *Bond*, *supra*, at p. 234. An expectation of being sued by a third party is now sufficient to entitle the bailee to interplead, see R. S. C., Ord. 57, r. 1 (a). But the interpleader will only determine as between the rival claimants which of them is entitled to the goods; and where there is an estoppel, the interpleader order will preserve the right of the party in whose favour it exists, if the goods turn out not to be his, to recover damages for conversion in an action in which the bailee will be estopped from denying the bailor's title to the goods (*Ex parte Mersey Docks and Harbour Board*, [1899] 1 Q. B. 546, C. A., following *Attenborough* v. *St. Katharine's Dock Co.* (1878), 3 C. P. D. 450, 455, 459, C. A.; *Rogers, Sons & Co.* v. *Lambert & Co.*, [1891] 1 Q. B. 318, C. A., *per* LINDLEY, L.J., at p. 327); and see *Robinson* v. *Jenkins* (1890), 24 Q. B. D. 275, 278, C. A.; and title INTERPLEADER.

SECT. 3. **Estoppel between Particular Persons.**

Circumstances preventing bailor from setting up *jus tertii*.

571. But if a warehouseman in possession of goods attorns to the buyer of them, acknowledging that he holds them for him (*s*), and upon the faith of that the buyer pays the price or the warehouseman's charges, the ordinary principles of estoppel by representation apply, and the warehouseman cannot afterwards turn round and say "The goods are not yours," setting up the *jus tertii* (*a*). And though it has been ruled that the mere acceptance by a warehouseman of an order for the delivery to a buyer of unappropriated goods out of bulk does not supply the want of an appropriation by the seller, so as to pass the property (*b*), a warehouseman who accepts without qualification from a buyer a delivery order for "twenty sacks" (apparently specific) of flour may be estopped from afterwards saying that he had not got so many sacks (or so many sacks unappropriated to other sales) belonging to the seller, and from denying that the property in twenty sacks in his possession has passed to the buyer (*c*). So a seller of unappropriated goods who accepts a delivery order from a pledgee, and assures him it is in order, whereupon he advances money to the buyer, is estopped as against him from saying that the property has not passed (*d*).

SUB-SECT. 3.—*Companies and Holders of Certificates.*

To what extent a company is estopped by its certificate.

572. A company, which issues a certificate certifying that an individual shareholder named therein is a registered shareholder of the particular shares specified, is estopped as against transferees for value who have acted to their detriment on the faith of such certificates from denying the truth of what is thus represented (*e*). But

(*s*) The mere issue of dock warrants is not such an attornment (*Attenborough* v. *St. Katharine's Dock Co.* (1878), 3 C. P. D. 450, C. A., as explained by SMITH, L.J., in *Henderson & Co.* v. *Williams*, [1895] 1 Q. B. 521, C. A., at p. 534).

(*a*) *Biddle* v. *Bond* (1865), 6 B. & S. 225, at pp. 231, 232 (citing *Stonard* v. *Dunkin* (1810), 2 Camp. 345; followed in *Gosling* v. *Birnie* (1831), 7 Bing. 339; applying *Hawes* v. *Watson* (1824), 2 B. & C. 540); followed, *Henderson & Co.* v. *Williams*, [1895] 1 Q. B. 521, C. A. But mere attornment, where the purchaser or pledgee knows the facts, of which the bailee is ignorant, and does not advance his money on the faith of the attornment, does not in case of eviction by title paramount prevent the bailee setting up the *jus tertii* (*Ross* v. *Edwards & Co.* (1895), 73 L. T. 100, P. C.).

(*b*) *Unwin* v. *Adams* (1858), 1 F. & F. 312: the question of estoppel was not discussed, nor was *Gillett* v. *Hill* (1834), 2 Cr. & M. 530, cited.

(*c*) *Gillett* v. *Hill*, *supra* (on presentation of the order the defendant's foreman said that "they had not more than five sacks to spare, but the order was filed in the usual manner, and a subsequent order to deliver "5 sacks *ex* 20," was accepted and acted on). A seller who carries on a separate business as a wharfinger is not estopped by giving a delivery order, addressed to himself as wharfinger, but which has not been accepted or assented to by him in that capacity, from denying the title of the holder of the order (*Gillman, Spencer & Co.* v. *Carbutt & Co.* (1889), 61 L. T. 281, C. A.).

(*d*) *Woodley* v. *Coventry* (1863), 2 H. & C. 164; compare *Seton* v. *Lafone* (1887), 19 Q. B. D. 68, C. A.; *Coventry* v. *Great Eastern Rail. Co.* (1883), 11 Q. B. D. 776, C. A. As to estoppel against an auctioneer, see title AUCTION AND AUCTIONEERS, Vol. I., p. 515.

(*e*) *Re Bahia and San Francisco Rail. Co.* (1868), L. R. 3 Q. B. 584; approved in *Société Générale de Paris* v. *Walker* (1885), 11 App. Cas. 20, *per* Lord BLACKBURN, at p. 36; *Coates* v. *London and South Western Rail. Co.* (1880), 41 L. T. 553; *Hart* v. *Fronting etc. Gold Mining Co.* (1870), L. R. 5 Exch. 111; *Re Ottos Kopje Diamond Mines, Ltd.*, [1893] 1 Ch. 618, C. A. It is submitted

this estoppel gives no title to that which is the subject-matter of estoppel; nor does the certificate amount to an implied warranty upon which a transferee can sue (*f*). The court must look for the cause of action elsewhere upon the assumption that the company cannot dispute the facts stated in the certificate; thus, on an application by the transferee to be registered, the company, if they are estopped from denying the title of the transferor, may owe a duty to the transferee to place his name on the register of shareholders, and would therefore be liable in damages for refusing to do so (*g*). But if the transferee gave value for the transfer without seeing the certificate or relying upon its contents, the mere subsequent possession of the certificate would not give him a title to the shares or impose upon the company the duty of entering his name on the register, if at the time of the presentation of the transfer for registration the transferor had ceased to be a shareholder (*h*). It is, however, still uncertain whether and to what extent a company is bound to the transferee of shares by a statement on the certificate that no transfer will be registered without the production of the certificate (*i*), and in consequence the duty of the company to get in expired certificates also remains undefined.

that the *obiter dictum* of ROMER, L.J., in *Rainford* v. *James Keith and Blackman Co., Ltd.*, [1905] 2 Ch. 147, C. A., quoted at p. 154, "The only representation [contained in a certificate] is that at the date of the certificate the person named therein was the owner of the shares," is not in accordance with the above mentioned decisions, which clearly indicate that the representation is continuous; see also title COMPANIES, Vol. V., pp. 182, 183, 691.

(*f*) *Simm* v. *Anglo-American Telegraph Co.* (1879), 5 Q. B. D. 188, C. A., *per* BRETT, L.J., at pp. 206, 207. In this case certificates were issued on the presentation of a forged transfer. The transferee himself had no claim against the company by estoppel (see p. 410, *post*), but the certificates were pledged as security for a loan, whereby the pledgees acquired a right of action by estoppel. The loan was subsequently paid off and the certificate surrendered to the pledgor. It was held in the Court of Appeal that as the pledgees had acquired no title to the shares by estoppel (overruling LINDLEY, J.), this right of action ceased when the loan was paid off, and that consequently no right of action was transmitted to the pledgor by the surrender to him of the certificates; see title COMPANIES, Vol. V., p. 698.

(*g*) *Re Ottos Kopje Diamond Mines, Ltd.*, [1893] 1 Ch. 618, C. A., *per* BOWEN, L.J., at p. 628; *Balkis Consolidated Co.* v. *Tomkinson*, [1893] A. C. 396.

(*h*) *Rainford* v. *James Keith and Blackman Co., Ltd.*, [1905] 1 Ch. 296, *per* FARWELL, J., at p. 302. His decision was subsequently reversed, but on other grounds, [1905] 2 Ch. 147, C. A.

(*i*) *Shropshire Union Railways and Canal Co.* v. *R.* (1875), L. R. 7 H. L. 496, *per* Lord CAIRNS, L.C., at p. 509, approved in *Société Générale de Paris* v. *Walker* (1885), 11 App. Cas. 20, *per* Lord SELBORNE, at p. 29, seems to imply that the company are not so bound, but *Colonial Bank* v. *Whinney* (1886), 11 App. Cas. 426, *per* Lord BLACKBURN, at p. 437, quoted by FARWELL, J., in *Rainford* v. *James Keith and Blackman Co., Ltd.*, *supra*, is to the contrary effect. The question was specifically left undecided in the Court of Appeal (*Rainford* v. *James Keith and Blackman Co., Ltd.*, [1905] 2 Ch. 147, 160, C. A.), but CHANNELL, J., in *Guy* v. *Waterlow Brothers and Layton, Ltd.* (1909), 25 T. L. R. 515, followed FARWELL, J. The matter is one of contract, but the consequential duty (if any) might raise an estoppel; compare the *dictum* of ROMER, L.J., note (*e*), p. 408, *ante*. A person is not estopped by failing to answer a letter from the company informing him of the proposed transference of his shares (*Barton* v. *London and North Western Rail. Co.* (1889), 24 Q. B. D. 77, C. A.).

SECT. 3. **Estoppel between Particular Persons.**

No estoppel on account of a forged transfer.

573. A person who produces a forged transfer to the company, and by so doing gets himself registered and a certificate issued to him, but does not further alter his position in reliance on those facts, cannot on discovery of the fraud make the company liable to him by estoppel, both because he has not acted to his prejudice on the faith of any representation by the company, and because in producing the forged transfer he himself induced the company to do the things he complains of (*k*). A further reason is that, though it is usual for companies to make inquiry of persons purporting to transfer their shares, such inquiry is for their own protection against liability to the real stockholder, and is not a duty which they owe to the transferee (*l*). The duty of a company to one who presents a transfer for registration does not seem to extend beyond a reference to its own register (*m*), though even when such a reference would have shown that an alleged transferor was not in fact on the register the company is not liable by estoppel to the transferee unless he has changed his position in reliance on the certificate (*n*).

Vendor's shares.

574. In the case of shares stated on the certificate to be fully paid up, an estoppel is created against the company in favour of a transferee for value without notice, so that he is not liable to be placed on the list of contributories when less than the full amount has been paid on such shares (*o*).

(*k*) *Simm* v. *Anglo-American Telegraph Co.* (1879), 5 Q. B. D. 188, C. A., distinguishing *Re Bahia and San Francisco Rail. Co.* (1868), L. R. 3 Q. B. 584; *Hart* v. *Frontino etc. Gold Mining Co.* (1870), L. R. 5 Exch. 111, as explained in *Balkis Consolidated Co.* v. *Tomkinson*, [1893] A. C. 396, by Lord HERSCHELL, L.C., at p. 404; compare *Starkey* v. *Bank of England*, [1903] A. C. 114; *Sheffield Corporation* v. *Barclay*, [1905] A. C. 392; *A.-G.* v. *Odell*, [1906] 2 Ch. 47, C. A.; *Platt* v. *Rowe* (1909), 26 T. L. R. 49, where the first reason given in the text was applied to a case where a supposed transferee obtained a certificate for shares to which the transferor had no title and of which third persons were the registered owners.

(*l*) *Simm* v. *Anglo-American Telegraph Co. supra*, at pp. 203, 209, 214. This proposition appears to be good law notwithstanding the observations of FARWELL, J., in *Dixon* v. *Kennaway & Co.*, [1900] 1 Ch. 836, at p. 841; see *Sheffield Corporation* v. *Barclay*, [1905] A. C. 392, *per* Lord DAVEY, at p. 403.

(*m*) *Balkis Consolidated Co.* v. *Tomkinson*, [1893] A. C. 396, *per* Lord FIELD, at pp. 412, 413; *Dixon* v. *Kennaway & Co.*, *supra*; compare *Foster* v. *Tyne Pontoon and Dry Docks Co.* (1893), 63 L. J. (Q. B.) 50, where it was held that the fact that the fraudulent person had been insolvent from the first precluded the plaintiff in any event from getting damages from the company.

(*n*) *Balkis Consolidated Co.* v. *Tomkinson*, *supra*; *Dixon* v. *Kennaway & Co.*, *supra*, following *Knights* v. *Wiffen* (1870), L. R. 5 Q. B. 660, discussed by BRETT, L.J., in *Simm* v. *Anglo-American Telegraph Co.*, *supra*, at p. 212; *Platt* v. *Rowe*, *supra*.

(*o*) *Bloomenthal* v. *Ford*, [1897] A. C. 156. S. 25 of the Companies Act, 1867 (30 & 31 Vict. c. 131), by which vendor's shares could be issued as fully paid up on registration of the contract, has been repealed by s. 33 of the Companies Act, 1900 (63 & 64 Vict. c. 48), and remains repealed under the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69). As disputes may arise on certificates issued before the later Acts, it may be well to quote the principal cases where the company has been estopped, as against transferees for value without notice, from denying that the shares were fully paid up, though no contract was registered: *Burkinshaw* v. *Nicolls* (1878), 3 App. Cas. 1004; *Barrow's Case* (1880), 14 Ch. D. 432, C. A., where it was held that a holder for value without notice could give a good title to a transferee who had notice that the shares were not fully paid; *Re*-

The company's register.

575. The register of members of a company is only *primâ facie* evidence of matters inserted therein (*p*), but in the case of Government stock, the holders of which are registered in the books of the Bank of England, the bank is estopped from denying that the persons whose names are registered are the holders of stock, even if the original transfer of such stock was a forgery (*q*). A person whose name is on the register of a company, and who exercises acts of ownership over the shares standing in his name, is estopped in an action for the amount of unpaid calls from denying that the register is correct (*r*).

To what extent a company is estopped by a certification.

576. A certification given in the ordinary way of business by a proper officer of the company amounts to no more than a representation that the transferor has produced to him such documents as on the face of them show a *primâ facie* title in the transferor to transfer the shares mentioned in the transfer (*s*). The ostensible authority of a secretary of a company in this respect does not extend beyond giving a receipt or an acknowledgment for certificates and documents of title which have been actually lodged with him, and the company is not, at least when the secretary acts fraudulently for his own purposes, estopped by his certification acknowledging the receipt of certificates which have not been lodged (*a*). In any

Hall (*A. W.*) *& Co.* (1887), 37 Ch. D. 712; *Christchurch Gas Co.* v. *Kelly* (1887), 51 J. P. 374 (directors' shares); *Parbury's Case*, [1896] 1 Ch. 100. But where persons taking such shares were fully aware that they were vendor's shares, and in fact did not rely on the certificate, they were precluded from raising an estoppel (*Markham and Darter's Case*, [1899] 1 Ch. 414; *Bloomenthal* v. *Ford*, [1897] A. C. 156, *per* Lord HERSCHELL, at p. 167; *Re London Celluloid Co.* (1888), 39 Ch. D. 190, C. A.; as to when third parties are taken to be allottees, see *Carling, Hespeler, and Walsh's Cases* (1875), 1 Ch. D. 115, C. A.; *Re Newport and South Wales Shipowner's Co., Rowland's Case*, [1880] W. N. 80, C. A.; *Re Vulcan Ironworks Co.*, [1885] W. N. 120.

(*p*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 33.

(*q*) *Davis* v. *Bank of England* (1824), 2 Bing. 393, 407; *Bank of England* v. *Cutler*, [1908] 2 K. B. 208, 234, C. A.; compare *Hare* v. *London and North Western Rail. Co.* (1860), John. 722, as an instance of the case of an ordinary company where registration made on account of a forged transfer was held to be of no effect.

(*r*) *Crawley's Case* (1869), 4 Ch. App. 322; *Re Railway Time Tables Publishing Co., Ex parte Sandys* (1889), 42 Ch. D. 98, C. A.; compare *Hull Flax Co.* v. *Wellesley* (1860), 6 H. & N. 38. But a company is not estopped by sending a dividend warrant from denying the payee's title to the shares (*Foster* v. *Tyne Pontoon and Dry Docks Co.* (1893), 63 L. J. (Q. B.) 50).

(*s*) *Bishop* v. *Balkis Consolidated Co.* (1890), 25 Q. B. D. 512, 519, C. A.; compare *Longman* v. *Bath Electric Tramways, Ltd.*, [1905] 1 Ch. 646, C. A.

(*a*) *Whitechurch* (*George*), *Ltd.* v. *Cavanagh*, [1902] A. C. 117, 125, 126, 134. In *Bishop* v. *Balkis Consolidated Co.*, *supra*, a certificate including the shares purporting to have been transferred had been lodged with the company in respect, not of the transfer in question, but of an earlier transfer of the same shares, and it was said that the company was estopped from denying the truth of the facts certified. This decision may perhaps be supported on the ground of the absence of fraud (see *per* Lord BRAMPTON in *Whitechurch* (*George*), *Ltd.* v. *Cavanagh*, *supra*, at p. 139), but in view of the judgment of Lord MACNAGHTEN in the case last cited it would seem that this part of the judgment cannot now be regarded as correct; and see *Platt* v. *Rowe* (1909), 26 T. L. R. 49; see also the comments in *McKay's Case*, [1896] 2 Ch. 757, *per* VAUGHAN WILLIAMS, J., at p. 761, where he professed himself bound by, but unable to understand, the decision. The remarks of Lord MACNAGHTEN in *Whitechurch* (*George*),

SECT. 3. **Estoppel between Particular Persons.**

case, certification is not a document or warranty of title, and the company is not estopped by it from showing that the transferor had no title or a defective title to the shares mentioned in the certificate stated to have been lodged (*b*).

Blank transfers.

577. A person who signs a blank transfer in order to enable his broker to fill it up with particular shares is estopped from asserting that he signed the transfer in blank, so as to show that it is void in law (*c*), provided that the broker carried out his instructions; but where a broker has so acted as to make the whole transaction a forgery, filling up the transfer with a description of shares other than those specified, and has stolen the certificate of such shares in order to enable him to effect his purpose, the conduct of the transferor in executing the deed in blank is not the real or proximate cause of the loss occasioned, and he is not estopped from asserting the true facts in an action against the company for wrongfully removing his name from the register (*d*).

So in the absence of any mercantile usage creating an element of negotiability there is no estoppel in favour of a person who takes a transfer in blank and fills up the blanks in his own favour without the consent or knowledge of the original transferor (*e*).

In cases where the certificate contains on the back a blank form of transfer, and the practice is for such documents to pass from hand to hand, then, when the transfers are duly signed by the registered holders of the shares, each prior holder confers upon the *bonâ fide* holder for value of the certificates for the time being an authority to fill in the name of the transferee, and is estopped from denying such authority; but a title by unregistered transfer is not equivalent to what has been termed the legal estate in the shares or to the complete dominion over them (*f*).

Ltd. v. *Cavanagh*, [1902] A. C. 117, at p. 124, approved by Lord BRAMPTON at p. 139, indicate that the secretary of a company would not now be held to have ostensible authority to represent as fully paid up shares which were not so, in which case the decision in *McKay's Case*, [1896] 2 Ch. 757, even upon the assumption that the certificate had been lodged, can only be supported upon the ground suggested by Lord BRAMPTON.

(*b*) *Bishop* v. *Balkis Consolidated Co.* (1890), 25 Q. B. D. 512, C. A., approved by Lord BRAMPTON in *Whitechurch* (*George*), *Ltd.* v. *Cavanagh*, *supra*, at p. 138.

(*c*) As in *Hibblewhite* v. *M'Morine* (1840), 6 M. & W. 200; *France* v. *Clark* (1884), 26 Ch. D. 257, 263, C. A. As to the duty of one who signs a blank transfer not to hinder registration, see *Hooper* v. *Herts*, [1906] 1 Ch. 549, C. A.

(*d*) *Swan* v. *North British Australasian Co.* (1863), 2 H. & C. 175, Ex. Ch., disapproving, at p. 182, *Coles* v. *Bank of England* (1839), 10 Ad. & El. 437; explained by Sir G. MELLISH, L.J., in *Hunter* v. *Walters* (1871), 7 Ch. App. 75, 87; compare *Sheffield and Manchester Rail. Co.* v. *Woodcock* (1841), 7 M. & W. 574, 583; *Tayler* v. *Great Indian Peninsula Rail. Co.* (1859), 4 De G. & J. 559, C. A.; and as to negligence being the proximate cause of loss, *Merchants of Staple of England* (*Mayor etc.*) v. *Bank of England* (*Governor & Co.*) (1887), 21 Q. B. D. 160, C. A., following *Bank of Ireland* (*Governor & Co.*) v. *Evans' Charities in Ireland* (*Trustees*) (1855), 5 H. L. Cas. 389; and p. 400, *ante*. As to signature of blank transfers by executors, see title COMPANIES, Vol. V., p. 192.

(*e*) *France* v. *Clark* (1884), 26 Ch. D. 257, 262, C. A.; followed in *Fox* v. *Martin*, [1895] W. N. 36; *Montagu* (*Samuel*) *& Co.* v. *Weston*, *Clevedon and Portishead Light Railways Co.* (1903), 19 T. L. R. 272; compare *Tayler* v. *Great Indian Peninsula Rail. Co.*, *supra*.

(*f*) *Colonial Bank* v. *Hepworth* (1887), 36 Ch. D. 36, *per* CHITTY, J., at p. 53.

SUB-SECT. 4.—*Patentee and Licensee.*

SECT. 3. **Estoppel between Particular Persons.**

578. An estoppel which is very closely analogous to that between landlord and tenant exists between a patentee and his licensee. In some of the cases, as in the case of a lease, the estoppel has been by deed (*g*); but apart from this, as a tenant is estopped from disputing his landlord's title, so the licensee of a patent under agreement with the patentee, so long as he continues to act under the licence (*h*), or during the continuance of the agreement, is not at liberty to dispute the validity of the patent (*i*). The analogy between a licensee and a tenant is very exact: "So long as the lease remains in force, and the tenant has not been evicted from the land, he is estopped from denying the lessor's title to that land; but he is entitled to show that a particular parcel was never comprised in the lease. So a licensee may show that the particular thing he has done was not included in the patent, and that he has done it as one of the public, and is therefore not bound to pay royalty for it. If he has used that which is in the patent, and which his licence authorises him to use, then like a tenant under a lease he is estopped from denying the patentee's right, and must pay royalty. Though a stranger can show that the patent was bad (*k*), the licensee must not do so" (*l*).

Licensee estopped from denying validity.

On a somewhat different principle, a patentee after assignment of the patent is, as between himself and the assignee, and those claiming under him, estopped from disputing the validity of the patent (*m*).

But a bank taking such securities from a professional money-lender is not such a *bonâ fide* holder for value as to be protected by estoppel (*Sheffield* (*Earl*) v. *London Joint Stock Bank* (1888), 13 App. Cas. 333).

(*g*) *Smith* v. *Scott* (1859), 6 C. B. (N. S.) 771 (defendant estopped by his deed from denying (a) that it gave an exclusive licence, and (b) that the plaintiff was the true and first inventor), following *Bowman* v. *Taylor* (1834), 2 Ad. & El. 278, and followed in *Hills* v. *Laming* (1853), 9 Exch. 256, and distinguishing *Hayne* v. *Maltby* (1789), 3 Term Rep. 438, which was decided by all the judges on the ground that the licensee was in the position of a tenant who has been ejected by title paramount, and by Lord KENYON, C.J., and ASHURST, J., also on the ground of fraud.

(*h*) The estoppel does not continue after the expiration of the licence (*Goucher* v. *Clayton* (1865), 34 L. J. (CH.) 239; compare *Dangerfield* v. *Jones* (1865), 13 L. T. 142), nor does it bind an equitable assignee of the licence who is not acting under it (*Pidding* v. *Franks* (1849), 1 Mac. & G. 56; followed, *Baxter* v. *Combe* (1850), 1 I. Ch. R. 284, 289), nor does it bind a purchaser from the licensee (*Gillette Safety Razor Co.* v. *Gamage* (*A. W.*), *Ltd.* (1909), 25 T. L. R. 808).

(*i*) *Crossley* v. *Dixon* (1863), 10 H. L. Cas. 293; compare *Cutler* v. *Bower* (1848), 11 Q. B. 973; *Lawes* v. *Purser* (1856), 6 E. & B. 930; and *Noton* v. *Brooks* (1861), 7 H. & N. 499, where the question turned rather on consideration than estoppel.

(*k*) As actually occurred in *Grover and Baker Sewing Machine Co.* v. *Millard* (1862), 8 Jur. (N. S.) 713.

(*l*) *Clark* v. *Adie* (No. 2) (1877), 2 App. Cas. 423, *per* Lord BLACKBURN, at p. 433.

(*m*) *Walton* v. *Lavater* (1860), 8 C. B. (N. S.) 162, 180, 186. This seems to rest on the ordinary principle of estoppel by conduct, and on the rule that a man cannot derogate from his own grant. It does not apply as between a patentee after bankruptcy and the assignee of his trustee in bankruptcy (*Smith* v. *Cropper* (1885), 10 App. Cas. 249); nor does it bind a person who, after the assignment, becomes a partner of the assignor (*Heugh* v. *Chamberlain* (1877), 25 W. R. 742); and see title PATENTS AND DESIGNS.

ESTOVERS.

See COMMONS.

ESTRAYS.

See ANIMALS; CONSTITUTIONAL LAW.

ESTREAT.

See CRIMINAL LAW AND PROCEDURE.

EVICTION.

See COUNTY COURTS; LANDLORD AND TENANT.

EVIDENCE.

PAGE

PART I. INTRODUCTORY - - - - - - - - - 419

SECT. 1. FUNCTIONS OF THE LAW OF EVIDENCE- - - - 419

SECT. 2. FUNCTIONS OF JUDGE AND JURY - - - - - 428

SECT. 3. BURDEN OF PROOF - - - - - - - - 433

PART II. FACTS WHICH MAY BE PROVED- - - - - 436

SECT. 1. FACTS IN ISSUE - - - - - - - - - 436

SECT. 2. FACTS RELEVANT TO THE ISSUE - - - - - 439

Sub-sect. 1. In General - - - - - - - - 439
Sub-sect. 2. Facts probative of the Main Fact - - - 440
Sub-sect. 3. Facts showing the Identity or Connection of the Parties - - - - - - - 447
Sub-sect. 4. Facts showing State of Mind - - - - 448
Sub-sect. 5. Similar Facts - - - - - - - 450
Sub-sect. 6. Character - - - - - - - - 454

SECT. 3. HEARSAY - - - - - - - - - - 455

Sub-sect. 1. General Rule and Exceptions - - - - 455
Sub-sect. 2. Admissions and Confessions - - - - 456
Sub-sect. 3. Statements by Deceased Persons - - - 463
(i.) Declarations against Interest - - - - 463
(ii.) Declarations in the course of Duty - - - 464
(iii.) Declarations as to Public Rights - - - 467
(iv.) Declarations as to Pedigree - - - - 469
(v.) Declarations by Dying Persons - - - 471
(vi.) Declarations by Testators - - - - - 471
Sub-sect. 4. Statements in Public Documents - - - 472
(i.) Public Statutes, Parliamentary Journals, and Government Gazettes - - - - - 473
(ii.) Public Registers - - - - - - 473
(iii.) Public Surveys, Assessments, and Reports - 475
(iv.) Official Certificates - - - - - - 476
(v.) Corporation, Company, and Bankers' Books - 478
(vi.) Histories, Scientific Works etc. - - - - 478

SECT. 4. OPINIONS - - - - - - - - - - 479

Sub-sect. 1. General Reputation - - - - - 479
Sub-sect. 2. Opinions of Experts - - - - - 480
Sub-sect. 3. Opinions of Ordinary Witnesses - - - 482

SECT. 5. JUDGMENTS - - - - - - - - - 483

PART III. MODES OF PROOF - - - - - - - - 484

SECT. 1. ADMISSIONS FOR PURPOSES OF TRIAL - - - - 484

PAGE

PART III. MODES OF PROOF—*continued.*

SECT. 2. JUDICIAL NOTICE - - - - - - - - - 484

Sub-sect. 1. English Law, Customs, and Practice - - 484
Sub-sect. 2. Colonial and Foreign Laws - - - - 487
Sub-sect. 3. Time - - - - - - - - - 492
Sub-sect. 4. Affairs of State, States of War and Peace, Foreign Rulers, Officers of State - - - 492
Sub-sect. 5. Geography - - - - - - - - 493
Sub-sect. 6. Notorious Facts - - - - - - 494
Sub-sect. 7. Official Seals and Signatures - - - - 495

SECT. 3. PRESUMPTIONS - - - - - - - - - 497

Sub-sect. 1. In General - - - - - - - - 497
Sub-sect. 2. Conclusive - - - - - - - - 498
Sub-sect. 3. Rebuttable - - - - - - - - 499
Sub-sect. 4. Of fact - - - - - - - - - 507

SECT. 4. INSPECTION - - - - - - - - - - 507

PART IV. DOCUMENTARY EVIDENCE - - - - - - - 510

SECT. 1. PROOF OF EXECUTION OF DOCUMENTS - - - - - 510

Sub-sect. 1. Handwriting - - - - - - - - 510
Sub-sect. 2. Sealing, Delivery and Attestation - - - 510
Sub-sect. 3. Ancient Documents - - - - - - 512
Sub-sect. 4. Stamps - - - - - - - - - 515

SECT. 2. PROOF OF CONTENTS OF DOCUMENTS - - - - - 517

Sub-sect. 1. Primary Evidence - - - - - - - 517
Sub-sect. 2. Secondary Evidence - - - - - - 518
Sub-sect. 3. Copies of Public Documents - - - - 522
(i.) Exemplifications - - - - - - - 523
(ii.) Office Copies - - - - - - - - 523
(iii.) Examined Copies - - - - - - - 524
(iv.) Certified Copies - - - - - - - 524
(v.) Copies printed by Public Authority - - - 525
Sub-sect. 4. Proof of Particular Public or Official Documents 525
(i.) Statutes, Parliamentary Proceedings, and Orders 525
(ii.) Foreign Judgments and Acts of State - - 527
(iii.) Ancient Public Surveys, Inquisitions, and Assessments - - - - - - - - - 527
(iv.) Birth, Marriage, and Death Certificates - - 533
(a) Of the Registrar-General of England - - 533
(b) Foreign Registers - - - - - - 534
(v.) Parish and other Registers and Records of Baptisms, Marriages, and Burials - - 536
(vi.) Other Registers - - - - - - - 539
(vii.) Court Rolls - - - - - - - - 539
(viii.) Rate Books, Revenue Books, Log Books, Lighthouse Journals - - - - - - - 541
(ix.) Judicial Proceedings - - - - - - 542
(a) When and how Admissible - - - 542
(b) In High Court - - - - - - - 548
(c) In County Court - - - - - - 549
(d) In Criminal Court - - - - - 550
(e) Other Judicial Proceedings - - - 551
(x.) Probate and Letters of Administration - - 553
Sub-sect. 5. Proof of Particular Private Documents - - 554
(i.) Bankers' Books - - - - - - - 554
(ii.) Books of Companies and Corporations - - 555

PAGE

PART IV. DOCUMENTARY EVIDENCE—*continued.*

SECT. 2. PROOF OF CONTENTS OF DOCUMENTS—*continued.*

Sub-sect. 5. Proof of Particular Private Documents—*continued.*

(iii.) Letters - - - - - - - - - 556
(a) Posting and Delivery - - - - 556
(b) Without Prejudice - - - - - 557
(iv.) Telegrams - - - - - - - - 559
(v.) Deeds - - - - - - - - - 559
(vi.) Wills - - - - - - - - - 559
(vii.) Family Papers - - - - - - - 560
(viii.) Account Books - - - - - - - 561
(ix.) Bills of Exchange, Cheques, and Promissory Notes - - - - - - - - - 562
(x.) Receipts - - - - - - - - - 562
(xi.) Works of History and Science - - - - 563
(xii.) Plans and Maps - - - - - - - 563
(xiii.) Inscriptions - - - - - - - - 564
(xiv.) Photographs - - - - - - - - 565
(xv.) Newspaper Reports - - - - - - 565

SECT. 3. EXCLUSION OF EXTRINSIC EVIDENCE TO CONTRADICT OR VARY DOCUMENTS - - - - - - - - 566

Sub-sect. 1. General Rule - - - - - - - 566
Sub-sect. 2. Exceptions - - - - - - - - 567

SECT. 4. ADMISSION OF EXTRINSIC EVIDENCE TO INTERPRET DOCUMENTS - - - - - - - - - 568

PART V. WITNESSES - - - - - - - - - - 569

SECT. 1. COMPETENCY - - - - - - - - - 569

SECT. 2. PRIVILEGE - - - - - - - - - - 570

Sub-sect. 1. Judges, Jurors, Counsel, Solicitors - - - 571
Sub-sect. 2. Officers of State - - - - - - 572
Sub-sect. 3. Husband and Wife - - - - - - 573
Sub-sect. 4. Title Deeds - - - - - - - 574
Sub-sect. 5. Matter incriminating Witness - - - 574

SECT. 3. ATTENDANCE - - - - - - - - - 577

Sub-sect. 1. *Subpœna ad testificandum* - - - - 577
(i.) Witnesses within the Jurisdiction - - - 577
(ii.) Witnesses out of the Jurisdiction - - - 579
Sub-sect. 2. *Habeas corpus ad testificandum* - - - - 580
Sub-sect. 3. *Subpœna duces tecum* - - - - - 580
(i.) In General - - - - - - - - 580
(ii.) Solicitors - - - - - - - - 581
(iii.) Production of Documents at Proceedings other than Trial - - - - - - - - 582
Sub-sect. 4. Expenses - - - - - - - 583
Sub-sect. 5. Privilege from Arrest - - - - - 585
Sub-sect. 6. Penalties for Non-attendance - - - - 588

SECT. 4. OATH AND AFFIRMATION - - - - - - 590

SECT. 5. ORDERING OUT OF COURT - - - - - - 593

SECT. 6. EXAMINATION IN CHIEF, CROSS-EXAMINATION, AND RE-EXAMINATION - - - - - - - - 594

Sub-sect. 1. Leading Questions - - - - - - 594
Sub-sect. 2. Refreshing Memory - - - - - - 595
Sub-sect. 3. Cross-examination - - - - - - 597
Sub-sect. 4. Re-examination - - - - - - 599
Sub-sect. 5. Further Evidence - - - - - - 599

PAGE

PART V. WITNESSES—*continued.*

SECT. 7. IMPEACHING CREDIT OF WITNESS - - - - 600
Sub-sect. 1. Of Party's own Witness - - - - 600
Sub-sect. 2. Of Opponent's Witness - - - - - 601
Sub-sect. 3. Re-establishing Credit of Witness - - - 603
SECT. 8. CORROBORATION - - - - - - - - - 603
SECT. 9. ATTESTING WITNESSES, WHEN REQUIRED TO BE CALLED 604
SECT. 10. EVIDENCE OF OPINION AND BELIEF - - - - 607

PART VI. EVIDENCE OUT OF COURT- - - - - - 609
SECT. 1. HOW OBTAINED - - - - - - - - - 609
SECT. 2. EXAMINATION OF WITNESSES - - - - - 609
Sub-sect. 1. Commission - - - - - - - - 609
Sub-sect. 2. Examiners - - - - - - - - 610
Sub-sect. 3. Mandamus - - - - - - - - 611
Sub-sect. 4. Letters of Request - - - - - - 611
SECT. 3. WHEN EXAMINATION OUT OF COURT WILL BE ORDERED 611
Sub-sect. 1. Witnesses within the Jurisdiction - - - 613
Sub-sect. 2. Witnesses Abroad - - - - - - 613
SECT. 4. TAKING THE EVIDENCE - - - - - - 615
SECT. 5. RETURN AND USE OF THE EVIDENCE - - - - 617
SECT. 6. INTERLOCUTORY PROCEEDINGS—EVIDENCE BY AFFIDAVIT 618
SECT. 7. TRIAL ON AFFIDAVITS- - - - - - - - 620
Sub-sect. 1. By Consent - - - - - - - - 620
Sub-sect. 2. By Order of Court - - - - - - 622
Sub-sect. 3. In County Court - - - - - - 624
SECT. 8. FORM AND CONTENTS OF AFFIDAVITS - - - - 625
SECT. 9. WHO MAY TAKE AFFIDAVITS - - - - - 627
SECT. 10. FILING AND OFFICE COPIES OF AFFIDAVITS - - 629
SECT. 11. ACTION FOR PERPETUATION OF TESTIMONY - - - 630
SECT. 12. EVIDENCE FOR USE BEFORE FOREIGN TRIBUNALS - 630

For Acknowledgments, Certificate of *See title* REAL PROPERTY AND CHATTELS REAL; SALE OF LAND.

Admissions for Purposes of Trial - - - - ,, PLEADING; PRACTICE AND PROCEDURE.
Character, Evidence of - - ,, CRIMINAL LAW AND PROCEDURE.
Common Informer - - - ,, CRIMINAL LAW AND PROCEDURE.
Confession and Avoidance - ,, PLEADING.
Confessions - - - - ,, CRIMINAL LAW AND PROCEDURE.
County Courts - - - ,, COUNTY COURTS.
Criminal Cases, Evidence in - ,, CRIMINAL LAW AND PROCEDURE.
Custom - - - - - ,, CUSTOM AND USAGES.
Deeds, Receipts in - - - ,, DEEDS AND OTHER INSTRUMENTS.
Discovery - - - - ,, DISCOVERY, INSPECTION, AND INTERROGATORIES.
Easements - - - - ,, EASEMENTS AND PROFITS À PRENDRE.
Estoppel - - - - ,, ESTOPPEL.
Foreign Judgments - - ,, CONFLICT OF LAWS.
Inquests, Evidence at - - ,, CORONERS.
Inspection of Documents - - ,, DISCOVERY, INSPECTION, AND INTERROGATORIES.

For Interrogatories	*See title*	DISCOVERY, INSPECTION, AND INTERROGATORIES.
Judgments	,,	ESTOPPEL; JUDGMENTS AND ORDERS.
Pleadings	,,	PLEADING.
Prescription	,,	COMMONS; EASEMENTS AND PROFITS À PRENDRE.
Presumptions as to Rights of Property	,,	PERSONAL PROPERTY; REAL PROPERTY AND CHATTELS REAL.
Stamps	,,	REVENUE; titles *passim*.
Title, Abstract of	,,	SALE OF LAND.
Usage, Proof of	,,	CUSTOM AND USAGES.
Wills, Due Execution of	,,	WILLS.

Part I.—Introductory.

SECT. 1.—*Functions of the Law of Evidence.*

Proof.

579. In every system of jurisprudence it is recognised that, before a fact is accepted and acted upon, it must be proved. Evidence is the foundation of proof, with which it must not be confounded. Proof is that which leads to a conclusion as to the truth or falsity of alleged facts which are the subject of inquiry. Evidence, if accepted and believed, results in proof, but it is not necessarily proof of itself. The amount of evidence necessary to establish proof, the quality of the evidence which will be accepted, and the manner in which it may be given vary according to the usages of each country, but all systems recognise that, at least in theory, facts require to be proved.

The rules which regulate the admission or rejection of evidence are many and complex. They belong to the realm of procedure, and have been formulated in a few Acts of Parliament and an enormous number of judicial decisions spreading over the last hundred and fifty years.

Foundations of evidence.

580. The necessity of applying the law of evidence presupposes two things—

(a) The existence of a court, or of some tribunal in the nature of a court, whose duty it is to ascertain facts;

(b) An issue to be determined.

Law of evidence.

581. Given the forum and given the issue to be determined, the next question which arises is by what evidence is the court to be guided. The rules which govern the procedure of the court with reference to the admission or rejection of evidence constitute what is known as the law of evidence (*a*).

(*a*) Under the Judicature Acts the Rule Committee may make rules for regulating in the High Court of Justice the means by which particular facts may be proved, and the mode in which evidence thereof may be given: (a) on any application in any matter or proceeding relating to the distribution of any fund or property, whether in court or not; and (b) on any application upon summons for directions pursuant to such rules (Judicature (Procedure) Act, 1894 (57 & 58 Vict. c. 16), s. 3). The power to dispense with the technical rules of evidence depends entirely upon that Act (*Baerlein* v. *Chartered Mercantile Bank*, [1895] 2 Ch. 488, C. A.). Even when justices are sitting in an administrative capacity they may refuse to hear statements not made on oath (*R.* v. *Sharman, Ex parte Denton*, [1898] 1 Q. B. 578). Arbitrators are bound by the same rules

SECT. 1. Functions of the Law of Evidence.

The *lex fori*.

582. The *lex fori* must determine all questions relating to the admission or rejection of evidence. The questions are to be determined "by the law of the country where the question arises, where the remedy is sought to be enforced, and where the court sits to enforce it" (*b*). It follows that if it is desired in an English court to prove a foreign document, then, although such document may be provable in its country of origin by the production of a copy, it cannot be so proved in the English court unless the circumstances are such as to render the copy admissible by English law (*c*).

The cardinal rules.

583. There are two cardinal rules of evidence to be remembered—

(a) The facts of which evidence is tendered must be relevant to the issue to be tried;

(b) The *best evidence* procurable—in other words, *primary evidence*—must be given of the facts sought to be proved (*d*).

Facts relevant to the issue.

584. Facts relevant to the issue are those facts which, either directly or inferentially, lead to one of the conclusions necessary to proof or disproof of that which is affirmed. The facts which directly lead to such a conclusion are those essential to the issue. The facts which inferentially lead to such a conclusion are those which raise a presumption as to the existence of the facts essential to the issue.

The "*res gestæ*."

585. The facts necessarily involved in the determination of the issue are sometimes defined as the *res gestæ*, and the rule as to what facts form part of the *res gestæ*, and are consequently provable as facts relevant to the issue, has been well stated as including "acts, declarations, and incidents which constitute, accompany, and explain the facts or transaction in issue" (*e*). Facts inferentially relevant are usually those which are either the cause or the effect of those directly relevant, and which consequently go, by inference, to prove them, but, as just stated, the inference may be wider and may be drawn from facts which either accompany or explain the transaction in issue (*f*). Care must of course be taken that the facts sought to be proved as part of the "*res gestæ*" are not in reality what is known as "*res inter alios actæ*" (*g*). Any fact forming part of the transaction being inquired into is sufficiently connected therewith to be provable, although it may not itself be in issue (*h*).

of evidence as courts of law (*Re Enoch and Zaretzky, Bock & Co.'s Arbitration*, [1910] 1 K. B. 327, C. A.; and see p. 433, *post*).

(*b*) *Bain* v. *Whitehaven and Furness Junction Rail. Co.* (1850), 3 H. L. Cas. 1; *Hamlyn & Co.* v. *Talisker Distillery*, [1894] A. C. 203.

(*c*) *Brown* v. *Thornton* (1837), 6 Ad. & El. 185; *Clark* v. *Mullick* (1840), 3 Moo. P. C. C. 252. For the circumstances under which a copy of an original document is admissible according to English law, see pp. 518 *et seq.*, *post*.

(*d*) As to this rule in relation to criminal cases, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 390—393.

(*e*) The explanations must be themselves relevant to the issue. As to evidence of similar acts, see p. 450, *post*.

(*f*) *Rouch* v. *Great Western Rail. Co.* (1841), 1 Q. B. 51.

(*g*) *Hyde* v. *Palmer* (1863), 32 L. J. (Q. B.) 126; *Wright* v. *Tatham* (1838), 5 Cl. & Fin. 670, H. L.; *Agassiz* v. *London Tramway Co.* (1872), 21 W. R. 199.

(*h*) *R.* v. *Ellis* (1826), 6 B. & C. 145; *Carmarthen and Cardigan Rail. Co.* v. *Manchester and Milford Rail. Co.* (1873), L. R. 8 C. P. 685.

SECT. 1. Functions of the Law of Evidence.

It is the function of the judge to determine what is and what is not relevant to the issue, and consequently to ascertain what the issue is. At one time the issue—*i.e.*, the point to be determined—was to be discovered in the pleadings, and those documents were framed with much care in order that the litigants should define in and the court should ascertain from the pleadings the nature of the issue. In modern times some causes are tried without pleadings, and even in those where pleadings have survived they are subject to frequent and immediate amendment at the hearing "so as to raise the real issue to be tried"(*i*). The credibility of testimony is a question of fact to be determined by the jury, if the case is being tried before one, or by the judge, as a jury, if it is not; but the admissibility of evidence must be decided, as a preliminary question, by the judge as such when it is tendered, and it is consequently for him to discover what the issue is: this he must do, in the absence of pleadings, from the opening of the case, from such documents as are before him, and from such evidence as has been given without objection before any question of admissibility arises.

Function of the judge.

586. Having once admitted evidence, the duty of the judge is confined to directing the jury (if there be one and the necessity for such direction arises) as to the rules of law regarding corroboration (*j*), or the value to be attached to certain classes of testimony (*k*), and to commenting in his summing up, if he thinks the case requires it, on the volume and the value of the evidence given (*l*).

Best evidence.

587. It having been settled that the fact of which proof is tendered is one relevant to the inquiry, the question then arises, How may it be proved? And this leads to the second cardinal rule above stated, namely, that the best evidence must always be given; in other words, the evidence which affords the greatest certainty of the fact in question. The reasons for this rule are sufficiently obvious. Why should a litigant tender evidence less direct and consequently less convincing than other existing and attainable evidence unless for some reason which would make it improper for the court to receive it (*m*)? Thus, if a fact is to be proved by oral evidence, it is obvious that the evidence must be that of a person who has directly perceived the fact to which he testifies. Equally, if something is alleged to have been seen, the evidence must be that of the person who says he saw it; if heard, that of the person who says he heard it; otherwise it would be impossible to test by cross-examination the truth of the testimony, and the

(*i*) See title PLEADING.

(*j*) Corroboration is essential in cases of breach of promise and of bastardy, and is in practice generally required where a claim is made against the estate of a dead person. See p. 603, *post*.

(*k*) As in cases where evidence has been given by an accomplice, or by an unsworn child.

(*l*) See *Heslop* v. *Chapman* (1853), 2 C. L. R. 139, Ex. Ch.

(*m*) *Twyman* v. *Knowles* (1853), 22 L. J. (C. P.) 143; *Brewster* v. *Sewell* (1820), 3 B. & Ald. 296; *Strother* v. *Barr* (1828), 5 Bing. 136.

SECT. 1. Functions of the Law of Evidence.

law rejects evidence which cannot be adequately tested (*n*). Similarly, where the transaction sought to be proved is primarily evidenced by a writing, as in the case of a written contract, the writing, if it exists and is obtainable, must be produced (*o*). It is again obvious that it would be improper for the court to rely upon a possibly imperfect copy of an original when the original itself can be produced, or to accept the recollection of witnesses which may be faulty, as to the contents of a document, when the document can itself be referred to. For the same reasons it follows that when a preliminary written agreement has been followed by a deed, the deed, having superseded the written agreement, must be itself produced (*p*); also that in cases where oral testimony should be given, but the court has allowed such testimony to be embodied in depositions, the depositions can only be given in evidence on proof that the witnesses themselves are unable to attend the court (*q*).

The rule as to the production of the best evidence is inflexible, and the mind of the court is invariably alert to discover, when evidence of an alleged fact is tendered, whether it is not within the power of the persons tendering it to produce better evidence of the same fact, and if the court is satisfied that better evidence can be produced it will insist—although possibly an adjournment of the case be involved—upon the production thereof.

Secondary evidence.

588. In the unavoidable absence of the best or primary evidence the court will accept what is known as secondary evidence. Secondary evidence is evidence which suggests, on the face of it, that other and better evidence exists. It follows that it will never be received until the party tendering it proves that it is out of his power to obtain the best evidence. The fact that secondary evidence is receivable is sometimes stated as forming an exception to the rule which provides that the best evidence alone can be given. This is an error. So far from forming an exception to the rule, it is the logical outcome of it, for, as secondary evidence may only be given when the party tendering it has proved that primary evidence is not obtainable, the secondary evidence becomes the best which the court can procure and consequently satisfies the rule (*r*).

How secondary evidence of a document may be given.

589. When once it has been proved that a document exists, but that, for reasons which admit the giving of secondary evidence, it cannot be produced, then the contents may be proved by other means, *e.g.*, by the production of a certified copy (*s*), an office copy, any copy which it can be proved has been made from the original and is

(*n*) *A.-G.* v. *Davison* (1825), M'Cle. & Yo. 160, Ex. Ch.; *Fitzgerald* v. *Fitzgerald* (1863), 3 Sw. & Tr. 397; *Steinkeller* v. *Newton* (1838), 9 C. & P. 313; *Allen* v. *Allen*, [1894] P. 248, C. A.

(*o*) See p. 517, *post*.

(*p*) *Williams* v. *Morgan* (1850), 15 Q. B. 782.

(*q*) R. S. C., Ord. 37, r. 18.

(*r*) For the occasions on which secondary evidence of a document may be given, see p. 518, *post*.

(*s*) Many public documents, certificates, certified copies of documents, and of entries in registers etc. are by statute made evidence in courts of law, provided they are authenticated as the statute requires. For a detailed list of such documents and of the statutes under which they are made evidence, see pp. 525 *et seq.*, *post*.

correct (*a*), a counterpart, or by oral evidence as to the contents of the document given by a person who has seen it and is able to swear that he recollects the contents. The statements of deceased persons as to the contents of a lost document, if made under such circumstances as make the statements receivable in evidence, can also be given as secondary evidence (*b*).

Hearsay.

590. An important example of the rule which provides that the best evidence must always be given is found in the fact that, subject to exceptions presently stated, hearsay is not admitted. A witness cannot be called, in proof of a fact, to state that he heard someone else state it to be one. The reason lies, first, in the fallibility of human nature and human memory, which is found habitually to affect the accuracy of a narrative that passes through several persons; secondly, in the impossibility of testing the truthfulness of a statement not made by the witness who is repeating it, but by a person not called; and, thirdly, in the opportunities which any other rule would offer to fraudulent persons wishful to put into the mouths of others statements which they had never made (*c*).

Care must be taken to distinguish between evidence which is tendered to prove that someone else has spoken certain words when the fact of which proof is required is merely the speaking, and evidence which is tendered to prove that someone else has spoken certain words as leading to a conclusion that the words spoken were true. The former is admissible (as in cases where the uttering of a slander has to be proved); the latter is not.

Exceptions to the rule regarding hearsay.

591. Salutary as is the rule regarding the rejection of hearsay, it is manifest that certain statements by the parties must have an important bearing upon the determination of the issue, although, strictly speaking, such statements, when not proved out of the mouth of the person who made them, amount to nothing more nor less than hearsay. The various statements of which it has been found necessary to admit proof, although the proof be not given by the person responsible for the statement, may be either written or verbal. They are termed exceptions to the rule regarding the rejection of hearsay.

Admissions of one of the parties.

592. The first exception, and the one most usually met with in practice, is that which allows admissions made by one of the parties to be proved. The admission is evidence against the party making it, but not in his favour. What a person admits against himself may reasonably be supposed to be true, although it is more than possible that he might fabricate statements in his favour or even make them, when untrue, in the belief that they were true. Consequently the former statements are admissible; the

(*a*) A copy which has merely been examined with a draft, the draft itself not having been examined with the original, will be rejected (*Re Halifax Commercial Banking Co. and Wood* (1898), 79 L. T. 183).

(*b*) See p. 518, *post*.

(*c*) As to the antiquity of the rule as to hearsay, see 2 Hawk. P. C., c. 46, s. 14 (8th ed., p. 596); *Wright* v. *Doe* d. *Tatham* (1837), 7 Ad. & El. 313, Ex. Ch.

SECT. 1. Functions of the Law of Evidence.

latter are not (*d*). An admission may be written or verbal. Thus, an entry in a book kept by a party or by his firm cannot, strictly speaking, be evidence in his favour, although it may be evidence against him (*e*). In practice witnesses are frequently allowed to look at their books while giving evidence (*f*), but this is justified only by the rule which allows a witness to refresh his memory by looking at any note which he has made at the time. The fact that a witness is allowed to look at a document when in the box—whether it be a book of account or any other document—does not make the document evidence against his opponent unless his opponent calls for it, asks questions upon it, and thus does what is called "puts it in," *i.e.*, makes it evidence in the cause.

Besides verbal or written admissions, a party may admit by conduct; that is to say, he may so acquiesce in certain conditions, or in certain statements made by others, that it would be unjust to allow him afterwards to deny the propriety of the one or the truth of the other (*g*). Admissions may also be made not only by the parties, but by any person who is, by his relation to the party, in a position to bind him by the admission (*h*), *e.g.*, by a person jointly interested with the party against whom the evidence is tendered, or by the latter's predecessor in title (*i*).

Declarations of deceased persons—when admissible.

593. The next exception to the rule that hearsay will be rejected is afforded by the fact that in certain circumstances the statements—or declarations, as they are more usually called—of deceased persons are admissible in evidence (*k*).

Declarations of deceased persons to be so admissible must have been made—

(a) Against the pecuniary or proprietary interest of the deceased when he made it (*l*);

(b) In the course of business, or of duty in the nature of business (*m*);

(c) As to public rights (*n*);

(d) As to pedigree and ancient possession (*o*);

(*d*) *Darby* v. *Ouseley* (1856), 1 H. & N. 1; *R.* v. *Erdheim*, [1896] 2 Q. B. 260, C. C. R.; *Heane* v. *Rogers* (1829), 9 B. & C. 577, 586.

(*e*) *Smyth* v. *Anderson* (1849), 7 C. B. 21.

(*f*) *R.* v. *Worth* (*Inhabitants*) (1843), 4 Q. B. 132, 139.

(*g*) *La Banque Jacques-Cartier* v. *La Banque d'Epargne de la Cité et du District Montreal* (1887), 13 App. Cas. 118; *Moriarty* v. *London, Chatham and Dover Rail. Co.* (1870), L. R. 5 Q. B. 314; and see title ESTOPPEL, p. 388, *ante*.

(*h*) Confessions are a common form of admission. See p. 456, *post*; *Petch* v. *Lyon* (1846), 9 Q. B. 147; and title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 384—400.

(*i*) *Great Western Rail. Co.* v. *Willis* (1865), 18 C. B. (N. S.) 748; and see title AGENCY, Vol. I., p. 215. As to evidence of acts done by an agent or servant being evidence against the principal or employer, see *ibid.*, pp. 217, 218, and title MASTER AND SERVANT.

(*k*) See p. 463, *post*.

(*l*) See p. 463, *post*.

(*m*) See p. 464, *post*.

(*n*) See p. 467, *post*.

(*o*) See p. 469, *post*.

(e) When dying, as to the cause of death (*p*); or

(f) With reference to the deceased's testamentary intentions in the contents of his will (*q*).

When facts must be proved in a specific way.

594. The two cardinal rules with reference to the giving of evidence and the exceptions to that which provides that the best evidence must always be given having been set out, it remains to consider—

(a) Circumstances in which facts must be proved in a certain way;

(b) Circumstances in which facts do not require to be proved;

(c) Circumstances in which alleged facts may not be proved at all.

Cases in which a writing is necessary.

595. The circumstances in which facts have to be proved in a certain way are those in which the statute or the common law has provided that no action shall succeed unless founded on a written document. They are:—

(a) Actions brought on the promise of an executor to be personally liable. This is statutory and is provided for by s. 4 of the Statute of Frauds (*r*). The promise, or some memorandum thereof, must be in writing and signed by the party to be charged or some person thereunto by him lawfully authorised. The agreement must embody the consideration (*s*).

(b) Actions brought on the promise of one to be answerable for the present or future debt of another (*t*). The agreement need not disclose a consideration on the face of it (*u*), but a consideration must be proved (*x*).

(c) Actions brought on a promise in consideration of marriage (*y*).

(d) Actions on contracts not to be performed within a year from the making thereof (*z*). This is also provided for by s. 4 of the Statute of Frauds and is subject to the same provision regarding the necessity for a written agreement or some memorandum thereof. When the contract sued on is capable of being performed within a year from the date when made the statute has no

(*p*) See p. 471, *post*, and title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 393, 589.

(*q*) See p. 471, *post*.

(*r*) 29 Car. 2, c. 3, s. 4.

(*s*) *Rann* v. *Hughes* (1778), 4 Bro. Parl. Cas. 27; and see title EXECUTORS AND ADMINISTRATORS.

(*t*) Statute of Frauds (29 Car. 2, c. 3), s. 4.

(*u*) Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 3.

(*x*) *Semple* v. *Pink* (1847), 1 Exch. 74; *Holmes* v. *Mitchell* (1859), 7 C. B. (N. S.) 361. See titles CONTRACT, Vol. VII., p. 362; GUARANTEE.

(*y*) Statute of Frauds (29 Car. 2, c. 3), s. 4. The section does not, it is to be observed, deal with promises to marry, but with contracts to do something—as, for example, to pay money—in consideration of marriage; and see title CONTRACT, Vol. VII., p. 364.

(*z*) *Ibid.* This provision applies to an agreement for the sale of goods which is not to be performed within a year, notwithstanding the repeal of s. 16 by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71); *Prested Miners Co., Ltd.* v. *Garner, Ltd.*, [1910] 2 K. B. 776.

SECT. 1. Functions of the Law of Evidence.

application (*a*), but on the other hand, if the contract on the face of it is for longer, but may be determined by a contingency arising within the year, the statute applies (*b*).

(e) Actions on contracts to let or sell land. Sects. 1 and 2 of the Statute of Frauds (*c*) provide that "leases, estates, interests of freehold, or terms of years" in land are to be in writing, except in the case of leases not exceeding the term of three years from the making thereof, "whereupon the rent reserved to the landlord during such term shall amount unto two third parts at the least of the full improved value of the thing demised" which may be created by parol. By s. 4 of the statute no action is to be brought on any contract to sell lands "or any interest in or concerning them" except the contract or some note or memorandum thereof be in writing. The terms of the contract, the parties to it, and the subject-matter of it must appear with reasonable clearness in the agreement (*d*).

(f) Actions on contracts for the sale of goods of the value of £10 and upwards. This is provided for by the Sale of Goods Act, 1893 (*e*). The rule is, however, only operative in cases where the buyer has neither accepted and received part of the goods, nor given anything in earnest to bind the contract or in part payment (*f*). The buyer's acceptance may be implied from his conduct in dealing with the goods (*g*). Both acceptance (*h*) and receipt (*i*) may be constructive, not actual. When a written contract is relied upon it need not be contained in one writing; the statute will be satisfied if it can be deduced from several, but the writings must be sufficiently connected (*j*). The names of the parties or of their agents must appear in the writing, but if there is doubt as to which party is seller and which buyer, parol evidence on the subject may be given (*k*).

(g) Actions relating to the sale of a ship or of a share therein. A registered ship or a share therein, when disposed of to a person qualified to own a British ship, is to be transferred by bill of sale (*l*), and therefore the document must be produced to prove the sale.

(*a*) *Cherry* v. *Heming* (1849), 4 Exch. 631; *Smith* v. *Neale* (1857), 2 C. B. (N. S.) 67; and see title CONTRACT, Vol. VII., p. 365.

(*b*) *Davey* v. *Shannon* (1879), 4 Ex. D. 81; *Reeve* v. *Jennings* (1910), 26 T. L. R. 576.

(*c*) 29 Car. 2, c. 3. See further, as to these provisions of the statute, titles LANDLORD AND TENANT; SALE OF LAND; SPECIFIC PERFORMANCE.

(*d*) *Williams* v. *Lake* (1859), 2 E. & E. 349.

(*e*) 56 & 57 Vict. c. 71, s. 4 (1). If invalid on this ground, it will not be operative in other respects, *e.g.*, to rescind another contract (*Noble* v. *Ward* (1867), L. R. 2 Exch. 135, Ex. Ch.). See, further, titles CONTRACT, Vol. VII., p. 361; SALE OF GOODS.

(*f*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 4 (1).

(*g*) *Ibid.*, s. 4 (3).

(*h*) *Elmore* v. *Stone* (1809), 1 Taunt. 458.

(*i*) *Marshall* v. *Green* (1875), 1 C. P. D. 35.

(*j*) *Taylor* v. *Smith*, [1893] 2 Q. B. 65, C. A.; *Oliver* v. *Hunting* (1890), 44 Ch. D. 205; *Long* v. *Millar* (1879), 4 C. P. D. 450.

(*k*) *Newell* v. *Radford* (1867), L. R. 3 C. P. 52.

(*l*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 24; and see title SHIPPING AND NAVIGATION.

SECT. 1. Functions of the Law of Evidence.

Cases in which facts do not require to be proved.

596. The circumstances in which facts do not require to be proved arise where the facts relied on are those of which the court takes judicial notice without proof. They include the practice of the court itself (*m*), all public Acts of Parliament and every statute passed since 1851 (unless the statute itself provides to the contrary) (*n*), the proceedings and privileges of Parliament, the maritime law of nations (*o*), the *London Gazette*, the rules of practice in the Supreme Court, all customs established by a course of judicial decision (*p*), the existence and title of every State and Sovereign recognised by His Majesty, the existence of a war in which this country is engaged, royal proclamations, the Great Seal, the Privy Seal, all seals which any court is authorised to use by Act of Parliament (*q*), the seals of a notary public in the King's dominions (*r*), and a few other matters of general notoriety or appertaining to the ordinary course of nature (*s*).

Privileged communications.

597. There are certain cases in which persons are not compelled to give evidence of fact, such as communications between husband and wife made during marriage (*t*), communications between counsel, solicitors, and their clerks, made in professional confidence (unless the client expressly authorises the evidence to be given (*u*)), matters which are State secrets (and these include communications between public officials in the discharge of their public duties (*a*)), information given for the detection of crime (unless the disclosure be necessary to show the innocence of an accused (*b*)), judicial disclosures—by which is meant disclosures by judges of the superior courts or by arbitrators as to matters which have arisen before them in their judicial capacity (*c*), statements by parents which would bastardise their offspring (*d*), evidence which involves the unnecessary disclosure of indecent matter (*e*).

Exclusion of evidence to vary a written document.

598. Where a transaction has been reduced into writing, extrinsic evidence is inadmissible to contradict, vary, add to, or subtract from the terms of the document. Verbal evidence, however,

(*m*) *Pugh* v. *Robinson* (1786), 1 Term Rep. 116.
(*n*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 9.
(*o*) *Chandler* v. *Grieves* (1792), 2 Hy. Bl. 606, n.
(*p*) *London Chartered Bank of Australia* v. *White* (1879), 4 App. Cas. 413, 422, P. C.; *Re Parker, Ex parte Turquand* (1885), 14 Q. B. D. 636, C. A.
(*q*) *Doe* d. *Duncan* v. *Edwards* (1839), 9 Ad. & El. 555.
(*r*) *Cole* v. *Sherard* (1855), 11 Exch. 482.
(*s*) See Stephen, Digest of the Law of Evidence, 8th ed., art. 58; Taylor, Law of Evidence, 10th ed., ss. 4—21; and p. 494, *post*.
(*t*) By the Evidence Amendment Act, 1853 (16 & 17 Vict. c. 83), s. 3, neither husband nor wife shall be compellable to disclose the communications made by one to the other during marriage.
(*u*) *Wilson* v. *Rastall* (1792), 4 Term Rep. 753, 759; *Procter* v. *Smiles* (1886), 55 L. J. (Q. B.) 527, C.A.
(*a*) *Wyatt* v. *Gore* (1816), Holt (N. P.), 299; *Hennessy* v. *Wright* (1888), 21 Q. B. D. 509; *Wright & Co.* v. *Mills* (1890), 62 L. T. 558.
(*b*) *Marks* v. *Beyfus* (1890), 25 Q. B. D. 494, C. A.
(*c*) *Buccleuch* (*Duke*) v. *Metropolitan Board of Works* (1872), L. R. 5 H. L. 418.
(*d*) *The Aylesford Peerage* (1885), 11 App. Cas. 1; *The Poulett Peerage*, [1903] A. C. 395; *Burnaby* v. *Baillie* (1889), 42 Ch. D. 282.
(*e*) As to privilege, generally, see pp. 570 *et seq.*, *post*.

SECT. 1. Functions of the Law of Evidence.

may be admitted to impeach the document on the ground of fraud; to explain ambiguities not appearing on the face of the document itself; to show the existence of some condition precedent subject to which the agreement was made; and to prove that there was concluded, at the same time as the written agreement or earlier, another agreement adding to but not inconsistent with the former (*f*).

SECT. 2.—*Functions of Judge and Jury.*

Questions of law for judge, questions of fact for jury.

599. In all proceedings tried by judge and jury questions of law are decided by the judge and questions of fact by the jury. It is the duty of the judge to give the jury a proper and complete direction upon the law applicable to the matters in dispute (*g*), and it is the duty of the jury to accept and follow the direction of the judge upon the law.

Admissibility of evidence for judge.

600. Questions relating to the admissibility of evidence are questions of law and must be determined by the judge, and, if such questions depend upon the determination of some preliminary question of fact, it is the duty of the judge to decide that question by himself after hearing the evidence upon it, when evidence is necessary (*h*), even though the decision of such preliminary question involves the determination by the judge of the same fact which the jury have ultimately to decide (*i*). Upon this principle it is for the judge to decide whether deeds or documents more than thirty years old are produced from the proper custody (*k*), whether a witness can claim privilege (*l*), and whether documents required to be stamped are stamped sufficiently (*m*). Similarly, where it is sought, in the absence of an original document, to adduce secondary evidence of its contents (*n*), the judge decides whether reasonable

Examples.

(*f*) *Lindley* v. *Lacey* (1864), 17 C. B. (N. S.) 578; and see p. 566, *post*.

(*g*) See Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 22.

(*h*) *Boyle* v. *Wiseman* (1855), 11 Exch. 360; *Welstead* v. *Levy* (1831), 1 Mood. & R. 138; *Lewis* v. *Marshall* (1844), 7 Man. & G. 729; *Beaufort* (*Duke*) v. *Crawshay* (1866), L. R. 1 C. P. 699; *Bartlett* v. *Smith* (1843), 11 M. & W. 483, 486. In *Froude* v. *Hobbs* (1859), 1 F. & F. 612, the preliminary question was, by consent, decided by the jury. Where evidence is *primâ facie* admissible other evidence cannot be interposed for the purpose of excluding it (*Jones* v. *Fort* (1828), Mood. & M. 196).

(*i*) *Doe* d. *Jenkins* v. *Davies* (1847), 10 Q. B. 314; see, *contra*, *Stowe* v. *Querner* (1870), L. R. 5 Exch. 155. In *Hitchins* v. *Eardley* (1871), L. R. 2 P. & D. 248, as a practical means of meeting the difficulty, Lord PENZANCE decided, when a strong *primâ facie* case had been made out, to admit the evidence the admissibility of which was disputed, and leave the whole case to the jury. In criminal cases the rule that where evidence which was not legal evidence had been left to the jury a conviction ought not to stand (*R.* v. *Gibson* (1887), 18 Q. B. D. 537, C. C. R.; *R.* v. *Saunders*, [1899] 1 Q. B. 490, C. C. R.) is now subject to the express powers vested in the Court of Criminal Appeal to dismiss an appeal on the ground that there has been no substantial miscarriage of justice, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 435, note (*q*).

(*k*) *Rees* v. *Walters* (1838), 3 M. & W. 527; *Doe* d. *Shrewsbury* (*Earl*) v. *Keeling* (1848), 11 Q. B. 884; *Doe* d. *Jacobs* v. *Phillips* (1845), 8 Q. B. 158; and see as to proper custody (*Meath* (*Bishop*) v. *Winchester* (*Marquess*) (1836), 3 Bing. (N. C.) 183, H. L.; and p. 512, *post*.

(*l*) *Cleave* v. *Jones* (1852), 7 Exch. 421; *Stace* v. *Griffith* (1869), L. R. 2 P. C. 420.

(*m*) *Bartlett* v. *Smith* (1843), 11 M. & W. 483; *Bennison* v. *Jewison* (1848), 12 Jur. 485; *Dunsford* v. *Curlewis* (1859), 1 F. & F. 702.

(*n*) See p. 518, *post*.

exertion or search has been made to procure the original (*o*), whether the original is in the possession of the party to whom notice has been given to produce it (*p*), whether a witness required to produce documents under a *subpœna duces tecum* has a reasonable excuse for withholding them from production (*q*), and any questions that may be raised as to the existence (*r*) or identity (*s*) of the document alleged to be the original.

In cases of disputed ownership of land, where evidence is tendered of acts of ownership done in places not in dispute, it is for the judge to decide whether there is such a unity of character in the land in dispute and the places where the acts of ownership were done as to render the evidence admissible (*t*).

Question whether any evidence for judge.

601. Although it is the province of the jury to decide questions of fact, it is for the judge to decide whether there is any evidence upon which they can reasonably find that the party on whom the burden of proof lies has established the fact or facts which it is necessary for him to prove (*a*), and it is for the judge to determine whether it is open to the jury to draw an inference from the facts proved, leaving it to the jury to say whether or not such inference shall be drawn (*b*). If the judge is of opinion that there is no evidence upon which the jury can reasonably decide a question of fact in favour of the party who has to establish it affirmatively, he should withdraw the case from them or direct them to find in favour of the other party (*c*), but whenever there is conflicting evidence upon such a question it is entirely for the jury to say which evidence they accept, and the judge must leave the question to them for their decision (*d*).

Construction of documents for judge.

602. The construction, meaning, and effect of all written and printed documents, including statutes (*e*), deeds, wills, agreements and letters, are matters which fall within the peculiar province of the judge, and where the document is or documents are plain and unambiguous there is no question for the jury (*f*), but it may be necessary for the jury to assist the judge by determining as facts

(*o*) *Quilter* v. *Jorss* (1863), 14 C. B. (N. S.) 747.
(*p*) *Harvey* v. *Mitchell* (1841), 2 Mood. & R. 366.
(*q*) *Amey* v. *Long* (1808), 9 East, 473.
(*r*) *Froude* v. *Hobbs* (1859), 1 F. & F. 612; *Cox* v. *Couveless* (1860), 2 F. & F. 139.
(*s*) *Boyle* v. *Wiseman* (1855), 11 Exch. 360.
(*t*) *Doe* d. *Barrett* v. *Kemp* (1831), 7 Bing. 332. As to such evidence, see p. 452, *post*; and title BOUNDARIES, FENCES, AND PARTY WALLS, Vol. III., pp. 148, 149.
(*a*) *Ryder* v. *Wombwell* (1868), L. R. 4 Exch. 32, Ex. Ch.; *Hiddle* v. *National Fire and Marine Insurance Co. of New Zealand*, [1896] A. C. 372, P. C.
(*b*) *Metropolitan Rail. Co.* v. *Jackson* (1877), 3 App. Cas. 193; *Toal* v. *North British Railway*, [1908] A. C. 352.
(*c*) Such other party may, however, require that his evidence shall be heard before a decision is given (*Re Pincoffs, Ex parte Jacobson* (1882), 22 Ch. D. 312, C. A.).
(*d*) *Dublin, Wicklow, and Wexford Rail. Co.* v. *Slattery* (1878), 3 App. Cas. 1155.
(*e*) *Planché* v. *Braham* (1837), 8 C. & P. 68; *Elliott* v. *South Devon Rail. Co.* (1848), 2 Exch. 725.
(*f*) *Hitchin* v. *Groom* (1848), 5 C. B. 515.

SECT. 2. **Functions of Judge and Jury.**

any surrounding circumstances which may affect the proper construction or the meaning of any words contained in the document which have peculiar meanings attached to them in particular localities or trades (*g*). When the jury have ascertained upon the evidence the surrounding circumstances, if any, and the meaning to be attached to any such trade or local terms, it is for the judge to say what is the meaning and effect of the document in question (*h*).

Circumstances affecting construction of documents for jury.

Where, therefore, the terms of a contract are contained in, or the legal effect of any transaction is to be ascertained from, a number of documents or a series of letters between the parties, which do not involve the consideration of any technical or mercantile expressions, the matter is entirely for the judge to decide as a question of construction (*i*), but where, in addition to written documents, it is necessary, in order to ascertain the rights of the parties, to take into consideration their conduct, course of business, and oral evidence of communications made at interviews between them, it is for the jury to judge of the truth or falsehood of the oral evidence and, under the direction of the judge, to decide, upon the whole of the evidence before them, what was the real intention and meaning of the parties (*k*).

Documents in foreign language.

Similarly, in the case of a document in a foreign language, the meaning of the words must first be determined as a question of fact, upon the evidence of persons competent to translate them, and to explain any technical, legal, or scientific expressions which it may contain. The construction of the document so translated then becomes a question of law (*l*).

Inspection of record.

The inspection of a record is peculiarly within the province of the court (*m*), and if there is any dispute as to what are the actual words written in a document, it is for the judge on inspection of the document to decide, and not for the jury (*n*).

Lost documents.

The rule that the construction of documents is for the judge applies when the contents of a document which is lost are proved by secondary evidence. It is for the judge to say what is its proper meaning and effect, as it would have been if he had had the actual document before him (*o*).

(*g*) *Neilson* v. *Harford* (1841), 8 M. & W. 806; *Bowes* v. *Shand* (1877), 2 App. Cas. 455; *Ashforth* v. *Redford* (1873), L. R. 9 C. P. 20; *Alexander* v. *Vanderzee* (1872), L. R. 7 C. P. 530, Ex. Ch.

(*h*) *Hutchison* v. *Bowker* (1839), 5 M. & W. 535.

(*i*) *Macbeath* v. *Haldimand* (1786), 1 Term Rep. 172; *R.* v. *Cotesworth* (1852), 7 Exch. 595; *Ashpitel* v. *Sercombe* (1850), 5 Exch. 147; *Furness* v. *Meek* (1857), 27 L. J. (EX.) 34.

(*k*) *Smith* v. *Thompson* (1849), 8 C. B. 44; *Moore* v. *Garwood* (1849), 4 Exch. 681, Ex. Ch.; *Bolckow* v. *Seymour* (1864), 17 C. B. (N. S.) 107; *Hordern* v. *Commercial Union Insurance Co.* (1887), 56 L. T. 240, P. C.; *Maskelyne* v. *Stollery* (1899), 16 T. L. R. 97, H. L.; *Wilkinson* v. *Stoney* (1839), 1 Jebb & S. 509; *Brook* v. *Hook* (1871), L. R. 6 Exch. 89. As to the admissibility of such oral evidence, see pp. 566 *et seq.*, *post*.

(*l*) *Di Sora* (*Duchess*) v. *Phillipps* (1863), 10 H. L. Cas. 624; *Chatenay* v. *Brazilian Submarine Telegraph Co.*, [1891] 1 Q. B. 79, C. A.

(*m*) *R.* v. *Hucks* (1816), 1 Stark. 521.

(*n*) *Remon* v. *Hayward* (1835), 2 Ad. & El. 666.

(*o*) *Berwick* v. *Horsfall* (1858), 4 C. B. (N. S.) 450; and see *Read* v. *Price*, [1909] 2 K. B. 724, C. A.

SECT. 2. Functions of Judge and Jury.

603. In certain matters the respective functions of judge and jury are more particularly defined. In actions for libel and slander it is the duty of the judge to rule whether the words complained of are, in the circumstances in which they were used, capable of bearing a defamatory meaning, and, if not, to withdraw the case from the jury, but, if the judge holds the words capable of being defamatory, it is for the jury to decide whether they are defamatory or not (*p*). If the defence of privilege is raised in such an action the judge must decide whether the document containing the alleged libel is a privileged communication, whether the words complained of were published or spoken upon a privileged occasion, and, if so, whether there is any evidence of malice (*q*). The facts, however, upon which the judge's decision upon the question of privilege depends, if in dispute, must be found by the jury (*r*). If the judge holds in favour of the privilege claimed and that there is no evidence of malice, it is his duty to enter judgment for the defendant (*s*). If the defence raised is that of fair comment on a matter of public interest, the judge decides whether the matter is one of public interest, the jury whether the comment is fair (*t*).

Defamation.

Privilege.

Fair comment.

In actions for malicious prosecution and false imprisonment the question whether, on the facts, the defendant acted without reasonable and probable cause is for the judge, but the facts on which his decision depends must, if disputed, be found by the jury (*u*).

Malicious prosecution.

In an action against an infant for goods supplied (*a*), the question whether or not the goods can be necessaries is a question for the judge, and the question whether or not they are necessaries is a

Necessaries.

(*p*) As to libel, see *Goldstein* v. *Foss* (1827), 6 B. & C. 154; *Parmiter* v. *Coupland* (1840), 6 M. & W. 105; *Baylis* v. *Lawrence* (1840), 11 Ad. & El. 920; *Hearne* v. *Stowell* (1840), 12 Ad. & El. 719; *Sturt* v. *Blagg* (1847), 10 Q. B. 899, 906, Ex. Ch.; *Cox* v. *Lee* (1869), L. R. 4 Exch. 284; *Hunt* v. *Goodlake* (1873), 43 L. J. (C. P.) 54; *Saxby* v. *Easterbrook* (1878), 3 C. P. D. 339, *per* Lord COLERIDGE, C.J., at p. 342, and LINDLEY, J., at p. 343; *Capital and Counties Bank* v. *Henty* (1882), 7 App. Cas. 741; *Nevill* v. *Fine Art and General Insurance Co.*, [1897] A. C. 68; *Linotpye Co.* v. *British Empire Type-setting Machine Co.* (1899), 81 L. T. 331, H. L.; as to slander, see *O'Brien* v. *Salisbury* (*Marquis*) (1889), 6 T. L. R. 133; and see title LIBEL AND SLANDER.

(*q*) *Stace* v. *Griffith* (1869), L. R. 2 P. C. 420; *Stuart* v. *Bell*, [1891] 2 Q. B. 341, C. A., *per* LINDLEY, L.J., at p. 345; and see title LIBEL AND SLANDER.

(*r*) *Hebditch* v. *MacIlwaine*, [1894] 2 Q. B. 54, C. A.; *Hope* v. *I'Anson and Weatherly* (1901), 18 T. L. R. 201, C. A.

(*s*) *Stuart* v. *Bell*, *supra*; *Turner* v. *Bowley & Son* (1896), 12 T. L. R. 402, C. A.

(*t*) *Jenner* v. *A'Beckett* (1871), L. R. 7 Q. B. 11; *Cooney* v. *Edeveain* (1897), 14 T. L. R. 34, C. A.; and see title LIBEL AND SLANDER.

(*u*) As to malicious prosecution, see *Brown* v. *Hawkes*, [1891] 2 Q. B. 718, C. A.; *Hilliar* v. *Dade* (1898), 14 T. L. R. 534; *Cox* v. *English, Scottish, and Australian Bank*, [1905] A. C. 168, P. C.; *Abrath* v. *North-Eastern Rail. Co.* (1886), 11 App. Cas. 247; and title MALICIOUS PROSECUTION AND PROCEDURE. As to false imprisonment, see *West* v. *Baxendale* (1850), 9 C. B. 141; *Lister* v. *Perryman* (1870), L. R. 4 H. L. 521; and title TRESPASS. The similar question whether a pawnbroker reasonably suspects an article offered to him in pawn to have been stolen or otherwise illegally or clandestinely obtained so as to entitle him to detain the article and person offering it to him under the Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 34, is a question for the judge and not for the jury (*Howard* v. *Clarke* (1888), 20 Q. B. D. 558); see also title PAWN AND PLEDGES.

(*a*) See title INFANTS AND CHILDREN; and Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 2.

SECT. 2. **Functions of Judge and Jury.**

question of fact for the jury, but it is also a question of law whether there is any evidence upon which the jury can find them to be necessaries, and if the judge holds there is no such evidence he should direct the jury to find for the defendant or withdraw the case from them and direct judgment to be so entered (*b*).

"Parcel or no parcel."

In questions relating to boundaries, "parcel or no parcel" is for the jury. Although the construction of title deeds and documents is for the judge, the identification of the land intended to be described with the description contained in the deed or document is always a question for the jury (*c*).

Penalty or liquidated damages.

It is in each case a question of law for the judge to decide whether a sum of money stipulated in an agreement to be paid by one party to another, in the event of the agreement being broken, is a penalty or liquidated damages (*d*), whether a document is a sufficient acknowledgment to take a case out of the Statutes of Limitation (*e*), whether an agreement in restraint of trade is void as being unreasonably wide (*f*), and whether a custom is reasonable or unreasonable (*g*).

Statutes of Limitations.

Restraint of trade.

Custom.

Divorce.

In undefended petitions for dissolution of marriage, though there are no issues between the parties, the judge must satisfy himself, so far as he reasonably can, as to the truth of the petitioner's allegations (*h*). If such a petition, defended by one party but not by another, is tried with a jury, it is for the jury to decide the matters of fact contested by the party defending, but for the judge to be satisfied as to the facts alleged against the party who does not defend (*i*). Upon a husband's petition for damages against any person on the ground of his having committed adultery with the petitioner's wife, the damages must in all cases be ascertained by the verdict of a jury (*k*).

(*b*) *Maddox* v. *Miller* (1813), 1 M. & S. 738; *Harrison* v. *Fane* (1840), 1 Man. & G. 550; *Brooker* v. *Scott* (1843), 11 M. & W. 67; *Wharton* v. *Mackenzie*, *Cripps* v. *Hills* (1844), 5 Q. B. 606; *Peters* v. *Fleming* (1840), 6 M. & W. 42; *Barnes* v. *Toye* (1884), 13 Q. B. D. 410; *Ryder* v. *Wombwell* (1868), L. R. 4 Exch. 32, Ex. Ch.; *Nash* v. *Inman*, [1908] 2 K. B. 1, C. A.; and see title INFANTS AND CHILDREN.

(*c*) *Lyle* v. *Richards* (1866), L. R. 1 H. L. 222; and see title BOUNDARIES, FENCES, AND PARTY WALLS, Vol. III., p. 139.

(*d*) *Wallis* v. *Smith* (1882), 21 Ch. D. 243, C. A.; *Willson* v. *Love*, [1896] 1 Q. B. 626, C. A.; *Sainter* v. *Ferguson* (1849), 7 C. B. 716.

(*e*) *Morrell* v. *Frith* (1838), 3 M. & W. 402, overruling *Lloyd* v. *Maund* (1788), 2 Term Rep. 760; *Routledge* v. *Ramsay* (1838), 8 Ad. & El. 221; *Doe* d. *Curzon* v. *Edmonds* (1840), 6 M. & W. 295. *Linsell* v. *Bonsor* (1835), 2 Bing. (N. C.) 241, appears to have been wrongly decided.

(*f*) *Mallan* v. *May* (1843), 11 M. & W. 653; *Haynes* v. *Doman*, [1899] 2 Ch. 13, C. A.; *Dowden and Pook, Ltd.* v. *Pook*, [1904] 1 K. B. 45, C. A.; *United Shoe Machinery Co. of Canada* v. *Brunet*, [1909] A. C. 330, P. C., *per* Lord ATKINSON, at p. 341.

(*g*) Co. Litt. 56 b; *Tyson* v. *Smith* (1838), 9 Ad. & El. 406, Ex. Ch., *per* TINDAL, C.J., at p. 421; *Bradburn* v. *Foley* (1878), 3 C. P. D. 129, *per* LINDLEY, J., at p. 135; and see title CUSTOM AND USAGES, Vol. X., pp. 253, 254. Similarly the reasonableness of a customary fine on the dropping of lives of tenants of copyholds is for the judge and not the jury (*Wilson* v. *Hoare* (1839), 10 Ad. & El. 236).

(*h*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 29; and see title HUSBAND AND WIFE.

(*i*) *Ibid.*, ss. 28, 29.

(*k*) *Ibid.*, s. 33.

SECT. 2. Functions of Judge and Jury.

604. A judge sitting without a jury decides the issues both of law and fact, and when he is sitting with assessors, and differs from them, he is bound to decide in accordance with his own opinion (*a*).

Arbitrators are bound by, and must give effect to, the laws of evidence (*b*), unless a relaxation of those laws is justified by the submission or by the consent, express or implied, of the parties (*c*).

SECT. 3.—*Burden of Proof.*

Burden of proof.

605. In legal proceedings the general rule is that he who asserts must prove—a proposition sometimes more technically expressed by saying that the burden of proof rests upon the party who substantially asserts the affirmative of the issue.

This rule is derived from the Roman law, and is supportable not only upon the ground of fairness, but also upon that of the greater practical difficulty which is involved in proving a negative than in proving an affirmative.

Distinction to be drawn in applying rule.

In applying the rule, however, a distinction is to be observed between the burden of proof as a matter of substantive law or pleading, and the burden of proof as a matter of adducing evidence. The former burden is fixed at the commencement of the trial by the state of the pleadings, or their equivalent, and is one that never changes under any circumstances whatever; and if, after all the evidence has been given by both sides, the party having this burden on him has failed to discharge it, the case should be decided against him (*d*).

The test.

606. In considering upon whom this burden falls, a convenient test is to inquire whether the allegation involved, be it affirmative or negative, is or is not essential to the particular party's case, *i.e.*, whether he would fail if it were struck out of the record. If it be essential, and he would so fail, then the burden of proving it is upon him (*e*). Thus, in an action against a tenant for not repairing

(*a*) *The Beryl* (1884), 9 P. D. 137, C. A.; *The Owners of SS. Gannet* v. *Owners of SS. Algoa*, [1900] A. C. 234, 236.

(*b*) *Re Enoch and Zaretzky, Bock & Co.*, [1910] 1 K. B. 327, C. A.; and see *A.-G.* v. *Davison* (1825), 1 M'Cle. & Yo. 160, and *East and West India Dock Co.* v. *Kirk and Randall* (1887), 12 App. Cas. 738.

(*c*) Evidence which strictly is inadmissible is admitted in many references where the parties or arbitrators, or both, are not familiar with the law of evidence or no objection is taken, and in cases where an arbitrator admits that which is not evidence even if he knows it to be inadmissible at law (*Hagger* v. *Baker* (1845), 14 M. & W. 9), the court will, in its discretion, refuse to set his award aside if his decision was not misconduct but mere mistake (*James* v. *James* (1889), 23 Q. B. D. 12, C. A), but, strictly, that which is not evidence can only be admitted by consent, express or implied, of the parties, *e.g.*, where an umpire is appointed in accordance with the practice in a particular trade, and it has been customary in the trade for umpires so appointed to apply their own knowledge of the trade to the particular case. The statements to the contrary by the judges of the Court of Appeal in *Re Keighley, Maxsted & Co. and Durant & Co.*, [1893] 1 Q. B. 405, C. A., are qualified by the express statement by KAY, L.J., at p. 415, that the court was not satisfied that the evidence referred to in the judgment in that case was inadmissible, and are therefore only *dicta*. See also as to this case, *Re Enoch and Zaretzky, Bock & Co.*, *supra*, *per* FARWELL, L.J., at p. 335. Generally, as to evidence before arbitrators, see title ARBITRATION, Vol. I., p. 462.

(*d*) *R.* v. *Stoddart* (1909), 25 T. L. R. 612, C. C. A.; *Pickup* v. *Thames Insurance Co.* (1878), 3 Q. B. D. 594, 599, 600, C. A.; *Wakelin* v. *London and South Western Rail. Co.* (1886), 12 App. Cas. 41.

(*e*) *Mills* v. *Barber* (1836), 1 M. & W. 425, 427; *Abrath* v. *North Eastern Rail. Co.* (1883), 11 Q. B. D. 440, C. A., *per* BOWEN, L.J., at p. 457.

SECT. 3. Burden of Proof.

according to covenant; proof of non-repair, though a negative averment, is upon the plaintiff (*f*), as also, in an action for malicious prosecution, is the burden of proving the absence of reasonable and probable cause (*g*). On the other hand, in an action for false imprisonment, proof of the existence of reasonable cause is upon the defendant, since arrest, unlike prosecution, is *per se* a tort, and thus calls for justification (*h*).

Division of burden.

Where, however, there are several issues in a case the burden is sometimes divided, each party having the burden of proof of one or more of the issues cast upon him, and the above test may consequently have to be applied to each of these in turn. But, in a general way, the incidence of the issues is already pre-determined by law, so that, with regard to this sense of the term "burden of proof," little difficulty will usually arise. Thus, in an action for damage to goods shipped under a charterparty containing the usual exception as to damage by perils of the sea, the burden (where nothing is admitted by either party) is upon the plaintiff to prove the contract and damage or non-delivery, upon the defendant to prove that the damage arose by the perils excepted, and upon the plaintiff, in reply, to prove negligence by the defendant disentitling him to the benefit of the exception (*i*). Similarly, in an action against an innkeeper for loss of his guest's luggage, where the loss is admitted, but the defences are (1) contributory negligence, and (2) statutory exemption beyond £30—the burden is upon the defendant as to the first plea, and upon the plaintiff, in reply, to show wilful act, default, or neglect of the defendant so as to disentitle the latter to the statutory exemption (*k*).

Burden of adducing evidence.

607. The burden of proof, in the sense of adducing evidence, on the other hand, is a burden which may shift continually throughout the trial, according as the evidence in one scale or the other preponderates (*l*). This burden rests upon the party who would fail if no evidence at all, or no more evidence, as the case may be, were adduced by either side. In other words, it rests, before any evidence whatever is given, upon the party who has the burden of proof on the pleadings, *i.e.*, who asserts the affirmative of the issue; and it rests, after evidence is gone into, upon the party against whom, at the time the question arises, judgment would be given if no further evidence were adduced by either side (*m*). The rule, in this sense, applies not only to matters

(*f*) *Soward* v. *Leggatt* (1836), 7 C. & P. 613.

(*g*) *Abrath* v. *North Eastern Rail. Co.* (1886), 11 App. Cas. 247.

(*h*) *Hicks* v. *Faulkner* (1878), 8 Q. B. D. 167, 170.

(*i*) *The Glendarroch*, [1894] P. 226, C. A. Where the negligence alleged is criminal it is not necessary to give such evidence as would suffice to convict (*Vaughton* v. *London and North Western Rail. Co.* (1874), L. R. 9 Exch. 93). See title SHIPPING AND NAVIGATION.

(*k*) *Medawar* v. *Grand Hotel Co.*, [1891] 2 Q. B. 11, C. A. See title INNS AND INNKEEPERS.

(*l*) *Abrath* v. *North Eastern Rail. Co.*, *supra*; *Pickup* v. *Thames Insurance Co.* (1878), 3 Q. B. D. 594, 599, 600, C. A.; *Wakelin* v. *London and South Western Rail. Co.* (1886), 12 App. Cas. 41; *R.* v. *Stoddart* (1909), 25 T. L. R. 612, C. C. A.

(*m*) *Abrath* v. *North Eastern Rail. Co.*, *supra*; *Wakelin* v. *London and South Western Rail. Co.*, *supra*, C. A., as reported at [1896] 1 Q. B. 189, n., 196, n. If in an action for negligent driving of an omnibus, the plaintiff proves that the person driving was the conductor and not the regular driver, the burden is cast

which are the subject of express allegation in the pleadings, but also to those that relate merely to the admissibility of evidence or to the construction of documents. Thus, a party desiring to adduce a hearsay statement (*n*), or secondary evidence of a lost deed (*o*), must first establish the conditions necessary to its reception; and if a document be ambiguous, the party tendering it has the burden of showing that his interpretation thereof is correct (*p*).

608. There are two cases in which the burden of adducing evidence is liable to be shifted from the party on whom it would naturally fall, and which, therefore, may be considered as exceptions to the above general rule:— Exceptions:

(1) When there exists a rebuttable presumption of law in favour of a party, the burden of rebutting it lies upon his opponent. (1) Rebuttable presumption of law.

Thus, a party suing upon a bill of exchange need not, in the first instance, give any evidence of consideration, or that he is a holder in due course, the presumption on each of these points being in favour of the plaintiff (*q*). In the same way, the burden of proving the death of any person is upon the party asserting it; but if such party gives evidence that the person concerned has not been heard of for seven years by those most likely to hear of him, the presumption of death will arise, and the burden of disproof be shifted to the party's opponent (*r*). So, on a charge of manslaughter by negligent driving, proof of the killing will throw upon the defendant the burden of showing that he exercised proper care, since the presumption is that the killing was unlawful (*s*).

In many cases, however, the burden of proof has been arbitrarily fixed by statute, so that no single uniform rule will apply.

(2) Where the truth of a party's allegation lies peculiarly within the knowledge of his opponent, the burden of disproving it lies upon the latter. (2) Facts peculiarly within knowledge of opponent.

The principle of this exception has frequently been recognised, both by the Legislature (*t*) and in decided cases (*a*). On the other

on him to give evidence that the conductor was acting within the scope of his employment (*Beard* v. *London General Omnibus Co.*, [1900] 2 Q. B. 530, C. A.).

(*n*) *R* v. *Thompson*, [1893] 2 Q. B. 12, C. C. R.

(*o*) Stephen, Digest of the Law of Evidence, 5th ed., art. 97.

(*p*) *Falck* v. *Williams*, [1900] A. C. 176, 181, P. C.

(*q*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 30. As to this presumption and the shifting of the burden of proof, see title BILLS OF EXCHANGE ETC., Vol. II., p. 499.

(*r*) See p. 500, *post*.

(*s*) *R.* v. *Cavendish* (1873), 8 I. R. C. L. 178, C. C. R.

(*t*) See, *e.g.*, Foreign Enlistment Act, 1870 (33 & 34 Vict. c. 90), ss. 8, 9, where the burden is cast upon the builder of a ship to prove that he did not know she was to be employed in contravention of the Act.

(*a*) *Apothecaries Co.* v. *Bentley* (1824), Ry. & M. 159 (action for penalties against a person for practising as an apothecary without a certificate, proof of the certificate held to lie on the defendant as being peculiarly within his knowledge); and see *Dickson* v. *Evans* (1794), 6 Term Rep. 57; *R.* v. *Turner* (1816), 5 M. & S. 206; *Hibbs* v. *Ross* (1866), L. R. 1 Q. B. 534, 541, *per* MELLOR, J., and see *ibid.*, p. 543, where the present doctrine is apparently countenanced by BLACKBURN, J.; *Magdalen Hospital* (*Governors*) v. *Knotts* (1877), 8 Ch. D. 709, 724, C. A.; *Mahony* v. *Waterford, Limerick, and Western Rail. Co.*, [1900] 2 I. R. 273; *Powell* v. *M'Glynn and Bradlaw*, [1902] 2 I. R. 154, where it is accepted by BOYD, J., at p. 175, and apparently by O'BRIEN, L.C.J., at p. 185, but denied by BARTON, J., at p. 169; *General Accident Fire and Life Assurance Corporation* v. *Robertson* (*or Hunter*) (1909), 25 T. L. R. 685, 686, H. L.

SECT. 3. Burden of Proof.

hand, its validity has been several times challenged by high authorities (*b*), and having regard to this conflict of opinion, the following statement of the point is, perhaps, the one which is the least open to objection :—"In considering the amount of evidence necessary to shift the burden of proof, the court has regard to the opportunities of knowledge with respect to the fact to be proved which may be possessed by the parties respectively" (*c*).

Part II.—Facts which may be Proved.

SECT. 1.—*Facts in Issue.*

Facts which may be proved.

609. The facts which, in any particular case, are legally essential to establish the claim or defence of the parties respectively, and which have been alleged on the one side and denied on the other, are technically termed facts in issue (*d*). In the vast majority of cases these facts are all pre-determined by substantive law; they form a class apart, with which logic has nothing necessarily to do, and it is these alone which can be submitted for decision to a tribunal. This is sometimes expressed by saying that an issue is never raised as to a merely relevant or evidential fact (*e*). Having got a fact in issue, it becomes a question how far it may be considered the subject of evidence (*f*). It seems natural enough to say, "Evidence may be given in any proceeding of any fact in issue" (*g*); but in practice this is not literally true. Suppose, for example, that A. is charged with the murder of B. and pleads not guilty, and that the following facts are in issue: (1) The fact that A. killed B.; (2) the fact that A. was at the time prevented by disease from knowing right from wrong; and (3) the fact that A. had received from B. such provocation as would reduce the offence to manslaughter (*h*). If each of these statements was turned

(*b*) "The proof may be difficult where the matter is peculiarly within the defendant's knowledge, but that does not vary the rule of law" (*Doe* d. *Bridger* v. *Whitehead* (1838), 8 Ad. & El. 571, *per* Lord DENMAN, C.J.; at p. 575); "I doubt whether those expressions are not too strong. They are right as to the weight of the evidence, but there must be some evidence to start it, in order to cast the onus on the other side" (*Elkin* v. *Janson* (1845), 13 M. & W. 655, *per* ALDERSON, B., at p. 662); and, in a leading and more modern case:—"It has been said that an exception exists in those cases where the facts lie peculiarly within the knowledge of the opposite party. The counsel for the plaintiff has not gone the length of contending that in all those cases the onus shifts. . . . I think that a proposition of that kind cannot be maintained and that the exceptions supposed to be found amongst cases relating to the game laws may be explained on special grounds" (*Abrath* v. *North Eastern Rail. Co.* (1883), 11 Q. B. D. 440, C. A., *per* BOWEN, L.J., at pp. 457, 458).

(*c*) Stephen, Digest of the Law of Evidence, 6th ed., art. 96.

(*d*) *Ibid.*, art. 1.

(*e*) Wharton, Law of Evidence in Civil Issues, s. 26.

(*f*) A judge has no right to nonsuit the plaintiff without his consent on his counsel's opening statement (*Fletcher* v. *London and North Western Rail. Co.*, [1892] 1 Q. B. 122, C. A.). Where defendant has admitted all the facts pleaded, the plaintiff will not be allowed to call evidence, except by leave of the court on special grounds (*The Hardwick* (1883), 9 P. D. 32; *The Rothbury* (1893), 10 T. L. R. 60).

(*g*) Stephen, Digest of the Law of Evidence, 6th ed., art. 2.

(*h*) *Ibid.*, illustration to art. 2.

into an interrogatory and put to a witness—*e.g.*, "Did A. kill B.?"—the court would at once disallow it as a leading question (*i*); but even supposing the form to be corrected to the familiar "Tell us what happened," and the witness were to reply, "A. killed B.; A. did not know right from wrong; A. received such provocation as reduces his offence to manslaughter," the answers would still be excluded, because they involve inferences of law or fact which it is the province of the court or jury, and not of the witness, to draw (*k*). In simple cases, involving no inference on the part of the witness, this objection does not apply, *e.g.*, in an action of slander, where a fact in issue may be merely whether the defendant spoke the words or not (*l*). Nor does it apply where, as on questions of identity, though an inference or impression is stated, it is not always possible to give the bases thereof. Wherever the inference is doubtful, however, the proper course is for the witness to state the incidents relied on as constituting or amounting to the main fact, and not the latter *per se*.

Incidents not constituting fact in issue.

There are many incidents, however, which, though not strictly constituting a fact in issue, may yet be regarded as forming a part of it, in the sense that they closely accompany and explain that fact. In testifying to the matters in issue, therefore, witnesses must state them not in their barest possible form, but with a reasonable fulness of detail and circumstance (*m*). These constituent or accompanying incidents are in law said to be admissible as forming part of the *res gesta* or main fact (*n*); and, when they consist of declarations accompanying an act, are subject to three important qualifications: (1) They must not be made at such an interval as to allow of fabrication, or to reduce them to the mere narrative of a past event (*o*); (2) they must relate to, and can only be used to explain, the act they accompany, and not independent facts prior

(*i*) See p. 594, *post*.

(*k*) *Bonfield* v. *Smith* (1844), 12 M. & W. 405, where the point in issue was whether A. sold goods to B. solely, or to B. and C. jointly, and it was held that A. could not be asked, "With whom did you deal?" but that he might properly have been asked questions as to any particular acts that were done by the parties; *Rigg* v. *Manchester, Sheffield, and Lincolnshire Rail. Co.* (1866), 14 W. R. 834, where the question for decision was whether a railway platform was dangerous, and it was held that the opinions of witnesses that it was, or was not so, were inadmissible, though a statement that it was slippery etc. was allowed; *Seed* v. *Higgins* (1860), 8 H. L. Cas. 550, *per* Lord WENSLEYDALE, at pp. 565, 566 (question of infringement of patent: experts, though they may give their opinions on the points of science involved, may not testify that there has, or has not been, an infringement); *Grove* v. *Buluwayo Estate and Trust Co.* (1898), *Times*, 30th March, C. A. (experts not allowed to be asked whether a certain corporation was a "gold-mining company," as it depended on the construction of the prospectus etc.).

(*l*) *Clarke* v. *Main* (1904), *Times*, 24th March.

(*m*) Phipson, Law of Evidence, 4th ed., p. 45.

(*n*) "The principle of admission is that the declarations are *pars rei gestæ*" (*Rouch* v. *Great Western Rail. Co.* (1841), 1 Q. B. 51, *per* Lord DENMAN, C.J., at p. 60). As to what constitute the *res gestæ* in criminal cases, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp, 379—381.

(*o*) *Thompson* v. *Trevanion* (1693), Skin. 402 (action by husband and wife for injuries to latter: statement of wife, "immediate upon the hurt received and before she had time to devise anything to her own advantage," admitted); *The Schwalbe* (1859), Sw. 521 (collision action: statement by pilot after his ship was cut away and while she was backing, "The damned helm is still a-starboard," received); *Agassiz* v. *London Tramway Co.* (1872), 21 W. R. 199 (action

SECT. 1. Facts in Issue.

or subsequent thereto (*p*); and (3) though admissible to explain, or corroborate, they are not in general to be taken as any proof of the truth of the matters stated (*q*): they are consequently not, in any strict sense, to be classed as exceptions to the hearsay rule (*r*).

Mental and physical conditions.

610. With regard to the proof of mental and physical conditions, certain limitations prevail. Thus, although witnesses may give evidence of their own mental or physical condition at a given time, they may not testify directly as to that of others, but should state the facts from which the condition may be inferred. When, then, the bodily or mental feelings of another person are material to be proved, the usual expressions of such feelings made at the time by such person may be shown (*s*). If

against tramway company for injury to passenger: remark by fellow passenger to conductor, a few minutes after the collision, "The driver ought to be reported," and the conductor's reply, "He has already been reported, for he has been off the line five or six times to-day," rejected, the transaction being over, and the remark referring not to the *res*, but to the past acts, of the driver); *Smith* v. *Blakey* (1867), L. R. 2 Q. B. 326 (question as to terms on which A.'s country agent bought goods from B.: letter to A. by the agent, immediately after the sale, stating the terms, rejected); *R.* v. *Bedingfield* (1879), 14 Cox, C. C. 341 (charge of murder: exclamation of deceased, while rushing with her throat cut out of a house entered by prisoner a minute or two before, of "Oh aunt, see what Bedingfield has done to me," rejected, the transaction being over); see also *R.* v. *Goddard* (1882), 15 Cox, C. C. 7; *Gilbey* v. *Great Western Rail. Co.* (1910), 102 L. T. 202, C. A. In *R.* v. *Bedingfield*, *supra*, COCKBURN, C.J., is generally considered to have applied the rule too strictly; on the other hand, the *dictum* of Lord DENMAN, C.J., in *Rouch* v. *Great Western Rail. Co.* (1841), 1 Q. B. 51, that "concurrence of time, though material, is not essential," seems to err in the opposite direction, the weight of authority favouring a substantial, though not a literal, contemporaneousness. Where, however, the act is of a continuous nature—*e.g.*, prolonged residences in cases of domicil—declarations made at any time during its currency may properly be received (*Doucet* v. *Geoghegan* (1878), 9 Ch. D. 441, C. A.; *Re Grove, Vaucher* v. *Treasury Solicitor* (1888), 40 Ch. D. 216, C. A.). For a consideration of the cases decided under the old bankruptcy law, some of which contain very loose *dicta* on this point, see Law Quarterly Review, Vol. XIX., pp, 445—447.

(*p*) *Hyde* v. *Palmer* (1863), 32 L. J. (Q. B.) 126 (question whether an article patented by A. in 1849 had been publicly sold by B. in 1846: evidence that B. in selling the same article in 1850 had then remarked, "This is a new article which I don't want fully known," rejected to show that the sale in 1846 was also a private one); and see *Agassiz* v. *London Tramway Co.* (1872), 21 W. R. 199, where a statement accompanying an act was rejected because relating to prior acts.

(*q*) *Perkins* v. *Vaughan* (1842), 4 Man. & G. 988 (statement by acceptor of bill, when refusing to pay, that his signature had been forged by the drawer, admitted to show the good faith of the presenter in taking criminal proceedings against the drawer, but not to prove the forgery); *Milne* v. *Leisler* (1862), 7 H. & N. 786 (question whether A. sold goods to B. personally, or to B. as agent for C.: letter by A. to his own agent, asking him to "enquire as to credit of C., and also of B., who is making large purchases for C.," admitted in A.'s favour, to corroborate other evidence, though not as any proof *per se*, that B.'s purchase was for C.); *The Aylesford Peerage* (1885), 11 App. Cas. 1 (question as to legitimacy of child born in wedlock: letter from mother to friends stating that an adulterer was the father of her child admitted, not as evidence of truth of that statement, but as part of adulterous conduct, leading to the conclusion of illegitimacy).

(*r*) See pp. 455 *et seq.*, *post*.

(*s*) "There is nothing outside a man's mind which is a certain indication of what is going on inside, yet you must look into it if you are going to find fraud against him, and unless you think you see what must have been in his mind you cannot find him guilty of fraud" (*Angus* v. *Clifford*, [1891] 2 Ch. 449, *per* BOWEN, L.J., at p. 471).

these were the natural language of the affection, whether of body or mind, they furnish satisfactory evidence, and often the only proof, of its existence; and the question whether they were real or feigned is for the jury to determine (*t*). Such declarations are sometimes considered to fall within the *res gesta* principle, and sometimes to form a special category of their own: in either view, however, they are admitted merely as manifestations from which the given condition may be inferred, and not as assertions establishing the truth of the facts stated (*a*). So the answers of patients to inquiries by medical men and others, are admissible to prove their state of health, provided the answers be confined to contemporaneous symptoms, and are not in the nature of a narrative as to how or by whom the injuries were caused (*b*). Again, where it is material to prove the terms upon which two persons have lived, their conversations and correspondence with each other, or with third parties, are admissible (*c*); though, in the case of letters, in order to guard against collusion, independent evidence may be required that they were written before any suspicion of collusion could arise (*d*).

SECT. 2—*Facts relevant to the Issue.*

SUB-SECT. 1—*In General.*

Facts relevant to the issue.

611. Facts relevant to the issue are facts which tend, directly or indirectly, to prove or disprove a fact in issue or to prove directly some relevant fact.

Strictly speaking, legal and logical relevancy are not quite conterminous, law in some cases rejecting as the basis of an inference matters which logic would accept, *e.g.*, similar occurrences and character; in others prescribing as legal proof arbitrary requirements which have no logical bearing on the issue, *e.g.*, search and similar incidents necessary to admit secondary evidence of documents. In the main, however, the legal and logical theories coincide, and in the vast majority of cases the law will accept as evidence those matters which are indicated as such by the ordinary course of human experience.

It is not possible to classify all the facts which may be relevant in a judicial inquiry; but experience shows that in courts of law certain important classes of fact tend continually to recur as the bases of proof. These may, for convenience, be roughly grouped under three main divisions: (1) facts probative of the main fact; (2) facts showing the identity or connection of the parties; and (3) facts showing state of mind.

(*t*) Taylor, Law of Evidence, 10th ed., s. 580.

(*a*) Phipson, Law of Evidence, 4th ed., p. 50; and see *R.* v. *Gunnell* (1886), 16 Cox, C. C. 154, C. C. R.

(*b*) *Gærdner Peerage Claim* (1727), Le Marchant's Report, pp. 169—179; *R.* v. *Blandy* (1752), 18 State Tr. 1117; *Aveson* v. *Kinnaird* (*Lord*) (1805), 6 East, 188; *R.* v. *Guttridge* (1840), 9 C. & P. 471, 473; *R.* v. *Nicholas* (1846), 2 Car. & Kir. 246, 248; *R.* v. *Johnson* (1847), 2 Car. & Kir. 354; *R.* v. *Gloster* (1888), 16 Cox, C. C. 471; *Gilbey* v. *Great Western Rail. Co.* (1910), 102 L. T. 202, C. A. As to the exceptional case of complaints in charges of rape, see p. 446, *post*.

(*c*) *Trelawney* v. *Colman* (1817), 2 Stark. 191, 193; *Willis* v. *Bernard* (1832), 1 L. J. (C. P.) 118; *Winter* v. *Wroot* (1834), 1 Mood. & R. 404.

(*d*) *Edwards* v. *Crock* (1801), 4 Esp. 39; *Trelawney* v. *Colman*, *supra*; *Houliston* v. *Smyth* (1825), 2 C. & P. 22, 24; *Wilton* v. *Webster* (1835), 7 C. & P. 198.

SECT. 2. SUB-SECT. 2.—*Facts Probative of the Main Fact.*

Facts relevant to the Issue.

Facts logically probative.

612. Facts which have a natural and logical tendency to prove or disprove the main fact, or which experience ordinarily shows to have that effect, are, in general, also legally admissible. Thus, the question being whether A. is the child of B., the fact that in appearance A. closely resembles B. is relevant and admissible (*e*). So, the question being whether A. survived B. in a shipwreck in which both lost their lives, the fact that A. was stronger, in better health, and a more expert swimmer than B. is relevant (*f*). On the other hand, where the question is whether the pupils at a certain school were badly fed and lodged, evidence that they were badly educated should be rejected as irrelevant to that issue (*g*).

There are other classes of facts, however, of common occurrence in courts of law, but whose probative bearing is much less obvious, and which, to the lay mind, might in many cases seem to have a merely fanciful and remote connection with the issue. The law, nevertheless, allows them to be proved for what they are worth, leaving their weight to be determined by the circumstances of each individual case.

Continuance of facts.

613. In many cases the existence of the main fact may be shown by proving its previous existence at a reasonably proximate date, there being a probability that certain conditions or relations continue. This was formerly regarded as a presumption of law, but the better opinion now is that it is, in most cases, merely a probability, or presumption of fact, which will vary with the particular circumstances (*h*).

Presumption of life.

The most important application of this principle arises in the case of human life, as to which an inference of fact may legitimately be drawn that a person alive and in health at a certain time was alive a short time (*i*), or even several years (*j*), later. Similar inferences have also been drawn in the case of sanity (*k*), insanity (*l*), religious opinions (*m*), partnership (*n*), the tenure of land (*o*) or office (*p*),

(*e*) *Bagot* v. *Bagot* (1878), 1 L. R. Ir. 308; *Burnaby* v. *Baillie* (1889), 42 Ch. D. 282, 290.

(*f*) *Sillick* v. *Booth* (1841), 11 L. J. (CH.) 41; but not the mere fact that A. was a male and B. a female (*Underwood* v. *Wing* (1855), 4 De G. M. & G. 633; *Wing* v. *Angrave* (1860), 8 H. L. Cas. 183); see also *Durrant* v. *Friend* (1851), 5 De G. & Sm. 343, and *R.* v. *Hay* (1767), 1 Wm. Bl. 640.

(*g*) *Boldron* v. *Widdows* (1824), 1 C. & P. 65.

(*h*) *E.g.*, the fact that defendant was driving a motor car when stopped is some evidence that he had been driving it at a recent stage of the same journey (*Beresford* v. *St. Albans Justices* (1905), 22 T. L. R. 1).

(*i*) *Re Phené's Trusts* (1870), 5 Ch. App. 139; *R.* v. *Lumley* (1869), L. R. 1 C. C. R. 196; *Re Connor* (1892), 29 L. R. Ir. 261; *Re Aldersey, Gibson* v. *Hall*, [1905] 2 Ch. 181, 185.

(*j*) *R.* v. *Willshire* (1881), 6 Q. B. D. 366, C. C. R. (eleven years); *R.* v. *Jones* (1883), 15 Cox, C. C. 284, C. C. R. (seventeen years).

(*k*) *Dyce Sombre* v. *Troup* (1856), Dea. & Sw. 22, 38; *Sutton* v. *Sadler* (1857), 26 L. J. (C. P.) 284.

(*l*) *Smith* v. *Tebbitt* (1867), L. R. 1 P. & D. 398.

(*m*) *A.-G.* v. *Bradlaugh* (1884), Cab. & El. 467—469; and see title ECCLESIASTICAL LAW, Vol. XI., p. 357, note (*n*).

(*n*) *Clark* v. *Alexander* (1844), 8 Scott (N. R.), 147, 161; *Brown* v. *Wren Brothers*, [1895] 1 Q. B. 390.

(*o*) *Pickett* v. *Packham* (1868), 4 Ch. App. 190.

(*p*) *R.* v. *Budd* (1805), 5 Esp. 230.

and the settlement of paupers (*q*). So, in the absence of evidence to the contrary, a debt once proved to exist is presumed to remain unpaid (*r*). And where adultery has been proved, its continuance will be presumed while the parties live under the same roof (*s*); but if the continuance of a condition is unlawful it will not in general be presumed (*a*).

The presumption of continuance may operate retrospectively, and it has, in fact, been so applied in several instances. Thus, the fact that a ship became unseaworthy, without visible cause, shortly after sailing is evidence that she was unseaworthy at the time of sailing (*b*). And a letter which was proved to be unsealed when received was presumed to have been so when posted (*c*).

Course of business.

614. The doing of an act may, in some cases, be inferred from the existence of a general course of business according to which it would ordinarily be done, there being a probability that the general practice will be followed in the particular case. The most common illustration under this heading arises in the case of letters which, if proved to have been addressed properly and posted, are presumed to have been received in due course (*d*). Under several statutes and orders, indeed, such proof is rendered conclusive where the letter has been registered, and in certain cases even where it has not (*e*). The same presumption has been applied where the question was whether a licence to export certain goods had been obtained, and proof was given that the goods had been entered at the Custom House for exportation, and a licence was presumed from the fact that the course of office did not permit exportation without one (*f*).

The principle, however, is not by any means confined to public offices, but applies also to private concerns. Thus, where it was necessary to prove that an employer had paid certain wages to his servant, evidence was received that it was the former's practice to pay all his workmen regularly every Saturday, that the servant in question had been seen with the others waiting to be paid, and that he had not afterwards been heard to complain (*g*).

Acts of ownership.

615. As a general rule, title to property may be shown by the exercise of acts of ownership in connection therewith (*h*). Thus, possession is not only *primâ facie* evidence of ownership (*i*), but is

(*q*) *R.* v. *Tanner* (1795), 1 Esp. 304.
(*r*) *Jackson* v. *Irvin* (1809), 2 Camp. 48, 50.
(*s*) *Turton* v. *Turton* (1830), 3 Hag. Ecc. 338, 350.
(*a*) *Price* v. *Worwood* (1859), 4 H. & N. 512, 514.
(*b*) *Pickup* v. *Thames Insurance Co.* (1878), 3 Q. B. D. 594, C. A.; *Ajum Goolam Hossen & Co.* v. *Union Marine Insurance Co.*, *Hajee Cassim Joosub* v. *Ajum Goolam Hossen & Co.*, [1901] A. C. 362, P. C.
(*c*) *R.* v. *Burdett* (1820), 4 B. & Ald. 95, 124, 125.
(*d*) *Kufh* v. *Weston* (1799), 3 Esp. 54; *Warren* v. *Warren* (1834), 1 Cr. M. & R. 250; *Dunlop* v. *Higgins* (1848), 1 H. L. Cas. 381; *Household Fire Insurance Co.* v. *Grant* (1879), 4 Ex. D. 216, C. A.
(*e*) For a list of these statutes and orders, see Taylor, Law of Evidence, 10th ed., s. 180, and note (*d*), p. 556, *post*.
(*f*) *Van Omeron* v. *Dowick* (1809), 2 Camp. 42, 44.
(*g*) *Lucas* v. *Novosilieski* (1795), 1 Esp. 296.
(*h*) *Barnes* v. *Mawson* (1813), 1 M. & S. 77; and see title BOUNDARIES, FENCES, AND PARTY WALLS, Vol. III., pp. 148, 149.
(*i*) *Webb* v. *Fox* (1797), 7 Term Rep. 391, 397. As to this presumption in

SECT. 2. Facts relevant to the Issue.

also evidence of the highest title to the property in question (*k*), and, as against mere wrongdoers, has in cases of trespass to real property even been said to be conclusive (*l*). Moreover, the presumption from the possession of land will, in general, apply not only to the surface, but also to the minerals underneath (*m*), though an exception to this exists in mining districts where the two are frequently held in different rights, and even in other cases the presumption may always be rebutted by proof of separate enjoyment (*n*). In addition to possession, other *indicia* of title are also admissible as evidence of ownership, *e.g.*, receipt of the rents and profits of the property, and the discharge of its burdens and repairs (*o*). On the same principle, granting leases (*p*), planting and felling timber (*q*), cutting grass, and grazing cattle or turning off those of strangers (*r*), have been held evidence of a right to the soil; perambulations by the lord have been held evidence of the boundaries of a manor (*s*); and user has been held evidence of title to an easement, the character of the user determining the extent of the easement (*t*).

In all these cases it is important to remember that acts of ownership are receivable not as admissions, since they operate in favour of the party exercising them, but as evidence of possession, and thus as proof of title (*u*).

Ancient possession.

When the fact to be proved is the ancient possession of property, and the acts of ownership tendered consist of documents over thirty years old, two important qualifications exist, and these will only be receivable (1) if they purport to constitute (wholly or in part) the transactions which they effect, and are not mere prior directions to do, or subsequent narratives of having done, them (*a*); and (2) if they are produced from proper custody (*b*). To be of

relation to a wife's separate property when in the house of her husband, see *R.* v. *Murray*, [1906] 2 K. B. 385, C. C. R.; compare *Ramsay* v. *Margrett*, [1894] 2 Q. B. 18, C. A.

(*k*) *Jayne* v. *Price* (1814), 5 Taunt. 326; *Doe* d. *Daniel* v. *Coulthred* (1837), 7 Ad. & El. 235; *Doe* d. *Graham* v. *Penfold* (1838), 8 C. & P. 536, 537; *Daintry* v. *Brocklehurst* (1848), 3 Exch. 207; *Metters* v. *Brown* (1863), 1 H. & C. 686, 692.

(*l*) *Elliott* v. *Kemp* (1840), 10 L. J. (EX.) 321.

(*m*) *Rowbotham* v. *Wilson* (1860), 8 H. L. Cas. 348.

(*n*) *Rowe* v. *Grenfel* (1824), Ry. & M. 396; *Rowe* v. *Brenton* (1828), 8 B. & C. 737.

(*o*) Stephen, Digest of the Law of Evidence, art. 5, n.; *Ferrand* v. *Milligan* (1845), 7 Q. B. 730. Declarations accompanying acts of ownership may also be proved as indicating the nature of the acts (*Bennison* v. *Cartwright* (1864), 5 B. & S. 1). Notice to a purchaser that rents are paid by tenants to some person whose receipt is inconsistent with the title of the vendor, is notice of that person's rights (*Hunt* v. *Luck*, [1902] 1 Ch. 428, C. A.).

(*p*) *Doe* d. *Egremont* (*Earl*) v. *Pulman* (1842), 3 Q. B. 622, 623—626, where counterparts signed by the lessees were received; *Maydalen Hospital* (*Governors*) v. *Knotts* (1878), 8 Ch. D. 709, C. A.; *Haigh* v. *West*, [1893] 2 Q. B. 19, 30, C. A.

(*q*) *St. Leonards* (*Lord*) v. *Ashburner* (1869), 21 L. T. 595; *Doe* d. *Stansbury* v. *Arkwright* (1833), 5 C. & P. 575.

(*r*) *Belmore* (*Countess*) v. *Kent County Council*, [1901] 1 Ch. 873.

(*s*) *Woolway* v. *Rowe* (1834), 1 Ad. & El. 114.

(*t*) *Gingell, Son and Foskett, Ltd.* v. *Stepney Borough Council*, [1906] 2 K. B. 468; *Cowling* v. *Higginson* (1838), 4 M. & W. 245; *Blackett* v. *Lowes* (1814), 2 M. & S. 494; and title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., pp. 259, 265.

(*u*) *Jones* v. *Williams* (1837), 2 M. & W. 326, *per* PARKE, B., at p. 327.

(*a*) *Malcolmson* v. *O'Dea* (1862), 10 H. L. Cas. 593; *Bristow* v. *Cormican* (1878), 3 App. Cas. 641, 658; *Blandy-Jenkins* v. *Dunraven* (*Earl*), [1899] 2 Ch. 121, C. A.

(*b*) As to proper custody, see p. 512, *post*.

weight, moreover, these paper dispositions should be corroborated by proof of modern enjoyment thereunder, since it is conceivable that unscrupulous persons might have fabricated the deeds without having any title to the property (*c*). Strictly speaking, however, the absence of modern enjoyment goes merely to the weight, and not to the admissibility, of the evidence. Documents tendered under this head are sometimes considered to be admissible by way of exception to the hearsay rule; but seeing that they are received not as proving the truth of the matters stated, but merely as acts raising the inference of ownership, they are more properly classed under the present heading.

Public capacity or relationship.

616. Under the present head may be classed the rule that acting in a public capacity, or relation, is evidence of title so to act, even in favour of the party so acting, and even against third persons who have in no way acquiesced therein. Moreover, acting in a public office is evidence of due appointment, although the appointment is required to be by deed (*d*), and is directly in issue in the proceedings (*e*), and although the acting is only shown to have taken place on a single occasion, and the case is a criminal one (*f*). The appointment of the following officials has been held, at common law, to be provable in this manner: Lords of the Treasury (*g*); Masters in Chancery, though exercising special powers (*h*); deputy county court judges (*i*); commissioners for oaths (*k*); surrogates (*l*); sheriffs and under-sheriffs (*m*); justices of the peace, constables, and watchmen, though the appointments were, in some cases, made under local Acts (*n*); churchwardens (*o*); overseers (*p*); vestry clerks (*q*); trustees for raising rates under local Acts (*r*); trustees under a turnpike Act (*s*); bank directors (*t*); weigh-masters of market towns (*a*); and attested soldiers in the recruiting service (*b*). And this common law rule has, in a few cases, been extended by

(*c*) *Fort* v. *Clarke* (1826), 1 Russ. 604.
(*d*) *Doe* d. *James* v. *Brawn* (1821), 5 B. & Ald. 243.
(*e*) *Dexter* v. *Hayes* (1860), 11 I. C. L. R. 106; affirmed *sub nom. Hayes* v. *Dexter* (1861), 13 I. C. L. R. 22, Ex. Ch.; *Faulkner* v. *Johnson* (1843), 11 M. & W. 581.
(*f*) *R.* v. *Roberts* (1878), 14 Cox, C. C. 101, C. C. R.; *R.* v. *Lawson*, [1905] 1 K. B. 541, C. C. R.
(*g*) *R.* v. *Jones* (1809), 2 Camp. 131.
(*h*) *Marshall* v. *Lamb* (1843), 5 Q. B. 115.
(*i*) *R.* v. *Roberts*, *supra*.
(*k*) *R.* v. *Howard* (1832), 1 Mood. & R. 187; *R.* v. *Newton* (1844), 1 Car. & Kir. 469, 480; and see *R.* v. *Murphy* (1837), 8 C. & P. 297.
(*l*) *R.* v. *Verelst* (1813), 3 Camp. 432.
(*m*) *Bunbury* v. *Matthews* (1844), 1 Car. & Kir. 380; *Doe* d. *James* v. *Brawn*, *supra*; *Plumer* v. *Briscoe* (1847), 17 L. J. (Q. B.) 158; *Robinson* v. *Collingwood* (1864), 17 C. B. (N. S.) 777.
(*n*) *Berryman* v. *Wise* (1791), 4 Term Rep. 366; *Butler* v. *Ford* (1833), 1 Cr. & M. 662.
(*o*) *R.* v. *Mitchell* (1818), cited 2 Story on Criminal Evidence, 307, n.
(*p*) *Doe* d. *Bowley* v. *Barnes* (1846), 8 Q. B. 1037.
(*q*) *M'Gahey* v. *Alston* (1836), 2 M. & W. 206.
(*r*) *R.* v. *Murphy*, *supra*, at p. 310.
(*s*) *Pritchard* v. *Walker* (1827), 3 C. & P. 212.
(*t*) *R.* v. *Boaler* (1892), 67 L. T. 354; and see *R.* v. *Lawson*, *supra*.
(*a*) *M'Mahon* v. *Lennard* (1858), 6 H. L. Cas. 970; *Dexter* v. *Hayes*, *supra*.
(*b*) *Wolton* v. *Gavin* (1850), 16 Q. B. 48.

SECT. 2. Facts relevant to the Issue.

statute, *e.g.*, to the proof of the appointment of officers of excise (*c*) and customs (*d*).

Private capacity or relationship.

On the other hand, the fact that a person has acted in a private capacity, or relation, is generally, though not always, excluded as evidence of title, since the same safeguards do not exist as in the case of public functionaries. Evidence of the above nature has, accordingly, been rejected to prove the authority of a solicitor to act for his client (*e*); that of a collector of tithes for a private owner (*f*); as well as, it has been said, that of an executor or administrator (*g*); although it has been allowed in order to establish the relations of master and apprentice, landlord and tenant, and co-partners (*h*). But mere cohabitation is *primâ facie* evidence of a valid marriage, its weight varying with the circumstances (*i*); and the presumption may prevail although evidence be offered of the invalidity of a ceremony actually gone through by the parties (*k*).

Custom and usage.

617. Evidence of agricultural, mercantile, and other established usages is admissible to annex unexpressed incidents to contracts (whether oral (*l*) or written (*m*)), grants, wills (*n*), and the like (*o*), there being a presumption that people dealing in a particular market or place intend to adopt its settled practices (*p*).

(*c*) Inland Revenue Regulation Act, 1890 (53 & 54 Vict. c. 21), s. 24.

(*d*) Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), s. 261.

(*e*) *Bright* v. *Legerton* (1861), 2 De G. F. & J. 606.

(*f*) *Short* v. *Lee* (1821), 2 Jac. & W. 464, 468.

(*g*) Best, Law of Evidence, 10th ed., p. 307, n. (l), where it is pointed out that before the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 55, executors and administrators were bound, in pleading, to make profert of the probate or letters of administration; see Chitty on Pleading, 6th ed., p. 420.

(*h*) *R.* v. *Fordingbridge* (*Inhabitants*) (1858), 27 L. J. (M. C.) 290.

(*i*) *Doe* d. *Fleming* v. *Fleming* (1827), 4 Bing. 266; *Collins* v. *Bishop* (1878), 48 L. J. (CH.) 31; *Fox* v. *Bearblock* (1881), 17 Ch. D. 429; *Re Thompson*, *Langham* v. *Thompson* (1904), 91 L. T. 680.

(*k*) *Re Shephard*, *George* v. *Thyer*, [1904] 1 Ch. 456, applying *Sastry Velaider Aronegary* v. *Sembecutty Vaigalie* (1881), 6 App. Cas. 364, P. C.

(*l*) *Sewell* v. *Corp* (1824), 1 C. & P. 392; compare *Loader* v. *London and India Docks Joint Committee* (1891), 65 L. T. 674.

(*m*) *Pike* v. *Ongley* (1887), 18 Q. B. D. 708, C. A.; *Universo Insurance Co. of Milan* v. *Merchants Marine Insurance Co.*, [1897] 2 Q. B. 93, C. A.; *Bechuanaland Exploration Co.* v. *London Trading Bank*, [1898] 2 Q. B. 658.

(*n*) *Dashwood* v. *Magniac*, [1891] 3 Ch. 306, C. A.

(*o*) *E.g.*, a custom that horse dealers were intrusted with other people's horses as negativing the operation of the reputed ownership clause in bankruptcy (*Re Florence*, *Ex parte Wingfield* (1879), 10 Ch. D. 591, C. A.), but not a habit of horse dealers not to warrant a horse pronounced sound by a veterinary surgeon as negativing the giving of a warranty (*Howard* v. *Sheward* (1866), L. R. 2 C. P. 148). As to evidence of custom to explain a trade description, see *Watson* v. *Jaeger's Sanitary Woollen System Co.* (1897), 13 T. L. R. 150; see also *King* v. *Spencer* (1904), 20 Cox, C. C. 692 (customary mode of weighing); see also titles CONTRACT, Vol. VII., pp. 511, 516; CUSTOM AND USAGES, Vol. X., pp. 260 *et seq.*; SHIPPING AND NAVIGATION.

(*p*) *Hutton* v. *Warren* (1836), 1 M. & W. 466; *Pike* v. *Ongley*, *supra*; *Parker* v. *Ibbetson* (1858), 27 L. J. (P. C.) 236 (usage to terminate service by month's notice annexed to written hiring); *R.* v. *Stoke-upon-Trent* (*Inhabitants*) (1843), 13 L. J. (M. C.) 41 (usage to have certain holidays and Sundays free, annexed to written hiring); *Wigglesworth* v. *Dallinson* (1779), 1 Doug. (K. B.) 201; 1 Sm. L. C., 11th ed., 545 (usage for tenant to have away-going crop annexed to lease); *Johnson* v. *Raylton* (1881), 7 Q. B. D. 438, C. A. (usage that iron plates sold by a manufacturer under written contract were to be of his own make; see now Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), ss. 14, 55); *Marzetti* v. *Smith & Son*

The usage must not be inconsistent with the express terms of the contract (*q*); and must be so sufficiently certain, reasonable, and generally acquiesced in, that it may be presumed to have formed an ingredient of the contract (*r*), in which case it will bind the parties even though they may be ignorant of it; otherwise a mere practice (*s*), or a usage that is unreasonable (*t*), will only bind those who know of and assent to it.

A local, or business, usage, as distinguished from a common law custom that is judicially noticed (*a*), may be proved by the direct evidence of witnesses (*b*), or by a series of particular instances in which it has been acted on (*c*), or sometimes by showing that the alleged usage exists in the same (*d*), or even in similar (*e*), trades or localities elsewhere.

Treatment.

618. The fact that a person has treated a certain state of things as existing is not usually receivable as evidence of its existence,

(1883), 49 L. T. 580, C. A. (usage of port that general cargoes of steamships should be discharged on the quay, annexed to, and held not inconsistent with, bill of lading providing that cargoes were to be discharged from the ship's tackles). See, further, as to cases relating to the custom of the port, title SHIPPING AND NAVIGATION. For examples of customs rejected because inconsistent with written contracts, see *Barrow* v. *Dyster* (1884), 13 Q. B. D. 635 (custom which made broker a principal, in a certain event, inconsistent with written clause appointing him an arbitrator); *The Nifa*, [1892] P. 411 (custom of port throwing expense of taking cargo from ship's rail to quay on shipowner, inconsistent with contract that it was to be taken from alongside at merchant's expense). A less obvious application of this objection is shown in *Joynson* v. *Hunt & Son* (1905), 93 L. T. 470, C. A., where a glove manufacturer, after agreeing to pay a traveller commission on all business introduced by the latter and accepted by the former, terminated the agreement without notice. In an action by the traveller, the latter tendered evidence of a custom in the glove trade to give six months' notice on terminating an agency. The court, however, rejected this on the ground that, as the agreement excluded the idea of employment, and the custom could only apply thereto, it was inconsistent and inadmissible. See, further, as to parol evidence of local or mercantile customs in reference to written contracts, titles CONTRACT, Vol. VII., pp. 511, 516; CUSTOM AND USAGES, Vol. X., p. 217.

(*q*) *Robinson* v. *Mollett* (1875), L. R. 7 H. L. 802; *Brown* v. *Byrne* (1854), 3 E. & B. 703; *Barrow* v. *Dyster* (1884), 13 Q. B. D. 635; *Joynson* v. *Hunt & Son*, *supra*; *Hayton* v. *Irwin* (1879), 5 C. P. D. 130.

(*r*) *Plaice* v. *Allcock* (1866), 4 F. & F. 1074; *Ghose* v. *Manichund* (1859), 7 Moo. Ind. App. 282; *Devonald* v. *Rosser*, [1906] 2 K. B. 741—743.

(*s*) *Womersley* v. *Dally* (1857), 26 L. J. (EX.) 219; *Sweeting* v. *Pearce* (1861), 9 C. B. (N. S.) 534.

(*t*) *Blackburn* v. *Mason* (1893), 68 L. T. 510; *Perry* v. *Barnett* (1885), 15 Q. B. D. 388.

(*a*) See p. 484, *post*.

(*b*) *Lewis* v. *Marshall* (1844), 7 Man. & G. 744 (the evidence must be positive, and not the mere opinion of the witnesses).

(*c*) *Johnstone* v. *Spencer* (1885), 30 Ch. D. 581 (particular instances of manorial custom admitted, though they did not appear on any of the manor records); *Tucker* v. *Linger* (1882), 21 Ch. D. 34, 38 (an agricultural custom proved, not by what the tenants thought it was, but by acts publicly done throughout the district).

(*d*) *Noble* v. *Kennoway* (1780), 2 Doug. (K. B.) 510 (evidence of a custom in the cod fisheries of Labrador received to show what was the custom in those of Newfoundland); *Plaice* v. *Allcock*, *supra* (a custom of the bleaching trade at Nottingham received to show what was the custom in the same trade at Loughborough); *Re Leigh's Estate* (1877), 6 Ch. D. 256 (practice of other horse dealers admitted to show that agreement in question was reasonable).

(*e*) *Fleet* v. *Murton* (1871), L. R. 7 Q. B. 126 (a custom in the colonial trade in London admitted to show what was the custom in the fruit trade there).

SECT. 2. Facts relevant to the Issue.

unless it can be regarded as an admission by conduct made by a party to the suit, in which case it will operate as evidence against, but not for, him (*f*). Thus, on a question as to the sanity of a testator, the fact that his physician permitted him to make a will, or that he was elected, in his absence, to a high and responsible office, would be rejected; as also, on a question of seaworthiness, the fact that the captain showed his belief in the vessel by embarking in it with his family (*g*).

In certain cases, however, this rule is relaxed, and acts of treatment by a party are received, even in his own favour, as well as those done by strangers to the suit. Thus, acts of ownership by a party are admissible for him to establish title to property (*h*); and, on questions of pedigree, family conduct and treatment are receivable, even from non-parties, to show relationship (*i*). So a marriage may be inferred, not only from the cohabitation of the parties, but also from the fact that they were treated as married by their friends and neighbours (*k*); although where strict proof of this fact is required, *e.g.*, in bigamy proceedings, such evidence, while admissible, will not be sufficient (*l*).

Admissions by conduct.

619. A party's admissions by conduct of any material fact may always be proved against him; and evidence to explain or disprove such admissions is receivable in his favour. Thus, payment of tithe by A. to B. would be an admission by conduct on the part of A. that he owed B. the tithe; though its receipt would not be an admission by B. of A.'s liability (*m*). So, in an action by A. and her husband, where the question was whether A. had suffered injury by a railway accident, evidence that A.'s husband and her solicitor's clerk had conspired to suborn false witnesses at the trial to support their case was held an admission by conduct that A.'s claim was not genuine (*n*). In such a case the fact that A. had attributed her injuries to a fall, and not to the accident, would be receivable under the same head; while, in rebuttal, A. might show that she had had no such fall as suggested (*o*).

Complaints.

620. On charges of rape, indecent assault, and similar offences upon females (but on no others), the fact and particulars of any complaint made by the prosecutrix shortly after the outrage are admissible as evidence for the prosecution, not to prove the truth of the matters stated, but as confirming her testimony, and, where consent is a defence, to disprove consent (*p*). The complaint must have been

(*f*) *Pilot* v. *Craze* (1888), 52 J. P. 311; *Wright* v. *Doe* d. *Tatham* (1837), 7 Ad. & El. 313, 387, Ex. Ch., *per* PARKE, B., at p. 388; *Re Anglesey* (*Marquis*), *Willmot* v. *Gardner*, [1901] 2 Ch. 548, C. A.

(*g*) *Wright* v. *Doe* d. *Tatham*, *supra*.

(*h*) See p. 442, *ante*.

(*i*) *Greaves* v. *Greenwood* (1877), 2 Ex. D. 289, C. A.

(*k*) *Doe* d. *Fleming* v. *Fleming* (1827), 4 Bing. 266; *Re Thompson*, *Langham* v. *Thompson* (1904), 91 L. T. 680.

(*l*) *R.* v. *Simpson* (1883), 15 Cox, C. C. 323; *R.* v. *Althausen* (1893), 17 Cox, C. C. 630.

(*m*) *James* v. *Biou*, *Owen* v. *Flack* (1826), 2 Sim. & St. 600, 606.

(*n*) *Moriarty* v. *London*, *Chatham*, *and Dover Rail. Co.* (1870), L. R. 5 Q. B. 314; *R.* v. *Watt* (1905), 70 J. P. 29.

(*o*) *Melhuish* v. *Collier* (1850), 15 Q. B. 878.

(*p*) *R.* v. *Lillyman*, [1896] 2 Q. B. 167, C. C. R.; *R.* v. *Osborne*, [1905] 1 K. B. 551, C. C. R.; *Beatty* v. *Cullingworth* (1896), 60 J. P. 740; affirmed (1897),

made at the first reasonable opportunity that offered; thus complaints made on the following day (*q*), or three days after the outrage (*r*), have been rejected. The complaint must have been voluntary, and not induced by leading or intimidating questions. Answers to such inquiries as "Did A. assault you? Did he say this and that to you?" will be excluded; while answers to such questions as "What is the matter? Why are you crying?" will be admissible (*s*).

SUB-SECT. 3.—*Facts showing the Identity or Connection of the Parties.*

Questions of identity.

621. Where the question of personal identity arises, without reference to the doing of any particular act, it may be proved or disproved, not only by direct testimony, but also presumptively by evidence of similarity or dissimilarity of personal characteristics. Thus, if A. claims property on the ground that he is B., it is relevant to show that A. possesses all, or any, of the known attributes or peculiarities of B. In practice, however, the question of identity usually occurs with respect to the doing of some specific act forming the subject-matter of the proceedings, the point being whether A. is or is not the author of such act. In civil cases this act is most commonly the signing of some contract or instrument, and in the absence of direct evidence of the identity of the alleged and the actual author, similarity of name and handwriting, and sometimes also of residence and occupation, may have to be proved.

Criminal cases.

But by far the most important development of this principle occurs in criminal cases. Here, though the evidence tendered to prove the act may, in some cases, also prove the authorship, yet generally the proof of the two is separable (*a*), and consequently a much wider field may have to be explored. When, then, a criminal act has been proved, and it is desired to connect the accused therewith, it is relevant, whether there is direct evidence or not of identification, to show that he had or had not a motive for the act, or means and opportunity of doing it, or that he had made preparations with that end in view, or had threatened to do the act (*b*). Moreover, if the act itself, or the mode of doing it, revealed any special knowledge, skill, or peculiarity, the possession, or non-possession, by the accused of this special qualification may also be shown (*c*). The subsequent conduct of the accused often furnishes still more cogent evidence of guilt, *e.g.*, possession of recently stolen property, which, if unexplained, is evidence that

Times, 14th January; see also title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 394.

(*q*) *R.* v. *Rush* (1896), 60 J. P. 777.

(*r*) *R.* v. *Ingrey* (1900), 64 J. P. 106.

(*s*) *R.* v. *Osborne*, [1905] 1 K. B. 551, C. C. R.

(*a*) Wills, Circumstantial Evidence, 5th ed., pp. 318, 319.

(*b*) Stephen, Digest of the Law of Evidence, art. 7; Best, Law of Evidence, 10th ed., ss. 453—458; *R.* v. *Clewes* (1830), 4 C. & P. 221 (fear of discovery proved as motive for murder of confederate); *R.* v. *Buckley* (1873), 13 Cox, C. C. 293 (depositions showing that deceased had given evidence against the accused in former proceedings admitted to show motive).

(*c*) *R.* v. *Patch* (1806), cited Wills, Circumstantial Evidence, 5th ed., p. 165, n., pp. 390—395, and *R.* v. *Richardson* (1787), *ibid.*, pp. 384—389, in which cases the evidence showed that the crime must have been committed by, and that the accused was, a left-handed man.

SECT. 2. Facts relevant to the Issue.

the possessor is the thief, or the receiver, according to the circumstances, and throws on him the burden of explanation (*d*); flight; or the fabrication or suppression of evidence. On the other hand, a defence frequently raised by the accused is that of *alibi;* though very little weight will be attached to this unless it be supported by the prisoner's own evidence (*e*).

SUB-SECT. 4.—*Facts showing State of Mind.*

State of mind.

622. When the mental condition of a party is in question, it may be proved either directly by the party himself, or indirectly by other witnesses speaking to the outward expression of the given condition by the party at the time (*f*).

In addition to these sources, however, a third has frequently to be invoked, namely, that supplied by purely circumstantial evidence.

Inference of knowledge.

623. A party's knowledge of a fact may be inferred circumstantially in a variety of cases (*g*). Thus, it may be shown that he had prior knowledge of the fact, in which case there will be a presumption that such knowledge continued for a more or less lengthened period (*h*). In judicial proceedings, however, knowledge is more generally shown by documentary evidence. In ordinary cases, the mere fact that letters, with their seals broken, were found in the possession of a party will imply a knowledge by him of their contents (*i*). So, the execution (*k*), though not the mere attestation (*l*), of a written instrument will have the same effect. And access to documents sometimes affords presumptive evidence of knowledge, *e.g.*, in the case of the rules of a club, or of books kept between partners, or banker and customer (*m*). Knowledge of the

(*d*) *R.* v. *Partridge* (1836), 7 C. & P. 551; *R.* v. *Crowhurst* (1844), 1 Car. & Kir. 370; *R.* v. *Poolman* (1909), 3 Cr. App. Rep. 36; and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 649.

(*e*) *R.* v. *Kirkham* (1909), 73 J. P. 406, C. C. A.

(*f*) See p. 438, *ante*.

(*g*) As to the knowledge of an agent being imputed or not to his principal, see title AGENCY, Vol. I., pp. 215, 216; as to actual and constructive notice of facts affecting the title to land, see title EQUITY, pp. 84—88, *ante;* as to *scienter* in the case of damage done by an animal, see title ANIMALS, Vol. I., p. 372. The nature of the malady of a lunatic may be proved to show that defendant must have known of the lunacy (*Beavan* v. *M'Donnell* (1854), 10 Exch. 184).

(*h*) See p. 440, *ante*.

(*i*) *Wright* v. *Doe* d. *Tatham* (1837), 7 Ad. & El. 313, 369, 376, Ex. Ch.; and see S. C. (1838), 4 Bing. (N. C.) 531, H. L. This presumption, however, does not arise where the sanity of the recipient is in issue (*ibid.*).

(*k*) *Re Cooper, Cooper* v. *Vesey* (1882), 20 Ch. D. 611, C. A.

(*l*) *Harding* v. *Crethorn* (1793), 1 Esp. 57, 58.

(*m*) As to the imputation of knowledge of special terms printed on a ticket, invoice, bill of lading, or deposit note to the person receiving it, see *Henderson* v. *Stevenson* (1875), L. R. 2 Sc. & Div. 470; *Harris* v. *Great Western Rail. Co.* (1876), 1 Q. B. D. 515; *Parker* v. *South Eastern Rail. Co., Gabell* v. *Same* (1877), 2 C. P. D. 416, C. A.; *Malpas* v. *London and South Western Rail. Co.* (1866), L. R. 1 C. P. 336; *Richardson, Spence & Co. and "Lord Gough" Steamship Co.* v. *Rowntree,* [1894] A. C. 217; *Watkins* v. *Rymill* (1883), 10 Q. B. D. 178; *Burke* v. *South Eastern Rail. Co.* (1879), 5 C. P. D. 1; and titles CARRIERS, Vol. IV., p. 17; NEGLIGENCE; SHIPPING AND NAVIGATION. As to the effect of a condition printed on a sold note, see *Wallis, Son, and Wells* v. *Pratt and Haines* (1910), 26 T. L. R. 572, C. A.; and title SALE OF GOODS. As to the rule that a lessee or purchaser of land has constructive notice of that which he would

books of a company, however, will not be imputed either to a director or shareholder (*n*), though it will generally be implied where there is a duty to know (*o*), as distinguished from a mere right to inspect (*p*). Again, the notoriety of a fact in a party's calling, or neighbourhood, is some evidence that it reached his ears (*q*), while the mere existence of a rumour of the fact is none (*r*).

Intention.

624. In cases of intention, the line of demarcation between substantive law and evidence is not always very clearly observed (*s*). The intention with which a person did an act which he had a right to do cannot in general be inquired into (*t*), while in some cases, as where a defendant is charged with obtaining money without disclosing the fact of his bankruptcy, the intent, however innocent, with which he did so is, under statute, wholly immaterial, and any evidence on the point is consequently excluded, not by a rule of evidence, but by one of substantive law (*u*); so with a party's intent in infringing a patent (*a*); or inflicting cruelty to animals (*b*). When, however, intent can be, and is, properly put in issue, its proof becomes cognisable by the law of evidence, it being recognised that the state of a man's mind is as much a matter of fact, and so as much the subject of evidence, as the state of his digestion (*c*). It may be harder to prove than an external fact, but whenever it is material, litigants may prove it if they can (*d*). Intention, therefore, may be proved by the direct testimony of the party whose intention is in question; as well as by proof of his declarations made out of court at the time that such intention was material (*e*). But it may also, and much more often, be established circumstantially by the

State of mind a matter of evidence.

have discovered by a reasonable inquiry into the title, see titles EQUITY, pp. 86, 87, *ante;* LANDLORD AND TENANT; MORTGAGE; SALE OF LAND.

(*n*) *Hallmark's Case* (1878), 9 Ch. D. 329, C. A.; *Re Denham & Co.* (1883), 25 Ch. D. 752; *Re Printing, Telegraph, and Construction Co. of the Agence Havas, Ex parte Cammell*, [1894] 1 Ch. 528; *Dovey* v. *Cory*, [1901] A. C. 477, 492, 493.

(*o*) *Hallmark's Case, supra.*

(*p*) *Hill* v. *Manchester and Salford Water Works Co.* (1833), 5 B. & Ad. 866.

(*q*) *Re Matthews, Ex parte Powell* (1875), 1 Ch. D. 501, C. A.

(*r*) *Greenslade* v. *Dare* (1855), 20 Beav. 284.

(*s*) As to the distinction between representations of intention and of fact, see *Citizens' Bank of Louisiana* v. *First National Bank of New Orleans* (1873), L. R. 6 H. L. 352, and title MISREPRESENTATION AND FRAUD.

(*t*) *Bradford Corporation* v. *Pickles*, [1895] A. C. 587; *Allen* v. *Flood*, [1898] A. C. 1; *Quinn* v. *Leathem*, [1901] A. C. 495; *Fitzroy* v. *Cave*, [1905] 2 K. B. 364, C. A.; *Salt Union, Ltd.* v. *Brunner, Mond & Co.*, [1906] 2 K. B. 822.

(*u*) *R.* v. *Dyson*, [1894] 2 Q. B. 176, C. C. R.

(*a*) *Oxford and Cambridge Universities* v. *Gill & Sons* (1899), *Times*, 14th June.

(*b*) *Duncan* v. *Pope* (1899), 80 L. T. 120. For a statement of the cases in which *mens rea* is or is not required to be proved, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 233—238. In the case of *Hobbs* v. *Winchester Corporation*, [1910] 2 K. B. 471, C. A., the Court of Appeal, following *Mallinson* v. *Carr*, [1891] 1 Q. B. 48, *Blaker* v. *Tillstone*, [1894] 1 Q. B. 345, and *Firth* v. *McPhail*, [1905] 2 K. B. 300, and questioning *Walshaw* v. *Brighouse Corporation*, [1899] 2 Q. B. 286, held that *mens rea* was not essential to justify a conviction for being possessed of diseased meat. See also title FOOD AND DRUGS.

(*c*) *Edgington* v. *Fitzmaurice* (1885), 29 Ch. D. 459, C. A., *per* BOWEN, L.J., at p. 483.

(*d*) Pollock, Law of Fraud in British India, p. 61. As to evidence of intent to deceive in passing off cases, see *Saxlehner* v. *Apollinaris Co.*, [1897] 1 Ch. 893; and title TRADE MARKS.

(*e*) *Brodie* v. *Brodie* (1861), 4 L. T. 307.

SECT. 2. Facts relevant to the Issue.

party's previous or subsequent conduct. Thus, the question being with what intention as to domicil A., a Frenchman, resided in England, the facts that he lived here for twenty-seven years, married successively two English wives, was during the greater part of his stay a partner in an English business house, and made his will in an English and not a French form, were received as showing an English domicil; while the facts that he frequently visited France, and refused to be naturalised in England, or to take a house there for more than three years, were admitted, though allowed less weight, in favour of an opposite contention (*f*).

Distinction between law and evidence.

The opposition, or distinction, between law and evidence in this connection, is well illustrated in cases where drunkenness is sought to be proved by an accused person. Since, by the substantive law, inebriety is no excuse for crime, its proof is ordinarily irrelevant. Nevertheless, where intent is material, the accused is entitled to show that he was in such a condition through drink, at the time of the act, that he could not appreciate its probable effects (*g*). In judging, however, of a party's state of mind, it is often important to consider not only his acts, but the declarations both of himself and of others. Declarations tendered for this purpose are, of course, not to be used as evidence of the truth of the matters stated, but merely as throwing light upon his state of mind at the time (*h*).

SUB-SECT. 5—*Similar Facts.*

Similar facts.

625. Evidence of similar facts may be tendered for three main purposes: (1) To prove the occurrence of the main fact; (2) to prove that a given party was its author; (3) to prove the state of mind of that party with reference to such fact. Of these objects, the first and second have given rise to a general rule of exclusion, qualified by certain exceptions; and the third to a general rule of admission, qualified by certain exclusions. It is useful to bear in mind the precise purpose and limits of each rule, since the second might be, and indeed sometimes is, supposed to constitute merely an additional exception to the first, instead of forming an independent rule, which stands wholly outside it. The rule of exclusion may be stated as follows:—Facts similar to, but not part of, the same transaction as the main fact are not, in general, admissible to prove either the occurrence of the main fact or the identity of its author.

Origin of rule.

This rule is based, not on the logical irrelevancy of such evidence, nor, as is sometimes said, on the fact that it may be *res inter alios acta*, for it would be equally inadmissible if it were *inter partes*, but merely

(*f*) *Doucet* v. *Geoghegan* (1878), 9 Ch. D. 441, C. A.; *Platt* v. *A.-G. of New South Wales* (1878), 3 App. Cas. 336, P. C.; *Re Grove, Vaucher* v. *Treasury Solicitor* (1888), 40 Ch. D. 216, 229, 237, 239.

(*g*) *R.* v. *Haden* (1909), 2 Cr. App. Rep. 148; and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 242, 243.

(*h*) Thus, in an action for malicious prosecution, the question being whether the defendant acted in good faith in giving the plaintiff into custody, the fact that he had obtained the opinion of counsel justifying such a course, together with the contents of the opinion, were received in his favour, thou h they would not have been evidence of any facts therein asserted (*Ravenga* v. *Mackintosh* (1824), 2 B. & C. 693).

on the inconvenience and delay its admission might occasion, since it would tend to confuse the jury by raising collateral issues, and prejudice the parties by permitting attacks to be made without notice. The law assumes that litigants come into court ready to meet the specific case launched against them, but no man can be prepared to repel charges which may extend over the whole of his lifetime (*i*).

Inadmissible to prove occurrence of main fact.

In illustration of the first branch of the rule, *i.e.*, that similar facts are inadmissible to prove the occurrence of the main fact, may be cited a case in which the question was whether a certain brewer supplied good beer to a publican. The brewer sought to establish this by proving, *inter alia*, that during the period in question he supplied good beer to other publicans. The evidence was rejected, the court remarking that a man might deal well with one and not with others (*j*). So, where the question was whether a surgeon had performed a certain operation negligently, evidence that he had been negligent or skilful in performing similar operations on other patients was rejected (*k*); but where a practice to do or omit a particular act is in issue, evidence of the act or omission on several occasions is admissible (*l*).

Criminal cases.

In neither of the above cases, it may be observed, was the identity of the party doing the act in any sense in question. In criminal cases, however, it is mainly on the latter point that the evidence is important, and has, in practice, been tendered and ruled upon. The criminal act itself, the *corpus delicti*, is, *primâ facie* at least, assumed to have been established; and the question then arises, Was the prisoner the doer thereof? In order to establish this, evidence is offered that acts of a similar class were done by him which show a disposition, habit, or propensity on his part to do such acts, and a consequent probability that he did the act in question.

Proof of similar acts inadmissible.

It is to this proposition that the second branch of the rule applies; and although in everyday life inferences of the above kind are constantly drawn and acted upon, the law, nevertheless, regards them as unsafe, and will, in general, exclude the facts which give rise to them (*m*). Thus, if A. was charged with forging B.'s signature to a bill of exchange, and in order to connect A. with the crime it was proposed to show that he had forged B.'s signature in other instances, the evidence would be rejected (*n*), and, as here

(*i*) Where the charge is one of being an habitual criminal, the grounds of the charge must be stated in the notice of intention to raise it in a general way, and where evidence of previous bad conduct is admissible will depend on the circumstances of the case (*R.* v. *Turner*, [1910] 1 K. B. 346).

(*j*) *Holcombe* v. *Hewson* (1810), 2 Camp. 391; *Manchester Brewery Co.* v. *Coombs* (1900), 82 L. T. 347; but compare *Holden* v. *Bostock & Co., Ltd.* (1902), 50 W. R. 323, C. A., and *Bostock & Co., Ltd.* v. *Nicholson & Co., Ltd.*, [1904] 1 K. B. 725.

(*k*) *R.* v. *Whitehead* (1848), 3 Car. & Kir. 202; and see *Brown* v. *Eastern and Midlands Rail. Co.* (1889), 22 Q. B. D. 391, 393, C. A.; *Hales* v. *Kerr*, [1908] 2 K. B. 601, where, in an action against a barber by a customer who had contracted a contagious disease, evidence of witnesses who had also contracted the disease after being shaved at the defendant's shop was admitted; *McAllum* v. *Reid* (1869), L. R. 3 A. & E. 57, n.

(*l*) *Hales* v. *Kerr*, *supra*.

(*m*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 380, 381.

(*n*) *Griffits* v. *Payne* (1839), 11 Ad. & El. 131, 133, *per* Lord DENMAN, C.J.; *Viney* v. *Barss* (1795), 1 Esp. 293; *Balcetti* v. *Serani* (1792), Peake, 192, 193 [142, 143].

SECT. 2. Facts relevant to the Issue.

the parties would be the same in both cases, namely, the Crown and the prisoner, the objection of *res inter alios acta* could have no application, and the true ground of exclusion must be sought elsewhere.

Exceptions.

626. Upon the above rule, however, certain exceptions have from time to time become engrafted, and in several instances similar facts may be received either to show the existence of the main fact (*o*), or to identify its causative agency. Thus, in divorce cases, both ante-nuptial incontinence and post-nuptial acts, prior or subsequent to those charged in the petition, may be received to prove a wife's adultery with the co-respondent (*p*). To prove agency, repeated acts thereof are admissible (*q*), although no multiplication of acts by a special agent can be received to establish a general agency (*r*), nor is evidence of this kind allowable in proof of partnership (*s*). Evidence of similar facts may, however, sometimes be resorted to on questions of title. Thus, not only are repeated acts of ownership with respect to the same property admissible in proof of this issue, but in certain cases even acts done with respect to other places, provided the latter are connected with the *locus in quo* by "such a common character of locality as to give rise to the inference that the owner of one is likely to be the owner of the other"(*t*). This principle has been applied to the waste lands of a manor (*u*), to roads (*x*), rivers (*a*), inland lakes (*b*), woods, hedges (*c*), and the like. Manorial and trade customs are also similarly provable (*d*). When the behaviour of animals is in question, it is admissible to prove not only the doings of the same animal on different occasions, but even those of other animals of the same species (*e*). And the operation of physical agencies may be shown in the same way, *e.g.*, of poisons (*f*), explosives (*g*), noxious discharges from works (*h*), sparks from a railway engine (*i*), or infection from a hospital (*ii*).

(*o*) *E.g.*, to show that defendant had given orders for work on a house; evidence that he had given similar orders for other work on the same house may be admitted (*Woodward* v. *Buchanan* (1870), L. R. 5 Q. B. 285).

(*p*) *Wales* v. *Wales*, [1900] P. 63; *Cantello* v. *Cantello* (1896), *Times*, 1st February; *Howard* v. *Howard* (1904), *Times*, 14th July.

(*q*) *Blake* v. *Albion Life Assurance Society* (1878), 4 C. P. D. 94.

(*r*) *Barrett* v. *Irvine*, [1907] 2 I. R. 462, C. A.

(*s*) *Kennedy* v. *Dodson*, [1895] 1 Ch. 334, C. A.

(*t*) *Jones* v. *Williams* (1837), 2 M. & W. 326, *per* PARKE, B., at p. 331; *Lord Advocate* v. *Blantyre* (*Lord*) (1879), 4 App. Cas. 770, 791, 792.

(*u*) *Doe* d. *Barrett* v. *Kemp* (1835), 2 Bing. (N. C.) 102.

(*x*) *R.* v. *Brightside Bierlow* (*Inhabitants*) (1849), 13 Q. B. 933.

(*a*) *Neill* v. *Devonshire* (*Duke*) (1882), 8 App. Cas. 135; compare *Frost* v. *Richardson* (1910), 103 L. T. 22 (mill tail of mill built across navigable river not part of river).

(*b*) *Bristow* v. *Cormican* (1878), 3 App. Cas. 641, 670.

(*c*) *Jones* v. *Williams*, *supra*.

(*d*) *Anglesey* (*Marquis*) v. *Hatherton* (*Lord*) (1842), 10 M. & W. 218; as to trade customs, see p. 444, *ante*.

(*e*) *Brown* v. *Eastern and Midlands Rail. Co.* (1889), 22 Q. B. D. 391, C. A.

(*f*) *R.* v. *Geering* (1849), 18 L. J. (M. C.) 215; *R.* v. *Flannagan and Higgins* (1884), 15 Cox, C. C. 403.

(*g*) *R.* v. *Bernard* (1858), 1 F. & F. 240; *R.* v. *McGrath and McKevitt* (1881), 14 Cox, C. C. 598.

(*h*) *Tennant* v. *Hamilton* (1839), 7 Cl. & Fin. 122.

(*i*) *Aldridge* v. *Great Western Rail. Co.* (1841), 3 Man. & G. 515; *Piggot* v. *Eastern Counties Rail. Co.* (1846), 3 C. B. 229.

(*ii*) *Metropolitan Asylum District* (*Managers*) v. *Hill* (1882), 47 L. T. 29, H. L.

SECT. 2.
Facts relevant to the Issue.

Admissible to prove state of mind.

627. Evidence of similar facts, although in general inadmissible to prove the main fact or the connection of the parties therewith, is receivable, after evidence *aliunde* on these points has been given, to show the state of mind of the parties with regard to such fact. This rule, it will be observed, is not an exception to the preceding one, which forbids the proof of a criminal act by such evidence, but operates independently of it, and has a wholly different aim and scope, for it is always supposed that the doing of the act, as a fact capable of external observation, is first confessed, or that there is sufficient independent testimony on the subject to be laid before a jury. Were the law otherwise, it is obvious that under the pretence of proving the prisoner's state of mind the external act itself could be proved, and that the common law principle would thus be wholly set aside (*j*). Under the present rule, then, after the above foundation has been laid, evidence of similar facts may be legitimately received to prove a party's knowledge of the nature of the main fact or transaction, or his intent with respect thereto (*k*). The same principle is applicable to proof of fraud or malice (*l*). Thus, where A. was charged with fraudulently obtaining credit for board and lodging from B., evidence that shortly before he had left his previous landlord without paying his rent, and still owed this money when he went to lodge with B., was received to show his fraudulent intent with regard to the latter (*m*). And in libel cases, to establish malice, the publication by the defendant of other libels concerning the plaintiff, both prior and subsequent to that in issue, may be shown, together with all the circumstances attending their publication (*n*). And, in general, wherever it is necessary to rebut (even by anticipation) the defence of accident, mistake, or other innocent condition of mind, evidence that the defendant has been concerned in a systematic course of conduct of the same specific kind as that in question may be given (*o*). To admit evidence under this head, however, the other acts tendered must be of the same specific kind as that in question, and not of a

Evidence relating to collateral facts is only admissible when such facts will, if established, afford a reasonable presumption as to the matter in dispute, and when such evidence is reasonably conclusive (*ibid.*, *per* Lord WATSON, at p. 35).

(*j*) *R.* v. *Hall* (1887), 5 New Zealand Law Reports, C. A., 93.

(*k*) Thus, where the question was whether A. had attempted to obtain money from B. by falsely pretending that a certain article was a diamond ring, the fact that A. had previously attempted to obtain money from other persons by false representations as to the genuineness of jewellery was admitted to show his knowledge that the ring in question was not genuine (*R.* v. *Francis* (1874), L. R. 2 C. C. R. 128; *R.* v. *Ollis*, [1900] 2 Q. B. 758, C. C. R). Knowledge that money was counterfeit (*R.* v. *Foster* (1855), 24 L. J. (M. C.) 134, C. C. R.), or that an agency was dangerous (*R.* v. *Cooper* (1849), 3 Cox, C. C. 547, 549, 550), may be similarly shown; and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 381, 683.

(*l*) *Blake* v. *Albion Life Assurance Society* (1878), 4 C. P. D. 94; *Barnes* v. *Merritt & Co.* (1899), 15 T. L. R. 419, C. A.

(*m*) *R.* v. *Wyatt*, [1904] 1 K. B. 188, C. C. R.; *R.* v. *Walford* (1907), 71 J. P. 215, C. C. R.; *R.* v. *Smith* (1905), 92 L. T. 208, C. C. R.; *R.* v. *Rhodes*, [1899] 1 Q. B. 77, C. C. R.; and see *R.* v. *Ollis*, [1900] 2 Q. B. 758, C. C. R.

(*n*) *Barrett* v. *Long* (1851), 3 H. L. Cas. 395; *Pearson* v. *Lemaitre* (1843), 5 Man. & G. 700

(*o*) *R.* v. *Geering* (1849), 18 L. J. (M. C.) 215; *R.* v. *Garner* (1863), 3 F. & F. 681; *R.* v. *Cotton* (1873), 12 Cox, C. C. 400, following *R.* v. *Geering*, *supra*.

SECT. 2. Facts relevant to the Issue.

different character (*p*). And the acts tendered must also have been proximate in point of time to that in question (*q*). If, however, these conditions concur, it is no objection that the similar facts are the subject of prior indictments on which the defendant has already been acquitted (*r*), or of separate indictments still to be tried (*s*).

SUB-SECT. 6.—*Character.*

Character.

628. When a party's character is not directly in issue in the proceedings, but is merely tendered in proof of some other fact, it is, as a general rule, excluded—not because it may not in strictness be logically relevant, but for reasons of policy and fairness, since no litigant can be prepared to protect himself against imputations made without previous notice, and which may range over the whole of his career (*a*). Accordingly, it is not primarily permissible in a criminal case to adduce evidence that the accused either bears a bad general reputation in the community, or has a natural disposition to commit crimes of the class charged (*b*). And the converse of the rule has also sometimes been applied—*e.g.*, in a divorce case, to disprove a particular act of cruelty, the respondent has not been allowed to call evidence that he was of a generally humane disposition (*c*). The above rule, however, is not invariable, and in criminal cases it has been relaxed to a certain extent *in favorem libertatis* (*d*).

Evidence of character in civil cases.

629. In civil cases, evidence as to character, though character is not directly in issue, is admissible in two classes of cases: (1) To impeach the credit of witnesses (*e*); and (2) in reduction of damages. Under the latter head, the bad character of the plaintiff in the case of actions for libel (*f*) or breach of

(*p*) Thus, on a charge of obtaining a pony and trap by false pretences, evidence that the accused had afterwards obtained a quantity of oats and fodder from another party was rejected, as the two acts were dissimilar (*R.* v. *Fisher*, [1910] 1 K. B. 149, C. C. A., followed and approved in *R.* v. *Ellis*, [1910] 2 K. B. 746, C. C. A.; *Makin* v. *A.-G. for New South Wales*, [1894] A. C. 57, P. C.; and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 380.

(*q*) *R.* v. *Wyatt*, [1904] 1 K. B. 188, C. C. R.; *R.* v. *Smith* (1905), 92 L. T. 208, 209, C. C. R.; *R.* v. *Walford* (1907), 71 J. P. 215, C. C. R.

(*r*) *R.* v. *Ollis*, [1900] 2 Q. B. 758, C. C. R.

(*s*) *R.* v. *Jones and Hayes* (1877), 14 Cox, C. C. 3.

(*a*) *R.* v. *Rowton* (1865), 34 L. J. (M. C.) 57, C. C. R., but see dissenting judgments of ERLE, C.J., and WILLES, J.

(*b*) *R.* v. *Rowton*, *supra*; *R.* v. *Cole* (1810), cited 1 Phillipps and Arnold, Law of Evidence, 10th ed., 508, C. C. R.

(*c*) *Narracott* v. *Narracott* (1864), 33 L. J. (P. M. & A.) 61.

(*d*) As to evidence of character in criminal cases, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 282 *et seq.*

(*e*) See p. 600, *post*.

(*f*) *Scott* v. *Sampson* (1882), 8 Q. B. D. 491. The evidence must be confined to the bad general reputation of the plaintiff, or, in cases where the plaintiff is libelled in respect of his calling, to his general reputation in that capacity, *e.g.*, his general reputation as a jockey when he is libelled as a jockey (*Wood* v. *Cox* (1888), 4 T. L. R. 550, 652, 655; and compare *Wood* v. *Durham* (*Earl*) (1888), 21 Q. B. D. 501). Rumours or suspicions to the same effect as the libel, and particular facts showing bad character or disposition, are inadmissible (*Scott* v. *Sampson*, *supra*). Moreover, where the truth of the libel has not been pleaded, the defendant cannot give evidence in chief of the circumstances under which the

promise (*g*), and the bad character of the woman betrayed in the case of actions for seduction (*h*) or petitions for damages for adultery (*i*), may be proved in chief in reduction of damages, irrespective of the right to cross-examine such person should he or she testify as a witness.

SECT. 3.—*Hearsay.*

SUB-SECT. 1.—*General Rule and Exceptions.*

Hearsay: general rule.

630. As a general rule, statements made by persons not called as witnesses are inadmissible to prove the truth of the facts stated. The term "hearsay," in the present connection, imports a purpose, and not a quality. A statement is hearsay if tendered to prove the truth of the facts asserted; it is original, or circumstantial, evidence if its materiality depends on the fact that it was made, and not on the fact that it was true. This main test, or distinction, if carefully borne in mind, will suffice to obviate many of the difficulties occurring in the law of evidence; but it is not always easy to apply. Thus, A. gives B. into custody for forging C.'s acceptance to a bill of exchange. The charge is dismissed, and B. sues A. for malicious prosecution. A. testifies that on presenting the bill to C., the latter said: "It is a forgery; B. has forged it." C.'s statement is hearsay and inadmissible if tendered to prove the forgery, but is relevant and admissible on the question of A.'s *bona fides*, in order to show the information on which he acted (*a*). If A. had taken counsel's opinion before acting, the contents of the opinion would be admissible for the same purpose (*b*).

Reasons for rejection.

631. The reasons usually advanced for the rejection of hearsay evidence are numerous, chief among them being—the irresponsibility of the original declarant, the depreciation of truth in the process of repetition, the opportunities for fraud its admission would open, and the waste of time involved in listening to idle rumour. In strictness, however, only two objections appear to

libel was published, or of the character of the plaintiff, in mitigation of damages, without the leave of the judge, unless, seven days at least before the trial, he furnishes particulars to the plaintiff of the matters of which he intends to give evidence (R. S. C., Ord. 36, r. 37; and see title LIBEL AND SLANDER).

(*g*) *Foulkes* v. *Sellway* (1800), 3 Esp. 236. The evidence here may embrace the plaintiff's general character for, as well as specific acts of, immorality (*ibid.*).

(*h*) *Bamfield* v. *Massey* (1808), 1 Camp. 460; *Dodd* v. *Norris* (1814), 3 Camp. 519 (evidence of general immoral character, as well as prior, but not subsequent acts of immorality).

(*i*) *Smith* v. *Allison* (1765), Buller, Nisi Prius, 27. The wife's general immoral character, and previous but not subsequent acts of adultery (*Winter* v. *Henn* (1831), 4 C. & P. 494); as well as the husband's general character for infidelity, and particular acts thereof (*Bromley* v. *Wallace* (1803), 4 Esp. 237).

(*a*) *Perkins* v. *Vaughan* (1842), 6 Jur. 1114.

(*b*) *Ravenga* v. *Mackintosh* (1824), 2 B. & C. 693. Declarations which are a part of the *res gesta*, or which amount to acts of ownership, as leases, licences, and grants, or which constitute motive, convey notice or show good faith, fraud, negligence, or other states of mind, are all relevant, or the reverse, irrespective of the truth or falsity of the particular statement.

SECT. 3. Hearsay.

be essential and decisive, namely, the absence of an oath and the deprivation of cross-examination (*c*). It is true that the presence of the witness is generally required as an additional safeguard to testimony, but this seems to be exacted primarily to ensure cross-examination, and only secondarily to observe demeanour (*d*); and, provided that the requirements as to oath and cross-examination have been fulfilled, the physical absence of the witness will not necessarily entail the exclusion of his evidence.

Exceptions.

632. The general rule against hearsay evidence is subject to three important classes of exceptions: (1) Admissions and confessions; (2) statements by deceased persons; and (3) statements contained in public documents (*e*).

In interlocutory proceedings (*f*), and in taking accounts (*g*), similar evidence may also, within certain limits, be received; and on the hearing of a summons for directions the judge may order any particular fact to be proved by statement on oath of information and belief (*h*).

Hearsay, when falling within any of the above exceptions, is receivable notwithstanding that direct evidence of the facts involved may also be available.

SUB-SECT. 2.—*Admissions and Confessions.*

Admissions.

633. In civil cases, statements made out of court by a party to the proceedings are evidence of the truth of the facts asserted against, but not in favour of, such party (*i*).

Although what a party has said on some former occasion may, without injustice, be presumed to be true as against himself, yet no presumption of truth arises when such statements are tendered as evidence in his own favour; otherwise, every man, if he were in a difficulty, or in view of one, might make declarations to suit his own case (*k*). This objection does not apply when his own statements are tendered for some other purpose than to prove their truth, and they may accordingly always be proved by him when offered merely as original or circumstantial evidence (*l*).

(*c*) Wigmore, System of Evidence, s. 1363.

(*d*) *Ibid.*, s. 1365.

(*e*) For instances of the exceptions in criminal cases, see also title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 393, note (*i*).

(*f*) R. S. C., Ord. 38, r. 3; *Re Young* (*J. L.*) *Manufacturing Co., Ltd.*, *Young* v. *Young* (*J. L.*) *Manufacturing Co., Ltd.*, [1900] 2 Ch. 753, C. A.; *Lumley* v. *Osborne*, [1901] 1 K. B. 532.

(*g*) R. S. C., Ord. 33, r. 3.

(*h*) R. S. C., Ord. 30, r. 7.

(*i*) Even though such party is only trustee for another (*Bauerman* v. *Radenius* (1798), 7 Term Rep. 663; and see note (*p*), p. 460, *post*), but the acts of one who is sued as a mere nominal defendant are not admissible in favour of the plaintiff against the real defendant who has been substituted for him (*Armstrong* v. *Normandy* (1850), 5 Exch. 409).

(*k*) *R.* v. *Hardy* (1794), 24 State Tr. 199, 1093—1094; *R.* v. *Petcherini* (1855), 7 Cox, C. C. 79, 82, 83; *R.* v. *Haines* (1858), 1 F. & F. 86. On a similar principle, a married woman cannot by any admission she can make get rid of a restraint on anticipation (*Bateman* (*Lady*) v. *Faber*, [1898] 1 Ch. 144, C. A.).

(*l*) See pp. 436 *et seq.*, *ante*.

When circumstances receivable.

634. As the value of an admission depends on the circumstances in which it was made, these are always receivable to affect its weight. Thus, the party against whom it is tendered may show that it was made in ignorance of the facts, or when his mind was in an abnormal condition. Moreover, the law has always been peculiarly tender in its treatment of efforts made by the parties to compromise their disputes, and accordingly it will altogether exclude proof of negotiations entered into for that purpose either expressly or impliedly "without prejudice." In order, however, to entitle communications to protection on this ground, it must appear that there was a dispute or negotiation impending between them, and that the letters were written, or interviews held, *bonâ fide* with a view to its settlement (*m*). Thus, a letter marked "Without prejudice," but containing a threat against the recipient should the offer not be accepted, is admissible to prove the threat (*n*); so, where the alternative to acceptance was that the writer would commit an act of bankruptcy (*o*). Letters marked "Without prejudice" protect subsequent correspondence on the same subject (*p*); and generally such letters cannot be used even on a question of costs (*q*). It has also been held, with perhaps more questionable propriety, that independent facts admitted during negotiations for a settlement are not protected. Thus, in an action by A. against B. on a bill of exchange, A. tendered evidence of certain proposals for payment made by B. to him at a confidential interview, as well as the fact that B. had, at the same interview, admitted the signature of the bill. The court rejected the proposals, but allowed B.'s admission to be proved (*a*).

Letters "without prejudice."

When a party sues, or is sued, personally, any admission which he has previously made, even in a representative capacity, is evidence against him (*b*). But the converse does not hold, and when sued or suing as a representative, admissions made by him before sustaining that character, or after it has ceased, are not binding on his principal (*c*).

Whole statement receivable.

635. A party against whom an admission has been proved may call upon his adversary, as a part of the latter's case, to prove so much of the entire statement, document, or correspondence containing or referred to in the admission, as is necessary to explain it, even though such additional part may be unfavourable to the adversary proving the admission (*d*). And the same rule applies

(*m*) *Re Daintrey, Ex parte Holt*, [1893] 2 Q. B. 116.

(*n*) *Kurtz & Co.* v. *Spence & Sons* (1887), 57 L. J. (CH.) 238. See, further, as to letters written without prejudice, p. 557, *post*.

(*o*) *Re Daintrey, Ex parte Holt, supra*.

(*p*) *Paddock* v. *Forrester* (1841), 3 Scott (N. R.), 734; *Peacock* v. *Harper* (1877), 26 W. R. 109; *Oliver* v. *Nautilus Steam Shipping Co.*, [1903] 2 K. B. 639, C. A.

(*q*) *Walker* v. *Wilsher* (1889), 23 Q. B. D. 335, C. A.

(*a*) *Waldridge* v. *Kennison* (1794), 1 Esp. 143.

(*b*) *Stanton* v. *Percival* (1855), 5 H. L. Cas. 257.

(*c*) *New, Prance, and Garrard's Trustee* v. *Hunting*, [1897] 1 Q. B. 607, 611; *Legge* v. *Edmonds* (1855), 25 L. J. (CH.) 125, 141.

(*d*) *Thomson* v. *Austen* (1823), 2 Dow. & Ry. (K. B.) 358, 361; *Fletcher* v. *Froggatt* (1827), 2 C. & P. 569; *Cobbett* v. *Grey* (1850), 19 L. J. (EX.) 137; but the fact that such additional part contradicts the admission does not preclude

SECT. 3. Hearsay.

to interrogatories (*e*). The jury may, however, attach different degrees of credit to the different parts (*f*). Distinct portions of the communication, not forming part of or essential to explain the admission, cannot, however, be proved under this head, however material to the case (*g*).

Form of admission immaterial.

636. The particular form in which an admission was made is, so far as its admissibility goes, generally immaterial. Thus, not only are solemn admissions on oath, such as those contained in affidavits and answers to interrogatories in the same or former proceedings (*h*), receivable against a party, but also declarations in wills (*i*), recitals or descriptions in deeds (*k*), receipts (*l*), bankers' pass-books (*m*), cases for the opinion of counsel (*n*), maps and surveys (*o*), probate stamps and executors' inventories (*p*), debtors' statements in bankruptcy proceedings (*q*), and even statements contained in cancelled or invalid instruments (*r*), though not (in civil cases) in unstamped ones (*s*). On the other hand, neither pleadings, unless upon oath (*t*), nor statements or depositions of witnesses called by a litigant are evidence against him in other proceedings under this head, unless expressly caused to be made or knowingly used as true by him for the purpose of proving some particular fact (*a*). Generally, however, any document which a party has signed or otherwise recognised, adopted, or acted upon, may be tendered against him as an admission, and so as evidence of the truth of its contents (*b*), though mere failure to answer a letter or object to an account will not necessarily have this effect (*c*).

the statement being regarded as some evidence of the admission (*Brown* v. *Wren Brothers*, [1895] 1 Q. B. 390).

(*e*) R. S. C., Ord. 31, r. 24; *Lyell* v. *Kennedy* (1884), 27 Ch. D. 1, 15, 29, C. A.

(*f*) *Bermon* v. *Woodbridge* (1781), 2 Doug. (K. B.) 781, 788; *Smith* v. *Blandy* (1825), Ry. & M. 257.

(*g*) *Prince* v. *Samo* (1838), 7 Ad. & El. 627.

(*h*) R. S. C., Ord. 31, r. 24; *Fleet* v. *Perrins* (1868), L. R. 3 Q. B. 536.

(*i*) *Re Hoyle, Hoyle* v. *Hoyle*, [1893] 1 Ch. 84, C. A.

(*k*) *Carpenter* v. *Buller* (1841), 8 M. & W. 209.

(*l*) *Lee* v. *Lancashire and Yorkshire Rail. Co.* (1871), 6 Ch. App. 527. See also title CONTRACT, Vol. VII., p. 446, note (*g*).

(*m*) *Gaden* v. *Newfoundland Savings Bank*, [1899] A. C. 281, 286, P. C.; *Holland* v. *Manchester and Liverpool District Banking Co., Ltd.* (1909), 25 T. L. R. 386; *Kepitigalla Rubber Estates, Ltd.* v. *National Bank of India*, [1909] 2 K. B. 1010; and see title BANKERS AND BANKING, Vol. I., p. 619.

(*n*) *Meath* (*Bishop*) v. *Winchester* (*Marquis*) (1836), 3 Bing. (N. C.) 183, H. L.

(*o*) *Craven* (*Earl*) v. *Pridmore* (1902), 18 T. L. R. 282, C. A.

(*p*) Taylor, Law of Evidence, 10th ed., s. 860.

(*q*) *Hart* v. *Newman* (1811), 3 Camp. 13.

(*r*) *Breton* v. *Cope* (1791), Peake, 43.

(*s*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 14.

(*t*) *Boileau* v. *Rutlin* (1848), 2 Exch. 665.

(*a*) *Ibid.*; *Brickell* v. *Hulse* (1837), 7 Ad. & El. 454; *Gardner* v. *Moult* (1839), 10 Ad. & El. 464; *Richards* v. *Morgan* (1863), 4 B. & S. 641; *Simmons* v. *London Joint Stock Bank* (1890), 62 L. T. 427; *Evans* v. *Merthyr Tydfil Urban Council*, [1899] 1 Ch. 241, C. A.

(*b*) *Evans* v. *Merthyr Tydfil Urban Council, supra*; *Freeman* v. *Cox* (1878), 8 Ch. D. 148 (failure to dispute affidavit that money was in defendant's hands as executor treated as an admission by him); *Hampden* v. *Wallis* (1884), 27 Ch. D. 251 (admission in recital of settlement).

(*c*) *Fairlie* v. *Denton* (1828), 3 C. & P. 103; *Doe* d. *Frankis* v. *Frankis* (1840), 11 Ad. & El. 792; *Wiedemann* v. *Walpole*, [1891] 2 Q. B. 534, C. A., where, in

Statements in a party's presence.

637. Statements made in the presence and hearing of a party are also evidence against him under the present head, to the extent that his answers or conduct show that he accepts the assertions made (*d*). And his mere silence, where he is reasonably called on to reply, will have the same effect (*e*). Where, however, a reply cannot reasonably be expected, silence will afford no inference of assent, *e.g.*, where the party was deaf, ignorant of the language, intoxicated, asleep (*f*), or *in extremis* (*g*). So, as to statements made in a party's presence in the course of judicial inquiries, for here the regularity of the proceedings prevents free interposition (*h*).

Admissions by privies.

638. Not only may a party's own statements be thus given in evidence against him, but those also of other persons who were at the time in privity with him. The term "privity" implies mutual or successive relationship to the same interests, and the admissions of privies are receivable because they are identified in interest with the party against whom they are tendered (*i*). Privies are of three classes: (1) Privies in blood, as heir and ancestor; (2) privies in law or representation, as executor and testator; and (3) privies in estate or interest, as vendor and purchaser, grantor and grantee, lessor and lessee.

Admissions made by persons so connected with a party are, however, only *primâ facie* evidence against him, and may be contradicted or explained in the same manner as if made by himself.

The following are the chief relationships of this class:—

Predecessors in title.

Statements made by a predecessor in title, when in possession of property, and affecting his rights thereto, are evidence against, but not in favour of, a party claiming through him by title subsequent to the admission (*j*). But the rule is only co-extensive with the identity

an action for breach of promise by A. against B., copies of letters written both by A. and by the rector of her parish to B., in which they alleged that B. had promised to marry A., but to which B. had returned no answer, were rejected both as proof and as corroboration of the promise. Compare *Gaskill* v. *Skene* (1850), 14 Q. B. 664.

(*d*) *R.* v. *Norton*, [1910] 2 K. B. 496; *Child* v. *Grace* (1825), 2 C. & P. 193; *Jones* v. *Morrell* (1844), 1 Car. & Kir. 266. In *R.* v. *Smith* (1897), 18 Cox, C. C. 470, HAWKINS, J., held that a party's denial of a statement made in his presence excluded it; but in *R.* v. *Bromhead* (1906), 71 J. P. 103, C. C. R., this proposition was considered too wide, and the court, while declining to lay down any general rule, said that each case must be decided on its own circumstances.

(*e*) *R.* v. *Norton*, *supra*; *Wiedemann* v. *Walpole*, [1891] 2 Q. B. 534, 539, C. A.; *Richards* v. *Gellatly* (1872), L. R. 7 C. P. 127, 131; *R.* v. *Tate*, [1908] 2 K. B. 680, 683, C. A. Thus, in a breach of promise case, evidence that the plaintiff had said to the defendant, in circumstances which made it reasonable to expect an answer, "You know you have always promised to marry me, and now you don't keep your word," to which the defendant made no reply, was received as some evidence of corroboration of the promise (*Bessela* v. *Stern* (1877), 2 C. P. D. 265, C. A.).

(*f*) *Wright* v. *Tatham* (1838), 5 Cl. & Fin. 670, 701, 722, H. L.

(*g*) *R.* v. *Mitchell* (1892), 17 Cox, C. C. 503, 508.

(*h*) *R.* v. *Turner* (1832), 1 Mood. C. C. 347; *R.* v. *Mitchell* (1892), 17 Cox, C. C. 503.

(*i*) The answers of a bankrupt, however, are, on special grounds, not admissible against other parties even in the same proceedings (*Re Brünner* (1887), 19 Q. B. D. 572).

(*j*) *Melbourne Banking Corporation* v. *Brougham* (1882), 7 App. Cas. 307, P. C. Where A. sued B., as administrator of C., an intestate, to recover a watch, a declaration by C. that he had given the watch to A. is evidence against B. (*Smith* v. *Smith* (1836), 3 Bing. (N. C.) 29). And where A. sued B. for trespass

SECT. 3. Hearsay.

of the interest, and, accordingly, admissions by a subordinate will not affect the estate of a superior in title. Thus, a tenant cannot by his admissions restrict his landlord's rights (*k*); nor can a tenant for life the title of the remainderman (*l*). In this connection, however, a distinction exists between the case of an assignee of land and that of an assignee of a negotiable instrument, the former having, in general, no title unless his assignor had, while the latter may have a good title though his assignor had none. Consequently, unless the plaintiff suing on a bill or note stands on the title of the former owner, as by taking the bill with notice, or without consideration, or when overdue, the declarations of the former holder are not receivable against him (*m*).

Nominal and real parties.

The admissions of a real party who, though not named on the record, has a substantial interest in the event are evidence against a nominal party to the proceedings. The admissions must, however, have been made during the subsistence of the interest of the real party, and are only receivable so far as the rights of the two are identical. Thus, the admissions of a *cestui que trust* are evidence against his trustee (*n*), as also are those of a shipowner against the master, where the latter sues for freight (*o*). And, conversely, the principal may be affected by the admissions of his representative, if made while the latter filled that capacity (*p*). So, also, the admissions of an executor are receivable against a legatee (*q*), though not against the heir or devisee, since here the two interests are distinct (*r*). This rule, however, does not apply to the case of a guardian or next friend of an infant, these being merely officers appointed for the latter's protection, and, accordingly, admissions made by either are not evidence against the infant (*s*).

Partners, co-contractors.

Admissions or representations made by a partner concerning the partnership business, and in its ordinary course, are evidence against the firm (*t*). And an admission by one of several joint

to land, and B. tendered evidence that C., a former proprietor of A.'s estate, had, while in possession thereof, stated that he (C.) had only a right of common over the land, but no right to enclose it, this was admitted against A., although A. was alive and might have been called as a witness (*Woolway* v. *Rowe* (1834), 1 Ad. & El. 114). On the other hand, a statement made by a mortgagor, after he had assigned the equity of redemption, that he had paid interest on the mortgage up to a certain date would be inadmissible (*Dysart Peerage Case* (1881), 6 App. Cas. 489, 500). See also *Fenwick* v. *Thornton* (1827), Mood. & M. 51.

(*k*) *Papendick* v. *Bridgwater* (1855), 5 E. & B. 166; *Blandy-Jenkins* v. *Dunraven* (*Earl*), [1899] 2 Ch. 121, C. A.

(*l*) *Howe* v. *Malkin* (1878), 27 W. R. 340; unless the admission is accompanied by some act (*ibid.*).

(*m*) *Barough* v. *White* (1825), 4 B. & C. 325; *Beauchamp* v. *Parry* (1830), 1 B. & Ad. 89; Byles on Bills, 16th ed., p. 432.

(*n*) *Harrison* v. *Vallance* (1822), 1 Bing. 45; *May* v. *Taylor* (1843), 6 Man. & G. 261.

(*o*) *Smith* v. *Lyon* (1813), 3 Camp. 465.

(*p*) *Legge* v. *Edmonds* (1855), 25 L. J. (CH.) 125, 141; *New, Prance, and Garrard's Trustee* v. *Hunting*, [1897] 1 Q. B. 607, 611.

(*q*) *Concha* v. *Concha* (1886), 11 App. Cas. 541, 553.

(*r*) *Fordham* v. *Wallis* (1853), 10 Hare, 217.

(*s*) *Ingram* v. *Little* (1883), 11 Q. B. D. 251; though as to interrogatories and inspection or production of documents, see now R. S. C., Ord. 31, r. 29, and title DISCOVERY ETC., Vol. XI., p. 35.

(*t*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 15; and see title PARTNERSHIP.

contractors concerning the joint undertaking is receivable against the others, whether sued or suing jointly or severally (*u*).

The interest entitling such evidence to be received must, however, be of a joint, and not merely of a common, nature. Thus, though the admissions of joint tenants would be evidence against each other, the rule does not extend to those of tenants in common (*a*), nor to mere co-part-owners of a vessel, as distinguished from co-partners therein or in a part thereof (*b*). Moreover, the admissions must have been made during the continuance of the joint interest, and not before it commenced (*c*), nor after it had ceased (*d*). The same rule applies to co-representatives. Thus, admissions made by a trustee as to the receipt of money will bind his co-trustees where they are personally liable, though not otherwise (*e*). But it does not extend to co-parties in legal proceedings, *e.g.*, respondent and co-respondent (*f*), nor *à fortiori* to the case of principal and surety, for here, as the surety contracts with the creditor, there is no privity between him and the debtor (*g*).

Agents.

The admissions of an agent are evidence against his principal, either when expressly authorised by the latter, or when made on the principal's behalf in the ordinary course of some business or transaction in which the agent acted as his representative (*h*). The agent's admissions, however, must have been made to a third person, mere reports to his own principal not being evidence against the latter (*i*).

Particular agents.

Under this head admissions made by the directors (*k*) or manager (*l*), but not by the secretary (*m*), of a company, have been received against it, when made in the course of transactions with third persons, and not as confidential communications to the company's own shareholders (*n*). So, admissions by a station-master as to the loss of goods at his station have been received against the railway company (*o*), while those by a night inspector have been rejected (*p*).

(*u*) See *Wood* v. *Braddick* (1807), 1 Taunt. 104.

(*a*) Taylor, Law of Evidence, 10th ed., ss. 750, 751; *Dan* v. *Brown* (1825), 4 Cowen, 483, 492 (American case). An acknowledgment by one of two executors and devisees in trust of real estate against the wish of the other is not binding on the two in their capacity of trustees (*Astbury* v. *Astbury*, [1898] 2 Ch. 111); nor if it does not relate to the affairs of the executorship (*Fox* v. *Waters* (1840), 12 Ad. & El. 43).

(*b*) *Jaggers* v. *Binnings* (1815), 1 Stark. 64.

(*c*) *Catt* v. *Howard* (1820), 3 Stark. 3; *Tunley* v. *Evans* (1845), 2 Dow. & L. 747.

(*d*) *Parker* v. *Morrell* (1848), 2 Ph. 453.

(*e*) *Skaife* v. *Jackson* (1824), 3 B. & C. 421; *Jago* v. *Jago* (1893), 68 L. T. 654.

(*f*) *Crawford* v. *Crawford* (1886), 11 P. D. 150.

(*g*) *Bain* v. *Cooper* (1842), 9 M. & W. 701; *Re Kitchin, Ex parte Young* (1881), 17 Ch. D. 668, C. A.

(*h*) See title AGENCY, Vol. I., p. 215.

(*i*) *Re Devala Provident Gold Mining Co.* (1883), 22 Ch. D. 593; *Cooper* v. *Metropolitan Board of Works* (1883), 25 Ch. D. 472, C. A.

(*k*) *Ibid.*

(*l*) *Simmons* v. *London Joint Stock Bank* (1890), 62 L. T. 427.

(*m*) *Bruff* v. *Great Northern Rail. Co.* (1858), 1 F. & F. 344; *Burnside* v. *Dayrell* (1849), 3 Exch. 224. See title COMPANIES, Vol. V., p. 244.

(*n*) *Re Devala Provident Gold Mining Co., supra.*

(*o*) *Kirkstall Brewery Co.* v. *Furness Rail. Co.* (1874), L. R. 9 Q. B. 468.

(*p*) *Great Western Rail. Co.* v. *Willis* (1865), 34 L. J. (C. P.) 195.

SECT. 3. Hearsay.

Similarly, the admissions of the captain of a ship are evidence against the owners, but not generally those of the officers or crew (*q*), unless made in the ship's log (*r*), nor those of the pilot (*s*).

Husband and wife.

The admissions of a wife are not, in general, receivable against her husband. Where, however, he has either expressly appointed her his agent in that behalf, or has impliedly done so, as by allowing her to conduct his business in his absence, her admissions made in the ordinary course thereof are evidence against him. Thus, her admissions as to the receipt of goods have been held to bind her husband (*t*); though not those relating to matters outside the conduct of the business—*e.g.*, the terms of his tenancy of the premises (*u*).

Solicitor and counsel.

In civil cases, the admissions of a solicitor, or of his managing clerk or agent, if made during the actual progress of litigation, are evidence against his client in the same proceeding (*a*). Indeed, if made for the express purpose of dispensing with proof at the trial, they will generally be conclusive against the client (*b*); otherwise they amount merely to *primâ facie* evidence of the facts involved (*c*). Admissions made before litigation commenced (*d*), or casually in mere conversation (*e*), or to persons other than the opposite party (*f*), will, not, however, bind the client. The rule is somewhat narrower in the case of counsel; for whereas the admissions of a solicitor bind the client if made at any time during the proceedings for which he is retained, those of counsel only bind when made on the particular occasion for which he is instructed (*g*).

Referees.

On similar principles, when a party refers to a third person for information or an opinion on a given subject, the latter's reply is, at all events, *primâ facie* evidence against the former (*h*); and if the reference has been made under an agreement in that behalf, it will probably be conclusive (*i*).

(*q*) *The Actaeon* (1853), 1 Ecc. & Ad. 176.

(*r*) *The Solway* (1885), 10 P. D. 137; *The Earl of Dumfries* (1885), 10 P. D. 31.

(*s*) *The Schwalbe* (1859), Sw. 521.

(*t*) *Clifford* v. *Burton* (1823), 1 Bing. 199; *Meredith* v. *Footner* (1843), 11 M. & W. 202.

(*u*) *Ibid.*

(*a*) *Elton* v. *Larkins* (1832), 5 C. & P. 385; *Doe* d. *Wetherell* v. *Bird* (1835), 7 C. & P. 6; *Blackstone* v. *Wilson* (1857), 26 L. J. (EX.) 229; and see title SOLICITORS. An admission by a solicitor made fraudulently is not binding on the client (*Williams* v. *Preston* (1882), 20 Ch. D. 672, C. A.).

(*b*) *Elton* v. *Larkins*, *supra*; *Langley* v. *Oxford* (*Earl*) (1836), 5 L. J. (EX.) 166.

(*c*) *Holt* v. *Squire* (1825), Ry. & M. 282.

(*d*) *Wagstaff* v. *Wilson* (1832), 4 B. & Ad. 339.

(*e*) *Petch* v. *Lyon* (1846), 15 L. J. (Q. B.) 393; *Watson* v. *King* (1846), 3 C. B. 608.

(*f*) *Wilson* v. *Turner* (1808), 1 Taunt. 398.

(*g*) *Richardson* v. *Peto* (1840), 1 Man. & G. 896; *R.* v. *Greenwich County Court* (*Registrar*) (1885), 15 Q. B. D. 54, C. A.; and see title BARRISTERS, Vol. II., p. 401.

(*h*) *Williams* v. *Innes* (1808), 1 Camp. 364; *Daniel* v. *Pitt* (1808), 1 Camp. 366, n.; *Lloyd* v. *Willan* (1794), 1 Esp. 178.

(*i*) *Price* v. *Hollis* (1813), 1 M. & S. 105. But an admission by an arbitrator that his award was improperly made is not admissible in an application to set it aside (*Re Whitley and Roberts' Arbitration*, [1891] 1 Ch. 558).

SUB-SECT. 3.—*Statements by Deceased Persons.* SECT. 3.

Hearsay.

Statements by persons since deceased.

639. The second group of exceptions to the hearsay rule consists of statements made by persons since deceased, which are admitted in proof of the facts asserted if made under certain specified conditions considered to afford a *primâ facie* guarantee of their accuracy.

The declarations so admissible are:—(i.) Declarations against Interest. (ii.) Declarations in the course of Duty. (iii.) Declarations as to Public Rights. (iv.) Declarations as to Pedigree. (v.) Dying Declarations in cases of Homicide. (vi.) Declarations by Testators as to their Wills.

Declarations falling under the first two headings are admissible upon any issue; the others are only admissible to prove the particular issue specified.

(i.) *Declarations against Interest.*

Declarations against interest.

640. Oral or written declarations made by deceased persons against their pecuniary or proprietary interests are admissible to prove the facts stated.

Requirements.

Declarations which acknowledge the payment of money due to the declarant, or charge him with the receipt of sums for which he is accountable to another, will satisfy the first-named requirement (*k*); and declarations which have been made when the declarant was in actual possession of property, and have operated in disparagement of his title thereto, will satisfy the second requirement (*l*).

On the other hand, if the statement, though against interest in other respects, does not affect the pecuniary or proprietary rights of the declarant, it will be rejected. Thus, where it was sought to prove the marriage of A. and B. by the statement of a deceased clergyman that he had married them—the circumstances being such that to have done so would render him liable to a criminal prosecution—the evidence was rejected on the ground that the detriment involved was not one of a pecuniary or proprietary nature (*m*).

(*k*) *Foster* v. *M'Mahon* (1847), 11 I. Eq. R. 287, 299; *In the Goods of Thomas* (1871), 41 L. J. (P. & M.) 32; *Wills* v. *Palmer* (1904), 53 W. R. 169. An entry made by a deceased accoucheur, in his own account-book, of the payment of his charges for attending a confinement on a certain date was received, as being against pecuniary interest, to prove the date of the child's birth (*Higham* v. *Ridgway* (1808), 10 East, 109; 2 Smith, L. C., 11th ed., 327). But the books of a firm in which entries against interest have been made by a deceased partner are not on that account admissible (*Re Fountaine, Re Dowler, Fountaine* v. *Amherst (Lord)*, [1909] 2 Ch. 382, C. A.); see also *Vivian* v. *Moat, Vivian* v. *Walker* (1881), 44 L. T. 210.

(*l*) *Peaceable* v. *Watson* (1811), 4 Taunt. 16; *Carne* v. *Nicoll* (1835), 1 Bing. (N. C.) 430; *Doe* d. *Welsh* v. *Langfield* (1847), 16 M. & W. 497; *R.* v. *Exeter Guardians* (1869), L. R. 4 Q. B. 341. A statement made by a person, while engaged in felling timber on certain land, that the land belonged to a third person, was received, after proof of the declarant's death, as evidence of the facts asserted. In this case the mere felling of timber was held to be a sufficient act of ownership to imply seisin in the declarant, so as to let in his statement in derogation of that *primâ facie* title (*Doe* d. *Stansbury* v. *Arkwright* (1833), 5 C. & P. 575; see also *Gery* v. *Redman* (1875), 1 Q. B. D. 161).

(*m*) *The Sussex Peerage* (1844), 11 Cl. & Fin. 85, 108, H. L.; *R.* v. *Birmingham Overseers* (1861), 1 B. & S. 763.

SECT. 3. Hearsay.

The declarations must have been against interest at the time they were made; it is not sufficient that they might possibly turn out to be so afterwards (*n*). Thus, where, in order to prove that A., a deceased bankrupt, owed money to B., an admission of that fact in the bankrupt's statement was tendered as being a declaration against interest, since there might be a surplus, after payment of debts, which would be diminished by the debt to B., the court rejected the evidence on the ground that the statement was not one which was, when made, adverse to the bankrupt (*o*). So, a statement of the terms of a contract will not be presumed to be against the interest of either party (*p*). But an acknowledgment by a deceased creditor of money received by him on account of a debt is receivable as a declaration against interest if made before, though not after, the debt has become statute-barred (*q*).

Knowledge unnecessary in declarant.

641. Declarations against interest are admissible although the declarant had no personal knowledge of the facts stated, but spoke or wrote merely from hearsay (*r*); and although he might even have had an interest to misstate the facts. These circumstances affect the weight, not the admissibility, of the evidence. Moreover, the declarations are receivable to prove not only the precise fact which is against interest, but any other connected facts which are necessary to explain the former, even though these may operate in the declarant's favour (*s*). On this principle, accounts have been admitted, some items of which charge the declarant, although other connected items discharge him, or even show a balance in his favour, since it is not to be presumed that a man will charge himself falsely for the mere purpose of getting a discharge; and, in the latter case, the debit items would still be against interest, since they diminish the balance in his favour (*t*). On the other hand, disconnected items, although contained in the same document or statement, will be excluded (*a*).

(ii.) *Declarations in the course of Duty.*

Declarations in the course of duty.

642. Statements made by a deceased person in the course of his duty and in the ordinary routine of his business are admissible in certain circumstances to prove the facts alleged in the pleading.

To be admissible upon this ground the statement must (a) relate to some act or transaction performed by the person making it in the ordinary course of his business and duty; (b) be made in the

(*n*) *Massey* v. *Allen* (1879), 13 Ch. D. 558.
(*o*) *Re Tollemache, Ex parte Edwards* (1884), 14 Q. B. D. 415.
(*p*) *R.* v. *Worth* (*Inhabitants*) (1843), 4 Q. B. 132.
(*q*) *Briggs* v. *Wilson* (1854), 5 De G. M. & G. 12, C. A.
(*r*) *Taylor* v. *Witham, Witham* v. *Taylor* (1876), 3 Ch. D. 605; *Percival* v. *Nanson* (1851), 7 Exch. 1.
(*s*) *Taylor* v. *Witham, Witham* v. *Taylor, supra; Hudson* v. *The Swiftsure* (*Owners*), *The Swiftsure* (1900), 82 L. T. 389.
(*t*) *Rowe* v. *Brenton* (1828), 3 Man. & Ry. (K. B.) 133, 269; *Williams* v. *Geaves* (1838), 8 C. & P. 592; *Clark* v. *Wilmot* (1841), 1 Y. & C. Ch. Cas. 53; *R.* v. *Worth* (*Inhabitants*) (1843), 12 L. J. (M. C.) 47.
(*a*) *Doe* d. *Kinglake* v. *Beviss* (1849), 7 C. B. 456; *Knight* v. *Waterford* (*Marquis*) (1841), 4 Y. & C. (EX.) 283, 293—295.

ordinary course of his business under a duty to make it; and (c) be made at or near the time at which the act or transaction to which it relates was performed (*b*).

Book entries.

(a) The entries made in business books by clerks and servants recording the transactions performed by them in their employers' business form the earliest and most frequent illustrations of the first of the above rules (*c*). Such entries have been admitted, for instance, after the death of the persons who made them, to prove the delivery of goods (*d*), the delivery of a solicitor's bill (*e*), the posting of letters (*f*), the payment of rates (*g*), the service of an order of the Court of Aldermen (*h*), and the presentment (*i*) and dishonour (*k*) of a bill of exchange. It is not necessary that the actual entry should be made by the hand of the deceased person who himself carried out the transaction recorded. It is sufficient if he sign the entry (*l*), or do any act by which he adopts it as his own, or if it be made by someone employed or authorised to make it for him. In such cases it is not required, to make the entry admissible, that the person who actually wrote it should be called as a witness, although he may be still alive (*m*).

Duty to make declaration.

(b) The statement must not only relate to some act done by the person making it, but must be made by him in performance of a duty to make it (*n*). Such duty may be imposed by or implied

(*b*) See *Mercer* v. *Denne*, [1905] 2 Ch. 538, C. A., *per* VAUGHAN WILLIAMS, L.J., at p. 558.

(*c*) See this rule stated in *Smith* v. *Blakey* (1867), L. R. 2 Q. B. 326, *per* BLACKBURN, J.; *The Henry Coxon* (1878), 3 P. D. 156; and *Ryan* v. *Ring* (1889), 25 L. R. Ir. 184.

(*d*) *Pitman* v. *Maddox* (1699), 2 Salk. 690; *Price* v. *Torrington* (*Earl*) (1703), 1 Salk. 285; 2 Smith, L. C., 11th ed., 320; *Rowcroft* v. *Basset* (1802), Peake, Add. Cas. 199.

(*e*) *Champneys* v. *Peck* (1816), 1 Stark. 404.

(*f*) *Pritt* v. *Fairclough* (1812), 3 Camp. 305; *Hagedorn* v. *Reid* (1813), 3 Camp. 377. An entry, however, of letters to be posted is not sufficient by itself to prove the postage (*Rowlands* v. *De Vecchi* (1882), Cab. & El. 10).

(*g*) *R.* v. *St. Mary, Warwick* (*Inhabitants*) (1853), 1 E. & B. 816.

(*h*) *R.* v. *Cope* (1835), 7 C. & P. 720, 726.

(*i*) *Sutton* v. *Gregory* (1797), Peake, Add. Cas. 150.

(*k*) *Poole* v. *Dicas* (1835), 1 Bing. (N. C.) 649.

(*l*) This was done in *Price* v. *Torrington* (*Earl*), *supra*. In *Brain* v. *Preece* (1843), 11 M. & W. 773, it was the duty of a workman at a coal mine to give notice to the foreman of sales. The foreman, being unable to write, employed another man to enter the sales for him in his books. The entries were read over to the foreman every evening. In an action for coal sold, after the death of both the workman and the foreman, the person who made the entries was called, and produced the book containing them. The entries were held to be inadmissible, apparently upon the ground that they were merely the entries of the foreman, who had no personal knowledge of the sales, which were merely reported to him. He could not have proved them had he been alive. In *Fox* v. *Bearblock* (1881), 17 Ch. D. 429, an entry in a minute book of King's College, Cambridge, relating to proceedings of the college in 1803, in the handwriting of the person who usually made the entries, but not authenticated by the signature of the registrar, as was the general practice in connection with such entries, was rejected owing to this irregularity; see also *Bradshaw* v. *Widdrington*, [1902] 2 Ch. 430, C. A., as to entries in a solicitor's books; compare *Re Fountaine, Re Dowler, Fountaine* v. *Amherst* (*Lord*), [1909] 2 Ch. 382, 396, C. A.

(*m*) Compare *Doe* d. *Graham* v. *Hawkins* (1841), 2 Q. B. 212.

(*n*) *Smith* v. *Blakey*, *supra*; *Massey* v. *Allen* (1879), 13 Ch. D. 558;

SECT. 3. **Hearsay.**

from the terms, rules, or ordinary practice of the business in which he is employed, as in the case of clerks and servants, or may arise from a statutory obligation (*o*).

Duty of professional men.

Professional men may also, for the due performance of the work they are employed to do, be under an obligation to their clients to ascertain and record facts, so as to render their records as to such facts admissible after their death as having been made in the course of duty (*p*). The existence of such a duty in any particular case must depend largely upon the particular facts as to the nature and terms of the employment, but in general there is no such duty upon a solicitor to record transactions carried out by him for his clients (*q*), nor upon a medical man to inform his patients of the nature of their illness (*r*), as to render such statements by them admissible upon the principle in question.

Statement must be contemporaneous with act.

(c) In the case of a statement made in the course of duty it is, lastly, essential that it be contemporaneous—that is, it must be shown to have been made at or near the time when the transaction which it records was performed (*s*). In this respect the rule as to

Trotter v. *Maclean* (1879), 13 Ch. D. 574; *R.* v. *Dukinfield* (*Inhabitants*) (1848), 11 Q. B. 678, *per* ERLE, J., at p. 686; *Doe* d. *Padwick* v. *Skinner* (1848), 3 Exch. 84, *per* PARKE, B., at p. 88. In *R.* v. *Worth* (*Inhabitants*) (1843), 4 Q. B. 132, entries in a book made by a master of the terms upon which his servants were hired were rejected upon the ground that he was under no duty to make them.

(*o*) See *Evans* v. *Merthyr Tydfil Urban Council*, [1899] 1 Ch. 241, C. A., *per* LINDLEY, M.R., at p. 250, where a survey of Crown lands, made by a surveyor in performance of a duty cast upon him by statute, was held admissible on this ground, and *North Staffordshire Rail. Co.* v. *Hanley Corporation* (1909), 73 J. P. 477, C. A.

(*p*) See *Mellor* v. *Walmesley*, [1905] 2 Ch. 164, C. A., where entries of measurements made by a deceased surveyor in a field book for the purpose of making a report in the exercise of his profession were admitted on the ground that it was his duty to make and record the measurements, without which he could not arrive at his ultimate conclusion; see also *Doe* d. *Patteshall* v. *Turford* (1832), 3 B. & Ad. 890.

(*q*) *Hope* v. *Hope*, [1893] W. N. 20, C. A. Such statements have, however, been admitted. In *Doe* d. *Patteshall* v. *Turford*, *supra*, an entry of service of a notice to quit made by a deceased solicitor upon a duplicate of the notice kept in his office was admitted as evidence of the service. It was there shown to be the practice and duty of the clerks to make such entries, and the court assumed that the solicitor would himself do what he required of his clerks. Similarly, in *Rawlins* v. *Rickards* (1860), 28 Beav. 370, entries made by a deceased solicitor in his diary relating to a deed prepared by him and executed by his client, also deceased, were admitted as made in the ordinary course of business and duty. The rule as stated in the earlier cases is that the entry must be made not so much in the ordinary course of duty as in the ordinary course of business; see, *e.g.*, *Doe* d. *Patteshall* v. *Turford*, *supra*, *per* TAUNTON, J., at p. 898. The general result seems to be that while a solicitor's clerk owes a duty to his employer to make such entries, the solicitor himself owes none to his client.

(*r*) *Dawson* v. *Dawson* (1905), 22 T. L. R. 52.

(*s*) *Champneys* v. *Peck* (1816), 1 Stark. 404; *Doe* d. *Patteshall* v. *Turford*, *supra*, *per* PARK, J., at p. 898; *Doe* d. *Padwick* v. *Skinner*, *supra*; *Eastern Union Rail. Co.* v. *Symonds* (1850), 5 Exch. 237; *Turner* v. *Hutchinson* (1861), 3 L. T. 815. In *Pritt* v. *Fairclough* (1812), 3 Camp. 305, the court was satisfied on this point by evidence that the clerk making entries in a copy letter-book was punctual in performing his duties. In *The Henry Coxon* (1878), 3 P. D. 156, one of the grounds upon which entries in a ship's

statements made in the course of duty differs from that regulating the admissibility of statements against interest.

Such statements are also to be distinguished from statements against interest made by persons since dead, in that they are admitted as evidence only of the particular fact or facts which the person making them was under a duty to state or record, and their admission does not extend to any other facts stated or recorded, however closely such facts may be connected with the admissible portion of the statement (*t*).

Writing immaterial.

If the above conditions are fulfilled, it is immaterial whether the statements sought to be proved were made orally or in writing. Oral statements made by deceased persons in the course of duty are admissible upon the same principles as written statements, though obviously different considerations arise in measuring the weight and effect to be attributed to them (*a*).

Oral contradiction of written statement.

Oral statements, however, made by a deceased person subsequently to and in contradiction of an admissible written statement made by him in the course of his duty are inadmissible (*b*), and statements made by an attesting witness to a deed are similarly inadmissible after his death for the purpose of showing that the deed was a forgery (*c*).

(iii.) *Declarations as to Public Rights.*

Ancient public rights.

643. Declarations by deceased persons of competent knowledge, made *ante litem motam*, are receivable to prove ancient rights of a public or general nature.

This exception to the hearsay rule is allowed partly on the ground of necessity, since without such evidence ancient rights could rarely be established; and partly on the ground that the public nature of the rights minimises the risks of misstatement.

The term "public right" imports a right exercisable by every member of the State, *e.g.*, a right of highway (*d*), or of fishery in tidal rivers (*e*); a "general right" is one which affects some

log by a deceased mate were rejected was that they were not contemporaneous, the collision to which they referred having happened on a Saturday, and the entries not having been made until the following Monday.

(*t*) *Chambers* v. *Bernasconi* (1831), 1 Tyr. 335; (1834) 4 Tyr. 531, Ex. Ch., where, it being the duty of a sheriff's officer to record the execution by him of a warrant of arrest, his memorandum, stating the arrest at a certain place, was held inadmissible as evidence, after his death, to prove the place at which the arrest was effected. See also *Davis* v. *Lloyd* (1844), 1 Car. & Kir. 275; *Smith* v. *Blakey* (1867), L. R. 2 Q. B. 326, *per* BLACKBURN, J., at p. 332; *The Henry Coxon* (1878), 3 P. D. 156; and *Sturla* v. *Freccia* (1880), 5 App. Cas. 623, *per* Lord SELBORNE, L.C., at p. 633.

(*a*) *Stapylton* v. *Clough* (1853), 2 E. & B. 933, *per* Lord CAMPBELL, C.J., at p. 937; *Turner* v. *Hutchinson* (1861), 3 L. T. 815, *per* WILLIAMS, J., at p. 816. In *Dawson* v. *Dawson* (1905), 22 T. L. R. 52, an oral statement by a deceased doctor to his patient as to the nature of her illness was rejected solely on the ground that he was under no duty to make it; see also *R.* v. *Buckley* (1873), 13 Cox, C. C. 293.

(*b*) *Stapylton* v. *Clough*, *supra*, where the oral statement was not made in the course of business.

(*c*) *Stobart* v. *Dryden* (1836), 1 M. & W. 615.

(*d*) *Crease* v. *Barrett* (1835), 1 Cr. M. & R. 919.

(*e*) *Neill* v. *Devonshire* (*Duke*) (1882), 8 App. Cas. 135.

SECT. 3. **Hearsay.**

considerable section of the community, *e.g.*, a right of common (*f*), or a right to elect the churchwardens of a certain parish (*g*).

Private rights.

Statements by deceased persons as to private rights are not admissible, since such rights are less likely to be commonly known, and more likely to be misrepresented by interested persons (*h*). If, however, the private right is identical with a public one (*i*), or the question is whether the particular right involved is public or private (*k*), the declarations will be admissible.

Competency.

With regard to the competency of the declarant, the rule is that, in the case of a public right, all members of the State are presumed to possess competent knowledge, so that its absence in any particular instance affects merely the weight, and not the admissibility, of the evidence; whereas, in the case of a general right, competent knowledge will not be presumed, but must be specially proved (*l*), *e.g.*, by residence in, or other connection with, the locality (*m*).

Declarations must be *ante litem motam.*

Moreover, to obviate bias, the declarations are required to have been made *ante litem motam*, which means not merely before the commencement of legal proceedings, but before even the existence of any actual controversy, concerning the subject-matter of the declarations (*n*). So strictly has this requirement been enforced that the fact that such a dispute was unknown to the declarant (*o*), or was fraudulently begun with a view to shut out his declarations (*p*), has been held immaterial. Where, however, the declarations were made before any dispute had arisen, though avowedly for the purpose of preventing future controversy, they have been received (*q*); as also where the right involved had come only collaterally, but not directly, in question in prior legal proceedings (*r*). Thus, in an action between a lord of a manor and his tenant, where the question was as to the mode in which a customary fine should be assessed, depositions showing this and made in an ancient suit between a tenant and a former lord, but in which suit only the amount of the fine, and not its mode of assessment, was in question, were received (*s*). Declarations made in the obvious interests of the declarant will, generally speaking, be rejected (*t*); though, if no dispute has arisen, or no claim has been

(*f*) *Dunraven* (*Lord*) v. *Llewellyn* (1850), 15 Q. B. 791, Ex. Ch.; *Nicholls* v. *Parker* (1805), 14 East, 331, n.

(*g*) *Berry* v. *Banner* (1792), Peake, 212 [156].

(*h*) *Dunraven* (*Lord*) v. *Llewellyn*, *supra.*

(*i*) *Thomas* v. *Jenkins* (1837), 6 Ad. & El. 525.

(*k*) *R.* v. *Bliss* (1837), 7 Ad. & El. 550.

(*l*) *Rogers* v. *Wood* (1831), 2 B. & Ad. 245; *Crease* v. *Barrett* (1835), 1 Cr. M. & R. 919, 928, 929; *Mercer* v. *Denne*, [1905] 2 Ch. 538, 560, C. A.

(*m*) *Freeman* v. *Phillipps* (1816), 4 M. & S. 486; *Newcastle* (*Duke*) v. *Broxtowe* (*Hundred*) (1832), 4 B. & Ad. 273; *Mercer* v. *Denne*, *supra.*

(*n*) *Berkeley Peerage Case* (1811), 4 Camp. 401, 417, H. L.; *Davies* v. *Lowndes* (1843), 6 Man. & G. 473, 518, Ex. Ch.

(*o*) *Berkeley Peerage Case*, *supra*; *Shedden* v. *A.-G.* (1860), 30 L. J. (P. M. & A.) 217.

(*p*) *Shedden* v. *A.-G.*, *supra.*

(*q*) *Berkeley Peerage Case*, *supra*; *Monkton* v. *A.-G.* (1831), 2 Russ. & M. 147; *Shedden* v. *A.-G.*, *supra.*

(*r*) *Freeman* v. *Phillipps*, *supra*; *Devonshire* (*Duke*) v. *Neill* (1877), 2 L. R. Ir. 132, 156, 157.

(*s*) *Freeman* v. *Phillipps*, *supra.*

(*t*) *Brockelbank* v. *Thompson*, [1903] 2 Ch. 344, 352, where in an action by a

contemplated, the mere fact that the declarations might tend to support the declarant's own title will not of itself be sufficient to exclude them (*a*).

Must be explicit.

Declarations to be admissible under this head must, in general, directly assert or deny the public right in question, and not relate merely to particular facts which may support or negative it. The omission, however, of all mention of the right in documents or instruments which might be expected to refer to it is strong, and sometimes conclusive, evidence of its non-existence (*b*).

Form.

Declarations as to public rights may be admissible in a variety of forms. Those most commonly tendered are mere oral statements by deceased persons of competent knowledge; but greater weight will naturally be attached to depositions taken on oath in former suits, provided the same right was only incidentally, and not directly, involved; for in the latter case the objection *post litem motam* will apply (*c*).

Old deeds.

Old deeds reciting the public or general rights are also often received under this head (*d*), but not copies or abstracts thereof (unless as secondary evidence), since the contents of a document are in the nature of a particular fact, and, as such, inadmissible (*e*). Maps and surveys are also receivable, provided they were made by or under the direction of deceased persons of competent knowledge (*f*), or at least were used by such persons to define the general right, and not merely to establish some particular fact (*g*).

(iv.) *Declarations as to Pedigree.*

Declarations as to pedigree.

644. Declarations by deceased relations, made *ante litem motam* (*h*), are admissible to prove matters of pedigree.

Such declarations are receivable partly on the ground of necessity, better evidence of the facts being often unobtainable, and partly because the peculiar means of knowledge possessed by the

lord of a manor for trespass, to which the defendant pleaded a right of church way, and the plaintiff, in disproof, tendered a memorandum by a former lord, stating that only certain classes of tenants had the right claimed, and the evidence was rejected upon this as well as upon other grounds.

(*a*) *Doe* d. *Jenkins* v. *Davies* (1847), 10 Q. B. 314.

(*b*) *Anglesey* (*Marquis*) v. *Hatherton* (*Lord*) (1842), 10 M. & W. 218; *Portland* (*Duke*) v. *Hill* (1866), L. R. 2 Eq. 765.

(*c*) *Freeman* v. *Phillipps* (1816), 4 M. & S. 486; *Devonshire* (*Duke*) v. *Neill* (1877), 2 L. R. Ir. 132; *Crease* v. *Barrett* (1835), 1 Cr. M. & R. 919; *Evans* v. *Merthyr Tydfil Urban Council*, [1899] 1 Ch. 241, C. A.; *Mercer* v. *Denne*, [1905] 2 Ch. 538, C. A.

(*d*) *Brett* v. *Beales* (1829), 10 B. & C. 508; *Curzon* v. *Lomax* (1803), 5 Esp. 60.

(*e*) *Doe* d. *Padwick* v. *Wittcomb* (1851), 6 Exch. 601.

(*f*) *Hammond* v. *Bradstreet* (1854), 10 Exch. 390; *Smith* v. *Lister* (1895), 72 L. T. 20; *Mercer* v. *Denne*, *supra*; *Assheton-Smith* v. *Owen* (1906), 75 L. J. (CH.) 181, 188, 192, C. A.; see also *R.* v. *Norfolk County Council* (1910), 26 T. L. R. 269.

(*g*) *Daniel* v. *Wilkin* (1852), 7 Exch. 429; *Pipe* v. *Fulcher* (1858), 1 E. & E. 111; *Smith* v. *Lister*, *supra*; *Vyner* v. *Wirrall Rural District Council* (1909), 73 J. P. 242.

(*h*) As to what is the commencement of a *lis mota*, see *Frederick* v. *A.-G.* (1874), L. R. 3 P. & D. 270. The declaration must be spontaneous (*Hill* v. *Hibbit* (1870), 19 W. R. 250).

SECT. 3. Hearsay.

declarant, and his absence of interest to misrepresent, clothe the declarations with a *primâ facie* probability of truth.

To constitute a "matter of pedigree" there must be a genealogical question actually in issue in the proceedings (*i*), and the declarations must relate either directly thereto, or at all events to some incident of family history required for the proof of such issue (*k*).

Competency of declarant.

645. Declarations to be admissible under this head must have been made by blood-relations of the family, or by their consorts, and not by persons who are merely related to the latter and not to the former (*l*), nor *à fortiori* by friends, neighbours, or servants of the family (*m*), or the family solicitor (*n*). Declarations by illegitimate relations are inadmissible under this rule, on the principle that a bastard being *filius nullius* can have no relations (*o*); though an admission by a deceased person of his own illegitimacy would always be evidence against his representatives as an admission (*p*), and a declaration by a deceased father that the father was not married at the date of his son's birth is evidence of the latter's illegitimacy (*q*).

Requirements for admissibility.

No very strict rule applies to the competency of the declarants. Thus, it is not essential that they should have had personal knowledge of the facts stated; it is sufficient if they spoke merely from what they had heard in the family, though if the hearsay was avowedly derived from strangers it will be rejected (*r*). Nor need the declarations relate to contemporaneous events, for if so the whole object of the rule might be nullified (*s*); accordingly, they

(*i*) Stephen, Digest of the Law of Evidence, 8th ed., art. 31.

(*k*) Thus, in an action of ejectment, the question whether A. is the heir-at-law of B. (*Doe* d. *Banning* v. *Griffin* (1812), 15 East, 293), or in administration proceedings, whether A. is the next of kin to B. (*In the Goods of Thompson* (1887), 12 P. D. 100), would be within the rule; and on such an inquiry the death of B., or of any of B.'s relations entitled in priority to A., would be a "matter of pedigree" provable by the declarations of deceased members of the family (*Doe* d. *Banning* v. *Griffin*, *supra*). Evidence of the same kind is also receivable on issues of legitimacy (*Re Perton, Pearson* v. *A.-G.* (1885), 53 L. T. 707). On the other hand, in an action for use and occupation against a tenant *pur autre vie*, who had held over after the death of the *cestui que vie*, the death of the latter was held not to be a "matter of pedigree," and so not provable as above (*Whittuck* v. *Waters* (1830), 4 C. & P. 375). And in an action for goods sold, to which the defence was infancy, an affidavit by the infant's deceased father, made in a former Chancery action to which the present plaintiff was not a party, was rejected to prove the date of the infant's birth (*Haines* v. *Guthrie* (1884), 13 Q. B. D. 818, C. A.), the purpose for which the evidence was required not being a genealogical one.

(*l*) *The Shrewsbury Peerage* (1858), 7 H. L. Cas. 1, 23.

(*m*) *Johnson* v. *Lawson* (1824), 2 Bing. 86.

(*n*) *Re Palmes, Palmes* v. *R.*, [1901] W. N. 146.

(*o*) *Doe* d. *Bamford* v. *Barton* (1837), 2 Mood. & R. 28; *Doe* d. *Jenkins* v. *Davies* (1847), 10 Q. B. 314.

(*p*) *Re Perton, Pearson* v. *A.-G.*, *supra*.

(*q*) *Murray* v. *Milner* (1879), 12 Ch. D. 845; see also *Re Turner, Glenister* v. *Harding* (1885), 29 Ch. D. 985; *The Aylesford Peerage* (1885), 11 App. Cas. 1.

(*r*) *Davies* v. *Lowndes* (1843), 6 Man. & G. 473, 527, Ex. Ch.; *Shedden* v. *A.-G.* (1860), 30 L. J. (P. M. & A.) 217.

(*s*) *Monkton* v. *A.-G.* (1831), 2 Russ. & M. 147, 157, 158; *Davies* v. *Lowndes*, *supra*.

have been received to prove matters occurring many generations before the birth of the declarant (*t*).

Declarations under this head may be made in any form, *e.g.*, oral statements, family correspondence, recitals in wills and settlements, inscriptions on tombstones, coffin-plates, hatchments, family portraits, rings, or pedigrees (*a*); or entries in family Bibles etc. With regard to the last-mentioned, these are receivable not on the ground of the sacred nature of the volumes, but because of the custom of using them as family registers. Family acknowledgment of the entries will, therefore, be implied, without requiring proof of the identity, blood-relationship, or even, possibly, the death of the declarants (*b*).

Form immaterial.

(v.) *Declarations by Dying Persons.*

646. In trials for homicide, the dying declarations of the deceased are admissible to prove the cause and circumstances of his death. The grounds of admission are necessity, since if the evidence of the victim were excluded such crimes might often go unpunished, and the sense of impending death, which supplies the most potent of all incentives to speak the truth (*c*).

Dying declarations.

(vi.) *Declarations by Testators.*

647. Declarations made by deceased testators as to their wills are receivable in certain cases (*d*), and are sometimes regarded as constituting exceptions to the hearsay rule.

Declarations by testators.

These declarations, however, will, in almost every case, be found to be examples, not of hearsay, but of original evidence, *i.e.*, they are receivable not to prove the truth of the facts stated, but merely to show the mental condition of the testator; while, when tendered for the former, and not the latter purpose, they have, with the single exception presently mentioned, been uniformly rejected.

648. Such declarations may, then, be tendered as original evidence, but not as hearsay, for three main objects:—(1) To establish the *factum* of the will; (2) to show what are its contents; and (3) to assist in its interpretation; and when so tendered it is, in general, immaterial whether they were made before, at, or after its execution.

When may be used.

Such declarations are not receivable as direct proof of the execution or revocation of the will, seeing that the effect of receiving them might be to substitute a mere statement by the testator for the proper and regular evidence of the fact required by the Wills Act (*e*),

Factum of the will.

(*t*) *Davies* v. *Lowndes*, (1843), 6 Man. & G. 473, 527, Ex. Ch.; Hubback, Evidence of Succession, p. 659.

(*a*) Taylor, Law of Evidence, 10th ed., ss. 648—657.

(*b*) *Berkeley Peerage Case* (1811), 4 Camp. 401, H. L.; *Monkton* v. *A.-G.* (1831), 2 Russ. & M. 147, 157, 158; *Hubbard* v. *Lees and Purden* (1866), L. R. 1 Exch. 255; and see *Payne* v. *Bennett* (1904), 20 T. L. R. 203.

(*c*) *R.* v. *Woodcock* (1789), 1 Leach, 500, *per* EYRE, C.B., at p. 504; *R.* v. *Perry*, [1909] 2 K. B. 697, C. C. A. As to dying declarations, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 393, 589.

(*d*) See title WILLS.

(*e*) *Atkinson* v. *Morris*, [1897] P. 40, C. A.; and see title WILLS.

SECT. 3. Hearsay.

but where the required formalities are shown to have been substantially complied with, post-testamentary declarations by the testator, acknowledging the validity of the will, have been received to support the presumption of due execution arising from a partial compliance with the statute (*f*). So, to show that certain papers formed part of the will, declarations by a testatrix, made before its execution, that she intended to leave her property in a certain manner, which corresponded with the provisions contained in those papers, and declarations, after the execution, that she believed she had effected this intention in her will, were received as showing that her mind continued in the same state after the will as before it (*g*). Again, to show whether an instrument has been executed as a deed or will (*h*), or whether a will has been destroyed, *animo revocandi*, or otherwise (*i*), declarations of intention by the testator are receivable.

Contents of the will.

Declarations by a testator are admissible as secondary evidence of the contents of a lost will. Thus, a draft signed by him, oral instructions given to his solicitor, and statements to third persons as to the provisions he was about to make, were in a well-known case received as presumptive evidence that the testator probably made the dispositions which his declarations foreshadowed (*k*). Post-testamentary declarations implying that he had made such dispositions, were in the same case also received, as exceptions to the hearsay rule; but this portion of the decision has been subjected to serious criticism, and it is doubtful whether it would now be followed, even in a similar state of facts (*a*). Declarations of intention by the testator are also admissible to rebut the presumption that alterations in his will were made after its execution; while his mere hearsay assertions as to their date have been rejected (*b*).

Interpretation of the will.

Declarations of testators may also, in certain cases, be resorted to in aid of the interpretation of the will (*c*).

SUB-SECT. 4.—*Statements in Public Documents.*

Public documents.

649. The third group of exceptions to the hearsay rule comprises statements in public documents, which are receivable to prove the facts stated, on the general grounds that they were made by the authorised agents of the public, in the course of official duty, and

(*f*) *Clarke* v. *Clarke* (1879), 5 L. R. Ir. 47, C. A.

(*g*) *Gould* v. *Lakes* (1880), 6 P. D. 1. Although this case, in terms, professed to follow *Sugden* v. *St. Leonards* (*Lord*) (1876), 1 P. D. 154, C. A., it does not in effect do so, but lays down a different, and, it is submitted, the correct, principle as above stated.

(*h*) *In the Goods of Slinn* (1890), 15 P. D. 156. In this case the testatrix had executed a deed-poll which disposed of all her property and was attested by two witnesses. A subsequent declaration that "I have not mentioned it in the paper, but would like B. to have £10 after my death," was received to show that she intended the deed to operate as a will, and not *inter vivos*.

(*i*) *Giles* v. *Warren* (1872), L. R. 2 P. & D. 401.

(*k*) *Sugden* v. *St. Leonards* (*Lord*), *supra*.

(*a*) *Woodward* v. *Goulstone* (1886), 11 App. Cas. 469; *Atkinson* v. *Morris*, [1897] P. 40, C. A.

(*b*) *Doe* d. *Shallcross* v. *Palmer* (1851), 16 Q. B. 747.

(*c*) See title WILLS.

respecting facts which were of public interest, or required to be recorded for the benefit of the community (*d*).

The following documents come within this category:—(i.) Public Statutes, Parliamentary Journals, and Government Gazettes. (ii.) Public Registers. (iii.) Public Surveys, Assessments, and Reports. (iv.) Official Certificates. (v.) Corporation, Company, and Bankers' Books. (vi.) Histories, Scientific Works etc.

(i.) *Public Statutes, Parliamentary Journals, and Government Gazettes.*

Public statutes etc.

650. Statements contained in any public statute, Speech from the Throne (*e*), royal proclamation (*f*), parliamentary journal (*g*), Government gazette (*h*), or State paper, are admissible, even against strangers, to prove facts of a public, but not of a private, nature.

Such statements, however, unless otherwise provided, are only *primâ facie*, and not conclusive, evidence of the facts asserted (*i*). On the other hand, private Acts, even when judicially noticed, are wholly inadmissible against strangers, not only to prove the facts recited (*k*), but even to fix a person with notice thereof (*l*).

(ii.) *Public Registers.*

Public registers.

651. Entries in public registers are evidence of the facts recorded, even against strangers, provided the book was required by law to be kept for public reference, and the entries were made promptly, and by the proper officer (*m*).

There must be a public duty to keep the register, and the information must be required to be preserved for the public use and benefit; registers kept under private authority, or for the benefit or information merely of private individuals, are inadmissible (*n*).

Parish registers etc.

Under the first-named head may be classed parish registers, which formerly were required to be kept under the authority of the common law (*o*), and now are kept under that of various statutes (*p*).

(*d*) Taylor, Law of Evidence, 10th ed., s. 1591; *Sturla* v. *Freccia* (1880), 5 App. Cas. 623.

(*e*) *R.* v. *Francklin* (1731), 17 State Tr. 626, 636—638.

(*f*) *R.* v. *Sutton* (1816), 4 M. & S. 532; *R.* v. *De Berenger* (1814), 3 M. & S. 67.

(*g*) *A.-G.* v. *Bradlaugh* (1885), 14 Q. B. D. 667, C. A.

(*h*) *R.* v. *Holt* (1793), 5 Term Rep. 436; *A.-G.* v. *Theakstone* (1820), 8 Price, 89.

(*i*) *R.* v. *Greene* (1837), 6 Ad. & El. 548; *R.* v. *Francklin, supra.*

(*k*) *Beaufort* (*Duke*) v. *Smith* (1849), 4 Exch. 450; *Polini* v. *Gray*, *Sturla* v. *Freccia* (1879), 12 Ch. D. 411, C. A.

(*l*) *Ballard* v. *Way* (1836), 1 M. & W. 520.

(*m*) *Doe* d. *France* v. *Andrews* (1850), 15 Q. B. 756; *Doe* d. *Warren* v. *Bray* (1828), 8 B. & C. 813; *Sturla* v. *Freccia* (1880), 5 App. Cas. 623, 644.

(*n*) *Henry* v. *Leigh* (1813), 3 Camp. 499; *Huntley* v. *Donovan* (1850), 15 Q. B. 96; *Irish Society* (*Governor etc.*) v. *Derry* (1846), 12 Cl. & Fin. 641, H. L.; *Sturla* v. *Freccia* (1880), 5 App. Cas. 623. As to a statement in Lloyd's List being notice of a state of blockade, see *Bain* v. *Case* (1829), 3 C. & P. 496.

(*o*) *Doe* d. *Wollaston* v. *Barnes* (1834), 1 Mood. & R. 386.

(*p*) See the Parochial Registers Act, 1812 (52 Geo. 3, c. 146) (as to baptisms and burials), and the Births and Deaths Registration Act, 1836 (6 & 7 Will. 4, c. 86), s. 31.

SECT. 3. Hearsay.

On the other hand, early Nonconformist registers were not required to be kept by any legal authority, and so were inadmissible. By statute, however, registers of the latter class may now, in many cases, be received, upon proof of deposit with the Registrar-General, entry in his list, and notice to the opponent of a party's intention to produce them (*q*); while, with regard to the births, marriages, and deaths of Nonconformists since 1836, registers thereof are now admissible under General Registration Acts (*r*). Bishops' registers have, at common law, been admitted on this principle to prove a right of nomination to a curacy (*s*), and vestry books to prove the due election of a parish officer (*t*); but an entry in an old parish book, made by a parish officer, purporting to relieve the parish from its liability to support a certain pauper, has been rejected, since the entry concerned merely the rights of two parishes *inter se*, and thus was not of a public nature (*a*). So a register of attendances of the medical officer of a union, kept under the orders of the Poor Law Commissioners, was held inadmissible for the same reason (*b*).

Under various statutes a large number of registers kept under legal authority in various public offices are receivable, usually as *primâ facie*, but in some cases as conclusive, evidence of the facts recorded (*c*).

(*q*) See the Non-parochial Registers Act, 1840 (3 & 4 Vict. c. 92), and the Births and Deaths Registration Act, 1858 (21 & 22 Vict. c. 25).

(*r*) See the Births and Deaths Registration Act, 1836 (6 & 7 Will. 4, c. 86), s. 31, amended by the Births and Deaths Registration Act, 1874 (37 & 38 Vict. c. 88), and the Marriage Act, 1898 (61 & 62 Vict. c. 58).

(*s*) *Arnold* v. *Bath and Wells* (*Bishop*) (1829), 5 Bing. 316.

(*t*) *R.* v. *Martin* (1809), 2 Camp. 100.

(*a*) *R.* v. *Debenham* (*Inhabitants*) (1818), 2 B. & Ald. 185.

(*b*) *Merrick* v. *Wakley* (1838), 8 Ad. & El. 170.

(*c*) The following are some of the chief registers rendered admissible by statute:—Registers kept at the Patent Office, under the Patents and Designs Act, 1907 (7 Edw. 7, c. 29), ss. 28, 52, and the Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 50; Registers of Copyright, kept under the Copyright Act, 1842 (5 & 6 Vict. c. 45), s. 11, the International Copyright Acts, 1844 (7 & 8 Vict. c. 12), s. 8, and 1886 (49 & 50 Vict. c. 33), ss. 7, 8, and the Fine Arts Copyright Act, 1862 (25 & 26 Vict. c. 68), ss. 4, 5; Registers of Newspapers, kept under the Newspaper Libel and Registration Act, 1881 (44 & 45 Vict. c. 60), s. 15; Registers of Deeds, Wills, and Charges affecting land in Yorkshire, under the Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54), ss. 9, 20, 21, 51, and in Middlesex, under the Middlesex Registry Act, 1708 (7 Ann. c. 20), ss. 6, 12, 19, amended by the Middlesex Registry Act, 1891 (54 & 55 Vict. c. 10); Registers of Voters, under the Ballot Act, 1872 (35 & 36 Vict. c. 33); Regimental Registers, kept under the Army Act, 1881 (44 & 45 Vict. c. 58), s. 163; Registers of Merchant Ships, kept under the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 64, 695 (evidence may be given by the defendant, in an action, for limitation of liability, that the registered tonnage is under-estimated (*The Recepta* (1889), 14 P. D. 131)). Register of Convictions kept under the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 22, to prove previous convictions in the same court (see *Police Commissioners* v. *Donovan*, [1903] 1 K. B. 895). As to office copies of entries in the Register kept under the Land Transfer Acts, 1875 (38 & 39 Vict. c. 81) and 1897 (60 & 61 Vict. c. 65), see Land Transfer Rules, 1903, r. 260, and Brickdale's Land Transfer Acts (ed. 1905), pp. 455, 464; and title REAL PROPERTY AND CHATTELS REAL. As to the effect of entries in the register, see *Capital and Counties Bank, Ltd.* v. *Rhodes*, [1903] 1 Ch. 631, C. A., and *A.-G.* v. *Odell*, [1906] 2 Ch. 47, C. A.

The entries must have been made by the officer whose duty it was to make them, or by his deputy (*d*), and with reasonable promptness (*e*). And errors, irregularities, and erasures of a trifling character will not, in general, exclude the entries, but merely affect their weight (*f*). Entries made in due course.

Colonial and foreign registers are also admissible under this head, provided that, in the former case, they are kept under the authority either of Colonial or of English law (*g*), and that in the latter they are kept under the sanction of public authority, and are recognised as authentic by the tribunals of their own country (*h*). Colonial and foreign registers.

(iii.) *Public Surveys, Assessments, and Reports.*

652. Surveys, assessments, inquisitions, and reports are evidence of the truth of the matters stated, even against strangers, if made under public authority and concerning matters of public interest (*i*). To render such documents admissible there must have been a judicial, or *quasi*-judicial, duty to inquire, undertaken by a public officer, and the matter must have been required to be ascertained for a public purpose (*k*). Inquisitions made for the purpose of ascertaining the rights of the Crown in the estates of deceased persons are within the rule (*l*), but not those made for some merely temporary object (*m*), nor are surveys admissible when made of lands which only devolved on the Crown after, and not before, the survey (*n*). Land-tax assessments are evidence of the assessment upon the persons and for the property named (*o*), though they are not evidence as to the seisin of land (*p*); and the report of a committee of the General Medical Council, finding a dentist guilty of professional misconduct, has been considered to be a proceeding *in rem* affecting his status, and to be admissible as *primâ facie* evidence of such misconduct in an action by a third party against the dentist in Public surveys etc. Land-tax assessments.

(*d*) *Doe* d. *Warren* v. *Bray* (1828), 8 B. & C. 813.

(*e*) *Ibid.* In this case entries made more than a year after the occurrence were excluded.

(*f*) *Lyell* v. *Kennedy*, *Kennedy* v. *Lyell* (1889), 14 App. Cas. 437, *per* Lord SELBORNE, at p. 449.

(*g*) *Evans* v. *Ball* (1878), 83 L. T. 141; Taylor, Law of Evidence, 10th ed., s. 1593.

(*h*) *Lyell* v. *Kennedy*, *Kennedy* v. *Lyell*, *supra*.

(*i*) For example, entries made by the coastguard as to the wind and weather (*The Catherina Maria* (1866), L. R. 1 A. & E. 53).

(*k*) *Sturla* v. *Freccia* (1880), 5 App. Cas. 623. Judges' notes are not evidence of the statements made by a witness (*Griffin's Divorce Bill*, [1896] A. C. 133); but a report made by an Irish judge, for the information of another Irish court, is admissible evidence in a proceeding between the same parties in England of what took place before him and what he decided (*Houstoun* v. *Sligo* (*Marquis*) (1885), 29 Ch. D. 448, C. A.). When matters in issue have formed the subject of proceedings reported in the law reports, the report is not evidence of the facts stated therein (*Shepheard* v. *Bray*, [1906] 2 Ch. 235).

(*l*) *Beaufort* (*Duke*) v. *Smith* (1849), 4 Exch. 450.

(*m*) *Mercer* v. *Denne*, [1905] 2 Ch. 538, C. A.

(*n*) *Daniel* v. *Wilkin* (1852), 7 Exch. 429.

(*o*) *Doe* d. *Strode* v. *Seaton* (1834), 2 Ad. & El. 171.

(*p*) *Doe* d. *Stansbury* v. *Arkwright* (1833), 2 Ad. & El. 182, n.

SECT. 3. Hearsay.

question (*q*). On the other hand, the confidential report of a committee appointed by a public department of a foreign State to ascertain the fitness of a candidate for a public office in that State has been rejected as evidence of the age and family history of such candidate, such authority not being a legal one for a public purpose, and the facts stated not being of a public nature (*r*).

Reports.

(IV.) *Official Certificates.*

Official certificates.

653. Certificates by public officers, duly authorised by law for the purpose, are in certain cases receivable in proof of the facts certified.

At common law, certificates of matters of fact not coupled with matters of law are usually said to be inadmissible, even though given by the Sovereign under his Sign Manual (*s*). If a person is bound to record a fact, the proper evidence thereof is, it has been considered, a copy of the record, duly authenticated; but as to matters he is not bound to record his certificate, being extra-judicial, is merely the unsworn statement of a private person, and as such will be rejected (*t*).

Matters triable by certificate.

Certain important matters, however, were from very early times triable by certificate merely, the results being received as conclusive evidence of the facts found, *e.g.*, that of the King's Marshal as to military service, that of the Lord Mayor and aldermen (by the Recorder) as to the customs of London (*u*), and that of a bishop as to marriage, bastardy, or excommunication (*a*). There were other cases, however, in which the certificates of high functionaries, though recognised as evidence, were allowed only a *primâ facie* effect (*b*), *e.g.*, heralds' funeral certificates, which were, and even at the present day are, admitted to prove the matters of pedigree therein contained (*c*).

Certificates admissible by common law.

654. Partly in analogy to the above, and partly on grounds of convenience, the certificates of public officers are still, in a few instances, receivable at common law by way of exception to the hearsay rule, although the cases establishing them are neither uniform nor very satisfactory. Thus, a certificate or letter from a Secretary of State in his official capacity has, in qualification of the original common law doctrine above stated, been held equivalent to that of His Majesty, and conclusive of the matters certified, *e.g.*, the independence of a foreign Sovereign (*d*). In other cases, however, the certificates of such officials have been held merely *primâ facie* evidence (*e*). So an ambassador's certificate has, with

(*q*) *Hill* v. *Clifford*, [1907] 2 Ch. 236, C. A.; affirmed, on other grounds, *sub nom. Clifford* v. *Timms*, [1908] A. C. 12.
(*r*) *Sturla* v. *Freccia* (1880), 5 App. Cas. 623.
(*s*) *Omichund* v. *Barker* (1745), Willes, 538, 549, 550; but see *Mighell* v. *Johore (Sultan)*, [1894] 1 Q. B. 149, C. A.
(*t*) Taylor, Law of Evidence, 10th ed., s. 1784.
(*u*) *London Corporation* v. *Cox* (1867), L. R. 2 H. L. 239.
(*a*) See Gresley, Law of Evidence in Equity, 1st ed., pp. 179—182.
(*b*) *Ibid.*
(*c*) *Sturla* v. *Freccia*, *supra*.
(*d*) *Mighell* v. *Johore (Sultan)*, *supra*.
(*e*) *Ferguson* v. *Benyon* (1867), 16 W. R. 71 (the certificate of a Secretary o

somewhat questionable propriety, been received to prove foreign law (*f*). And by long-established practice justices' certificates as to encroachments on, or repairs to, highways are admissible as evidence of those facts (*g*); and those of a notary public to prove the protest abroad of a foreign bill of exchange (*h*).

Certificates admissible by statute.

655. By statute, also, various matters are provable by the certificates of public officers, such documents being rendered in some cases conclusive, but in general only *primâ facie*, evidence of the facts certified (*i*), and of the necessary preliminaries having been performed (*k*). Thus, the registrar's certificate of the incorporation of a company is conclusive that all requisitions in respect of registration, or matters precedent or incidental thereto, have been complied with (*l*); while a certificate under the common seal of the company is *primâ facie* evidence of the title of the holder to the shares specified (*m*). So, the registrar's certificate of the registration of a British ship is *primâ facie* evidence of the matters contained therein or indorsed thereon (*n*), and the certificate of the Registrar of Building Societies that new rules were duly passed is conclusive that all preliminary steps were duly taken (*o*). A certificate of justices that a charge of assault has been dismissed is evidence of the fact of such dismissal (*p*), and under the Sale of Food and Drugs Act, 1875 (*q*), the analyst's certificate is rendered sufficient

State for India admitted to prove the competency of a local official to administer oaths); *Whaley* v. *Carlisle* (1866), 17 I. C. L. R. 792 (a passport signed by a Secretary of State admitted to prove that the person described was abroad on a certain date).

(*f*) *In the Goods of Oldenburg* (*Prince*) (1884), 9 P. D. 234; *In the Goods of Klingeman* (1862), 32 L. J. (P. M. & A.) 16; these cases were doubted by the late Mr. Taylor, Law of Evidence, 8th ed., s. 1784A, note.

(*g*) *R.* v. *Randall* (1662), 1 Keb. 256; *R.* v. *Mawbey* (*Bart.*) (1796), 6 Term Rep. 619, 635.

(*h*) Bayley on Bills, 490; compare *Geralopulo* v. *Wieler* (1851), 10 C. B. 690.

(*i*) As to the question whether a certificate which a statute says is to be "sufficient" evidence is therefore to be regarded as conclusive, see *Board of Trade* v. *Sailing Ship "Glenpark," Ltd.*, [1903] 2 K. B. 324, affirmed [1904] 1 K. B. 682, C. A., and *Garbutt* v. *Durham Joint Committee*, [1904] 2 K. B. 514, C. A.; and see further as to the distinction between sufficient and conclusive evidence, *Barraclough* v. *Greenhough* (1867), L. R. 2 Q. B. 612, Ex. Ch. An attestation paper of a soldier, though evidence that the answers set down were given, is no evidence that they were true (*Chertsey Union Guardians* v. *Surrey* (*Clerk of Peace*) (1893), 69 L. T. 384). As to certificates by teachers of public elementary schools in relation to attendance or standard of children, see title EDUCATION, Vol. XII., p. 66. A declaration which would by itself be conclusive is not so if it goes on to state facts which show that it is not true (*Allison* v. *Johnson* (1902), 46 Sol. Jo. 686).

(*k*) *Waddington* v. *Roberts* (1868), L. R. 3 Q. B. 579.

(*l*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 16, 17; and see title COMPANIES, Vol. V., p. 67. Where the assistant registrar had authority to sign in the absence of the registrar the absence was presumed from the fact that the assistant signed (*Baker* v. *Cave* (1857), 1 H. & N. 674).

(*m*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 23.

(*n*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 64, 695.

(*o*) *Dewhurst* v. *Clarkson* (1854), 3 E. & B. 194; followed *Rosenberg* v. *Northumberland Building Society* (1889), 22 Q. B. D. 373, C. A.

(*p*) Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), ss. 44, 45.

(*q*) 38 & 39 Vict. c. 63, s. 21. The certificate must contain such particulars as will enable the court to decide whether the adulteration charged is proved

SECT. 3 Hearsay.

evidence against the defendant of the result of the analysis, unless he requires the analyst to be called as a witness, or gives rebutting proof. Statutory certificates admissible under this head must be distinguished from mere certified copies of documents, which, though loosely called "certificates," are receivable only as secondary evidence of the originals (*r*).

(v.) *Corporation, Company, and Bankers' Books.*

Corporation and company books.

656. At common law the official books of a corporation are admissible, even in favour of the corporation and against strangers, to prove the public acts of the corporation, provided they were publicly kept as the corporation books (*s*) and the entries were made by the proper officer (*t*). Entries as to private matters, however, are only receivable as admissions against the corporation, or members who have acquiesced in them, and are not evidence in its own favour (*a*).

The books of public corporations and companies are, however, often rendered admissible by statute to prove their contents, both as to public and private transactions. Thus, under the Municipal Corporations Act, 1882 (*b*) (incorporated with the Local Government Act, 1888 (*c*)), the minute books of a corporation are receivable in evidence without further proof, and similar provisions apply to minute books of education committees and of managers of public elementary schools (*d*), and to the registers and minute books kept under the Companies Clauses Consolidation Act, 1845 (*e*), and the Companies (Consolidation) Act, 1908 (*f*).

Bankers' books.

With regard to bankers' books, special and important statutory provisions apply, and copies of entries therein are now receivable in all legal proceedings as *primâ facie* evidence of the transactions and accounts recorded, upon proof that the book was, at the time of the entry, one of the ordinary books of the bank, that it is in the custody or control of the bank, and that the entries were made in the usual course of business (*g*).

(vi.) *Histories, Scientific Works etc.*

Histories.

657. Accredited public histories are receivable in evidence as being in the nature of public documents, or, at all events, of general reputation, to prove ancient facts of a public, but not of a private or local, nature.

(*Newby* v. *Sims*, [1894] 1 Q. B. 478; *Fortune* v. *Hanson*, [1896] 1 Q. B. 202); and see title FOOD AND DRUGS.

(*r*) As to certified copies, see p. 524, *post*.

(*s*) *Shrewsbury Mercers etc.* (*Warden etc.*) v. *Hart* (1823), 1 C. & P. 113.

(*t*) *R.* v. *Mothersell* (1718), 18 Stra. 93; see also p. 555, *post*.

(*a*) *Hill* v. *Manchester and Salford Water Works Co.* (1833), 5 B. & Ad. 866. As to resolutions passed by the provisional committee of a railway, see *Rennie* v. *Clarke* (1850), 5 Exch. 292.

(*b*) 45 & 46 Vict. c. 50, s. 22.

(*c*) 51 & 52 Vict. c. 41, s. 75.

(*d*) Education Act, 1902 (2 Edw. 7, c. 42), Sched. I., A. (4) and B. (9).

(*e*) 8 & 9 Vict. c. 16, ss. 9, 98.

(*f*) 8 Edw. 7, c. 69, ss. 33, 71.

(*g*) Bankers' Books Evidence Act, 1879 (42 & 43 Vict. c. 11), ss. 3, 4; and see further, p. 554, *post*, and title BANKERS AND BANKING, Vol. I., pp. 643—647.

SECT. 3. Hearsay.

Thus, "Speed's Chronicle" has been admitted to prove the date of decease of an English queen (*h*), and "Collier's Ecclesiastical History," "Hooker's Polity," and other authoritative historical and theological works, to prove matters of Church doctrine and usage (*i*), while the Chronicles of Stowe and Dugdale have been rejected in proof of the creation of a peerage (*j*), and "Camden's Britannia" in proof of a local custom to sink salt pits (*k*).

Scientific works etc.

Scientific books and records are also receivable on the same ground (*l*). Thus, the "Carlisle Tables" have been admitted to show the average duration of life at a particular age, proof having been given that they were generally accepted as authoritative by insurance companies (*m*); the British Pharmacopœia, as evidence of the recognised standard for drugs (*n*); and the Almanack annexed to the Book of Common Prayer, as evidence of the matters contained in it (*o*). So, also, public maps, generally offered for public sale, have been admitted to show matters of general geographical notoriety, such as the relative situations of towns or counties (*p*), and for some purposes specifications of patents from the records of the Patent Office have been admitted (*q*).

Public maps etc.

SECT. 4.—*Opinions.*

Opinions.

658. Opinions, whether of the community (reputation) or of individuals, are, in general, inadmissible in proof of material facts.

The ground of exclusion of such evidence is that opinions, in so far as they may be founded on no evidence, or evidence not recognised by law, are worthless, and in so far as they may be founded on legal evidence, tend to usurp the functions of the court and jury, whose province alone it is to draw conclusions of law or fact (*r*).

The above rule is, however, relaxed in the following instances, mainly on the ground of necessity, since better evidence is, in such cases, often either difficult or impossible to obtain.

SUB-SECT. 1.—*General Reputation.*

Reputation.

659. General reputation is receivable in proof of public rights (*s*), and family repute in proof of matters of pedigree, on the same grounds, and subject to the same limitations, as declarations by

(*h*) *Brounker* (*Lord*) v. *Atkyns* (1682), Skin. 14; and see *Bridgwater's* (*Lord*) *Case* (undated), cited *ibid.*, 15, H. L.

(*i*) *Read* v. *Lincoln* (*Bishop*), [1892] A. C. 644, 653, P. C.; *Ridsdale* v. *Clifton* (1877), 2 P. D. 276, P. C.

(*j*) *The Vaux Peerage* (1837), 5 Cl. & Fin. 526, H. L.

(*k*) *Stainer* v. *Droitwich Corporation* (1695), 1 Salk. 281.

(*l*) *E.g.*, maps and surveys made by persons of repute in that connection on questions of public rights (*R.* v. *Norfolk County Council* (1910), 26 T. L. R. 269.

(*m*) *Rowley* v. *London and North Western Rail. Co.* (1873), L. R. 8 Exch. 221, Ex. Ch.

(*n*) *Dickins* v. *Randerson*, [1901] 1 K. B. 437.

(*o*) *Tutton* v. *Darke* (1860), 5 H. & N. 647.

(*p*) *R.* v. *Orton* (1873), and *R.* v. *Jameson* (1896), cited Stephen, Digest of the Law of Evidence, art. 35; see also *North Staffordshire Rail. Co.* v. *Hanley Corporation* (1910), 73 J. P. 477, C. A.

(*q*) *Clark* v. *Adie* (No. 2) (1877), 2 App. Cas. 423, 431.

(*r*) Best, Law of Evidence, 10th ed., s. 511.

(*s*) *Barraclough* v. *Johnson* (1838), 8 Ad. & El. 99.

SECT. 4. Opinions.

deceased persons concerning those facts (*t*); indeed, the generic term "reputation" is often applied indiscriminately to both species of evidence. Where, however, the existence of a marriage is in question, whether as a matter of pedigree or not, evidence of repute is receivable, not merely from members of the family in question, but also from friends and neighbours (*u*). And it will not affect the admissibility of the evidence, though it may its weight, that such repute is divided or discontinuous (*a*), provided always that it is general in its nature, and not founded merely on the assertions of some particular person, for then it will cease to be admissible as reputation, and can only be received from deceased members of the family, and in a case which is strictly one of pedigree (*b*).

Reputation of identity.

General reputation is also sometimes admitted in proof of identification. Thus, the general repute existing in a testator's family or neighbourhood has been received to identify a legatee (*c*), or the subject-matter of a devise (*d*); and to show that a libel referred to the plaintiff, evidence may be given that he was publicly jeered at in consequence of the libel (*e*).

SUB-SECT. 2.—*Opinions of Experts.*

Opinions of experts.

660. The opinions of experts are, in general, admissible whenever the subject is one a knowledge of which can only be acquired by special training or experience. When, however, it is one upon which the jury are as competent to form an opinion as the witness, or when the court is assisted by assessors (*f*), such evidence will be rejected.

When expert evidence admitted.

Under the first head are included matters of science, art, and trade, the genuineness of handwriting, and foreign law. Thus, the opinions of medical men have been received as to the existence of insanity (*g*), or the cause of disease or death (*h*); those of a keeper of public records as to alterations in a will (*i*); those of actuaries as to the average duration of life in calculating annuities (*k*); those of engineers as to the cause of obstruction to a harbour (*l*); those of shipbuilders and marine surveyors as to the construction of a ship (*m*); and (provided the court is not sitting with assessors)

(*t*) See pp. 463 *et seq.*, *ante*.
(*u*) *Elliott* v. *Totnes Union* (1892), 57 J. P. 151.
(*a*) *Andrewes* v. *Uthwatt* (1886), 2 T. L. R. 895; *Re Haynes, Haynes* v. *Carter* (1906), 94 L. T. 431.
(*b*) *Shedden* v. *A.-G.* (1860), 30 L. J. (P. M. & A.) 217.
(*c*) *Re Gregory's Settlement and Will* (1865), 34 Beav. 600.
(*d*) *Anstee* v. *Nelms* (1856), 1 H. & N. 225; compare *Re Steel, Wappett* v. *Robinson*, [1903] 1 Ch. 135.
(*e*) *Cook* v. *Ward* (1830), 4 Moo. & P. 99; *Du Bost* v. *Beresford* (1810), 2 Camp. 511.
(*f*) *The Kestrel* (1881), 6 P. D. 182; *The Assyrian* (1890), 63 L. T. 91, C. A.
(*g*) Taylor, Law of Evidence, 10th ed., s. 1417; *R.* v. *Wright* (1821), Russ. & Ry. 456.
(*h*) *Ibid.*
(*i*) *Ffinch* v. *Combe*, [1894] P. 191.
(*k*) *Rowley* v. *London and North Western Rail. Co.* (1873), L. R. 8 Exch. 221, Ex. Ch.
(*l*) *Folkes* v. *Chadd* (1782), 3 Doug. (K. B.) 157.
(*m*) *The Robin*, [1892] P. 95.

those of nautical witnesses as to the proper navigation of a ship (*n*). The opinions of shopkeepers are admissible to show the average waste resulting from retail sales (*o*); those of accountants to discriminate between losses chargeable to capital and income (*p*); and now (according to the great weight of authority) those of underwriters as to the "materiality" of facts connected with marine insurance (*q*).

When not admitted.

On the other hand, experts will not be allowed to give their opinions upon the construction of documents, for this, being a matter of law, belongs solely to the court (*r*); nor upon matters of legal or moral obligation (*s*); nor upon what would probably have happened had the parties acted in one way rather than another (*a*). And, where the question is as to the probable cause of an injury which occurred to cattle while in a railway truck, the opinion of cattle drovers may be rejected (*b*).

Competency of expert.

661. An expert, in order to be competent as a witness, need not have acquired his knowledge professionally; it is sufficient, so far as the admissibility of the evidence goes, if he has made a special study of the subject, or acquired a special experience therein (*c*). Thus, hospital students, dressers, and unqualified practitioners may be permitted to testify as medical experts (*d*); and accountants who are conversant with the business of life insurance as actuaries (*e*). So foreign law has frequently been proved by witnesses who, though not professional lawyers, followed some occupation which gave them peculiar means of knowing the law in question (*f*).

Examination of experts.

In every case in which the opinions of experts are admissible, the grounds of such opinions may be inquired into, either in chief or, as is more usual, in cross-examination. And facts and experiments, even though not themselves relevant to the issue, are also receivable in corroboration or rebuttal of the opinion (*g*).

(*n*) *Sills* v. *Brown* (1840), 9 C. & P. 601; *Fenwick* v. *Bell* (1844), 1 Car. & Kir. 312; and see *M'Naghten's Case* (1843), 10 Cl. & Fin. 200, H. L., *per* TINDAL, C.J., at p. 212.

(*o*) *M'Fadden* v. *Murdock* (1867), 1 I. R. C. L. 211.

(*p*) *Bond* v. *Barrow Hæmatite Steel Co.*, [1902] 1 Ch. 353.

(*q*) See 1 Arnould, Marine Insurance, 8th ed., s. 626, where the cases are collected and considered; and title INSURANCE.

(*r*) *Grove* v. *Buluwayo Estate and Trust Co.* (1898), *Times*, 30th March; *Bowes* v. *Shand* (1877), 2 App. Cas. 455; *Betts* v. *Menzies* (1862), 10 H. L. Cas. 117.

(*s*) *Campbell* v. *Rickards* (1833), 5 B. & Ad. 840, *per* Lord DENMAN, C.J., at p. 846.

(*a*) *Ibid.*

(*b*) *Smith* v. *Midland Rail. Co.* (1887), 57 L. T. 813.

(*c*) *R.* v. *Silverlock*, [1894] 2 Q. B. 766, C. C. R.

(*d*) Best, Law of Evidence, 10th ed., s. 516.

(*e*) *Rowley* v. *London and North Western Rail. Co.* (1873), L. R. 8 Exch. 221, Ex. Ch.

(*f*) *Vander Donckt* v. *Thellusson* (1849), 8 C. B. 812, where a Belgian merchant and commissioner of stocks and bills of exchange was permitted to prove the Belgian law affecting bills; *Re Whitelegg*, [1899] P. 267; see pp. 487 *et seq.*, *post*.

(*g*) *Birrell* v. *Dryer* (1884), 9 App. Cas. 345; *R.* v. *Heseltine* (1873), 12 Cox, C. C. 404; also the fact that the witness acted on the opinion which he formed (*Stephenson* v. *River Tyne Improvement Commissioners* (1869), 17 W. R. 590).

SECT. 4. Opinions.

Moreover, experts may refresh their memories by reference to accredited works on their special topics—*e.g.*, a lawyer to codes and reports, a valuer to price lists, a doctor to medical treatises (*h*), or a skilled mechanician to former patents and specifications (*i*).

SUB-SECT. 3.—*Opinions of Ordinary Witnesses.*

Opinions of ordinary witnesses.

662. The opinions of ordinary witnesses are admissible as to identity, handwriting, age, and certain other miscellaneous matters.

Identity.

Thus, they may testify to their belief that the prisoner in the dock is the person they saw committing a crime; or that a photograph, which is produced, is the likeness of some absent party (*k*); or, in a case of infringement, that an engraving in court resembles an unproduced picture (*l*). So, in cases of libel, the friends and neighbours of the plaintiff may say that, on reading the libel, they considered it referred to him (*m*). And the same rule has been applied to the case of a written threat (*n*).

In affidavits used in interlocutory proceedings deponents are allowed to testify to their information and belief, provided that the grounds thereof are set out, otherwise not (*o*).

Handwriting.

663. A party's handwriting may, amongst other means, be proved by the opinion of witnesses who are acquainted with it. The knowledge requisite for this purpose may have been acquired by the witness having, at any time, either (1) seen the party write; or (2) received communications purporting to come from him in answer to those addressed to him by the witness; or (3) observed, in the ordinary course of business, documents purporting to be in the party's handwriting (*p*). On the other hand, knowledge acquired by a non-expert witness for the express purpose of qualifying him to prove the party's handwriting at the trial will not suffice to admit the evidence (*q*). Testimony thus admitted is considered to be primary, and not secondary, in its nature, and so will not be excluded, even though better evidence of the handwriting in question could be obtained (*r*).

Age.

664. The opinions of ordinary witnesses are receivable on questions of age. Thus, on a charge of ill-treating certain children

(*h*) *The Sussex Peerage* (1844), 11 Cl. & Fin. 85, 114, 115, H. L.; *Collier* v. *Simpson* (1831), 5 C. & P. 73.

(*i*) *Clark* v. *Adie* (No 2) (1877), 2 App. Cas. 423, 431, 437.

(*k*) *Frith* v. *Frith*, [1896] P. 74. In matrimonial cases, however, the court will not act upon identification by photograph alone (*ibid.*).

(*l*) *Lucas* v. *Williams & Sons*, [1892] 2 Q. B. 113, 116, C. A.

(*m*) *R.* v. *Barnard, Ex parte Gower* (*Lord R.*) (1879), 43 J. P. 127; *Hulton* (*E.*) *& Co.* v. *Jones*, [1910] A. C. 20; and see title LIBEL AND SLANDER.

(*n*) *R.* v. *Hendy* (1850), 4 Cox, C. C. 243.

(*o*) R. S. C., Ord. 38, r. 3; *Re Anthony, Birrell, Pearce & Co., Doig* v. *Anthony, Birrell, Pearce & Co., Re Same, Groos* v. *Same*, [1899] 2 Ch. 50; *Re Young* (*J. L.*) *Manufacturing Co., Young* v. *Young* (*J. L.*) *Manufacturing Co.*, [1900] 2 Ch. 753.

(*p*) *Doe* d. *Mudd* v. *Suckermore* (1836), 5 Ad. & El. 703, 730, 731; *Re Clarence Hotel, Ilfracombe, Ltd.* (1909), 54 Sol. Jo. 117. The third heading applies also to the proof of ancient handwriting (*The Fitzwalter Peerage* (1843), 10 Cl. & Fin. 193, H. L.).

(*q*) *R.* v. *Crouch* (1850), 4 Cox, C. C. 163; *Stranger* v. *Searle* (1793) 1 Esp. 14.

(*r*) *Lucas* v. *Williams & Sons*, *supra*.

under sixteen years old, the testimony of the mistress of an elementary school at which they attended, that she believed they were under that age, may be received; as also similar evidence by policemen and others who have seen the children (*s*).

Libel actions.

665. In cases of libel and slander, opinions are sometimes received as to the meaning of the words. Thus, though such evidence cannot be admitted to show that ordinary words were used in their ordinary sense, yet it is otherwise where a slanderous meaning is imputed to apparently innocent words. In such cases, however, a foundation must always be laid by first asking the witness whether there was anything in the circumstances of the case, or the conduct or tone of the speaker, to prevent the words from conveying their ordinary meaning. The question may then be asked: "What did you understand by the words?" (*a*).

Evidence as to character.

666. In practice, although not perhaps in strictness, witnesses called to prove a prisoner's character are allowed to speak to their individual opinion thereof, and not merely to his general reputation in the community (*b*).

SECT. 5.—*Judgments* (*c*).

Judgments.

667. A judgment is not evidence of any fact which was neither directly decided, nor a necessary ground of the decision. Thus, it is never evidence of matters which merely came collaterally in question, or were incidentally cognisable, or which can only be inferred by argument from the decision (*d*). Still less is it evidence of the truth of any *obiter dictum* of the court (*e*).

It should be noticed, too, that judgments may have a different evidential effect according as they are pronounced for or against a party. Thus, a conviction against a parish for non-repair of a road is conclusive of its liability to repair; but an acquittal, which does not, like a conviction, ascertain any specific fact, is no evidence for the parish of its non-liability to repair (*f*).

Moreover, in general, all judgments when tendered as evidence are impeachable on the grounds that they are not final (*g*), or not on the merits (*h*), or were rendered without jurisdiction (*i*), or were obtained by fraud (*k*).

(*s*) *R.* v. *Cox*, [1898] 1 Q. B. 179, C. C. R.

(*a*) *Daines* v. *Hartley* (1848), 3 Exch. 200; *Brunswick* (*Duke*) v. *Harmer* (1850), 3 Car. & Kir. 10.

(*b*) See p. 479, *ante*.

(*c*) As to judgments and their operation, see titles ESTOPPEL, pp. 326 *et seq.*, *ante*; JUDGMENTS AND ORDERS.

(*d*) *Kingston's* (*Duchess*) *Case* (1776), 20 State Tr. 537; 2 Smith, L. C., 10th ed. 731.

(*e*) *Re Vitoria, Ex parte Vitoria*, [1894] 2 Q. B. 387, C. A.; *King* v. *Henderson*, [1898] A. C. 720, P. C.; *Re Allsop and Joy's Contract* (1889), 61 L. T. 213, *per* CHITTY, J.

(*f*) *R.* v. *Wick St. Lawrence* (*Inhabitants*) (1833), 5 B. & Ad. 526; *R.* v. *St. Pancras* (*Inhabitants*) (1794), Peake, 286 [220].

(*g*) *Nouvion* v. *Freeman* (1889), 15 App. Cas. 1.

(*h*) *Re Orrell Colliery and Fire Brick Co.* (1879), 12 Ch. D. 681.

(*i*) Taylor, Law of Evidence, 10th ed., ss. 1714—8. A foreign judgment may be impeached for a substantial defect, but not on the ground of irregularity of procedure (*Pemberton* v. *Hughes*, [1899] 1 Ch. 781, C. A.).

(*k*) *Birch* v. *Birch*, [1902] P. 130, C. A.; *Abouloff* v. *Oppenheimer* (1882), 10

SECT. 5. **Judgments.**

Conclusive evidence of existence and effect.

668. Every judgment is conclusive evidence against all the world of its own existence, date, and legal effect. The reason is that, being a public transaction of a solemn nature, it is conclusively presumed to have been truly recorded. But this presumption only extends to what has been called the substantive as distinguished from the judicial portions of the record (*l*).

Judgments admitted to contradict a witness.

669. Judgments, and especially convictions, are also sometimes admitted in this connection to contradict a witness who has denied or sworn to facts inconsistent with them; or to explain the character in which a party has sued in or defended a former action. In such cases, however, the record is not relied on as showing the truth of the facts found, but merely as evidence for the collateral purposes specified.

Part III.—Modes of Proof.

SECT. 1.—*Admissions for Purposes of Trial.*

Admissions for purposes of trial.

670. Admissions for the purposes of trial may be made on the record by actual or implied admissions on the pleadings (*m*), or by express admissions (*n*), or in answer to interrogatories (*o*), or may be made by agreement between the parties or on notice (*p*).

SECT. 2.—*Judicial Notice.*

SUB-SECT. 1.—*English Law, Customs, and Practice.*

Equity.

671. The judges are bound to recognise and take notice of all equitable estates, titles, and rights, and all equitable duties and liabilities appearing incidentally in the course of any cause or matter, and, subject thereto, to recognise and give effect to all legal claims and demands, and all estates, titles, rights, duties, obligations, and liabilities existing by the common law or by any custom (*q*).

Common law.

Q. B. D. 295, C. A. As to setting aside a consent order on the ground of mistake, see *Huddersfield Banking Co., Ltd.* v. *Lister* (*Henry*) *& Son, Ltd.*, [1895] 2 Ch. 273, C. A.

(*l*) Best, Law of Evidence, 10th ed., s. 590; and see title ESTOPPEL, pp. 323, 331 *et seq.*, 339 *et seq.*, *ante*. Thus, if A. is charged with larceny of B.'s goods and is acquitted, and afterwards sues B. for malicious prosecution, the record of A.'s acquittal is conclusive proof of that fact against B.; but it is neither conclusive, nor even admissible, evidence to show that A. was innocent, or that B. was the prosecutor, or was actuated by malice (*Legatt* v. *Tollervey* (1811), 14 East, 302). And, similarly, if A. obtains judgment against B. as surety for C., this judgment is conclusive evidence in an action by B. against C. of the amount paid by B.; but it is neither conclusive nor admissible evidence of B.'s liability to pay it (*King* v. *Norman* (1847), 4 C. B. 884; and compare *Re Kitchin, Ex parte Young* (1881), 17 Ch. D. 668, C. A.).

(*m*) See title PLEADING.

(*n*) See p. 456, *ante*.

(*o*) As to answers to interrogatories, see title DISCOVERY, INSPECTION, AND INTERROGATORIES, Vol. XI., pp. 108—113.

(*p*) See title PRACTICE AND PROCEDURE.

(*q*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24 (4), (6), as to judges of

Statutes.

They are also bound to take notice of all public Acts of Parliament (*a*), and of all Acts of Parliament whatever passed since the year 1850, unless the contrary is expressly provided by the particular Act in question (*b*).

Scotch law not noticed.

672. The English courts take notice of the prevalence in Ireland of the common law of England (*c*), but questions of Scottish law must be decided as questions of fact upon evidence in all English courts except the House of Lords, which, as the "*commune forum* of the three countries" (*d*), takes judicial notice of the law of each so far as it is material to the issues raised by the record in all cases that come before it (*e*).

In accordance with these principles, the court takes notice of every branch of English law, including the principles of international law, ecclesiastical law, marine law (*f*), the emanations from the Crown pursuant to statute, such as the articles of war and rules made under the Army Act as distinguished from rules not so made (*g*), the law and customs of Parliament, the existence and extent of the privileges of each House of Parliament (*h*), and the order and course of the proceedings therein (*i*), and the privileges of the Crown, *e.g.*, the privileges with respect to the royal palaces (*k*).

Usages of law merchant.

673. The court will take judicial notice of usages which are embodied in the law merchant (*l*), and of commercial or other usages which have been proved sufficiently often in the courts of law (*m*), and the court is bound to know and recognise such usages without proof (*n*). For example, the custom of merchants by which bills of lading are drawn in sets of three or more, and their

the High Court and Court of Appeal, and ss. 89, 91, as to judges of inferior courts. The common law courts took judicial notice of the rules of equity before the Judicature Act (*Sims* v. *Marryat* (1851), 17 Q. B. 281; *Neeves* v. *Burrage* (1849), 14 Q. B. 504.

(*a*) *R.* v. *Sutton* (1816), 4 M. & S. 532.

(*b*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 9; and see p. 525, *post*.

(*c*) *Re Nesbitt* (1844), 14 L. J. (M. C.) 30.

(*d*) *Cooper* v. *Cooper* (1888), 13 App. Cas. 88, *per* Lord WATSON, at p. 104.

(*e*) *Cooper* v. *Cooper, supra; Lyell* v. *Kennedy, Kennedy* v. *Lyell* (1889), 14 App. Cas. 437. Similarly in a colony or dependency the court takes judicial notice of the law there prevalent (*Secretary of State for Foreign Affairs* v. *Charlesworth, Pilling & Co.* (1901), 17 T. L. R. 265, P. C.).

(*f*) *Chandler* v. *Grieves* (1792), 2 Hy. Bl. 606, note a.

(*g*) *Bradley* v. *Arthur* (1825), 4 B. & C. 292, 304.

(*h*) *Stockdale* v. *Hansard* (1839), 9 Ad. & El. 1, 112; *Middlesex Sheriff's Case* (1840), 11 Ad. & El. 273; *Burdett* v. *Abbot* (1811), 14 East, 1, 148; (1817), 5 Dow, 165, 199, H. L.; *Wason* v. *Walter* (1868), L. R. 4 Q. B. 73; *Bradlaugh* v. *Gossett* (1884), 12 Q. B. D. 271; *Shaftsbury's (Earl) Case* (1677), 1 Mod. Rep. 144; and see title PARLIAMENT.

(*i*) *Lake* v. *King* (1668), 1 Wms. Saund. 120, 131 b.

(*k*) *Elderton's Case* (1703), 2 Ld. Raym. 978; *Winter* v. *Miles* (1809), 10 East, 578; *A.-G.* v. *Donaldson* (1842), 10 M. & W. 117; *A.-G.* v. *Dakin* (1870), L. R. 4 H. L. 338; and see title CONSTITUTIONAL LAW, Vol. VI., p. 409.

(*l*) See title CUSTOM AND USAGES, Vol. X., pp. 256, 273.

(*m*) *I bid.*, p. 272; and *Jones* v. *Peppercorne* (1858), 28 L. J. (CH.) 158.

(*n*) For list of usages of which judicial notice is taken, see title CUSTOM AND USAGES, Vol. X., pp. 256, 272—299.

SECT. 2. Judicial Notice.

effect when so drawn, are now part of the law of which the court will take notice without proof (*o*), and the court will take judicial notice of the customs which govern the descent of land in certain parts of England (*p*), as opposed to manorial customs in contravention of the common law, which must be proved.

Customs of the City of London.

674. The customs of the City of London were always noticed by the City court, and, after being certified by the Recorder, by the court to which the certificate was given (*q*). The following customs have been certified by the Recorder and acted upon by the court, namely, the custom of foreign attachment (*r*), the custom that a shop in the City of London in which goods are publicly exposed for sale is *market overt* for goods professedly dealt in there (*s*), the custom that a married woman carrying on a trade apart from her husband within the City is to be charged with liability as a *feme sole* (*t*), the nature of the office of a liveryman (*u*), and the customary distribution of a freeman's estate upon his death intestate (*a*). Since the Judicature Act, 1873, all courts will take notice of the customs so certified (*b*). A custom (*c*) of general application, which has been judicially noticed and acted upon, and is in effect part of the common law in the locality where it exists, can only be abolished or extinguished by Act of Parliament (*d*), while usage, being based purely upon habitual practice, may by disuse lose its notoriety and disappear (*e*).

Practice.

675. From the earliest times the superior courts took notice of the "customs and courses of every of the King's Courts" (*f*). The High Court of Justice, being now one court (*g*), takes judicial notice of the jurisdiction of the several branches into which it is divided by the statutes under which it is constituted, and of the rules made thereunder, which govern its practice and procedure,

(*o*) *Glyn Mills & Co.* v. *East and West India Dock Co.* (1882), 7 App. Cas. 591; *Sanders* v. *Maclean* (1883), 11 Q. B. D. 327, C. A.

(*p*) See title CUSTOM AND USAGES, Vol. X., p. 237.

(*q*) *Ibid.*, p. 237; and *Piper* v. *Chappell* (1845), 14 M. & W. 624.

(*r*) *Crosby* v. *Hetherington* (1842), 4 Man. & G. 933; *Westoby* v. *Day* (1853), 2 E. & B. 605; *Levy* v. *Lovell* (1880), 14 Ch. D. 234, C. A.; *London Corporation* v. *London Joint Stock Bank* (1881), 6 App. Cas. 393.

(*s*) *Market-Overt Case* (1596), 5 Co. Rep. 83 b; *Lyons* v. *De Pass* (1840), 11 Ad. & El. 326; *Crane* v. *London Dock Co.* (1864), 5 B. & S. 313; *Hargreave* v. *Spink*, [1892] 1 Q. B. 25.

(*t*) *Lavie* v. *Phillips* (1765), 3 Burr. 1776; see Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1.

(*u*) *King* v. *Clerk* (1697), 1 Salk. 349.

(*a*) *Bruin* v. *Knott* (1842), 12 Sim. 436; *Blunt* v. *Lack* (1856), 26 L. J. (CH.) 148, C. A. This custom was abolished by stat. (1856) 19 & 20 Vict. c. 94, s. 1.

(*b*) 36 & 37 Vict. c. 66, ss. 24 (6), 89, 91.

(*c*) As to the distinction between a custom and a particular trade or local usage, see title CUSTOM AND USAGES, Vol. X., p. 221.

(*d*) *Ibid.*, p. 246.

(*e*) *Ibid.*, p. 251.

(*f*) *Lane's Case* (1586), 2 Co. Rep. 16 b; compare *Dobson* v. *Bell* (1676), 2 Lev. 176; *Pugh* v. *Robinson* (1786), 1 Term Rep. 116. In *Dance* v. *Robson* (1829), Mood. & M. 294, printed copies of the rules circulated among the court's officers for their guidance were accepted as evidence of the rules.

(*g*) See title COURTS, Vol. IX., p. 51.

and have themselves the force of an enactment (*h*). The rules governing the practice and procedure of inferior courts, if made under statutory authority, are judicially noticed by all courts (*i*). The court is entitled to look at its own records and proceedings in any matter (*k*), and takes judicial notice of any illegality appearing therein on the part of any party by reason of which it considers that its assistance should be refused to such party, although the illegality is not pleaded or relied upon by the opposite party (*l*). It has also taken notice of the privileges and obligations of solicitors as officers of the court (*m*), of the practice of the taxing masters (*n*), and of the fact that the assizes may continue for longer than one day (*o*).

Records of the court.

SUB-SECT. 2.—*Colonial and Foreign Laws.*

676. The English courts cannot take judicial notice of foreign laws, and in this connection the laws of any British colony or any

Colonial laws must be proved.

(*h*) *Longman* v. *East* (1877), 3 C. P. D. 142, C. A., *per* BRETT, L.J., at p. 156; and see *Schneider* v. *Batt & Co.* (1881), 8 Q. B. D. 701, C. A.; *Re Mills' Estate, Ex parte Commissioners of Works and Public Buildings* (1886), 34 Ch. D. 24, C. A.; *Re Fisher*, [1894] 1 Ch. 450, C. A.

(*i*) See pp. 542—553, *post*.

(*k*) *Craven* v. *Smith* (1869), L. R. 4 Exch. 146.

(*l*) See *Evans* v. *Richardson* (1817), 3 Mer. 469; and *Griffiths* v. *Fleming*, [1909] 1 K. B. 805, C. A., *per* FARWELL and KENNEDY, L.JJ., at p. 820. The rule *ex turpi causâ non oritur actio* applies in actions for recovery of property as well as in actions arising out of contract, but the illegality must be directly connected with the action (*Gordon* v. *Metropolitan Police* (*Chief Commissioner*) (1910), 26 T. L. R. 645, C. A., and must not be merely collateral (*Feret* v. *Hill* (1854), 15 C. B. 207). In *Scott* v. *Brown, Doering, McNab & Co.*, *Slaughter and May* v. *Brown, Doering, McNab & Co.*, [1892] 2 Q. B. 724, C. A., the court refused to entertain an action to recover the price of shares, the facts of the plaintiff's case disclosing a criminal conspiracy to which he was a party; and in *Gedge* v. *Royal Exchange Assurance Corporation*, [1900] 2 Q. B. 214, the court took notice of the invalidity of an "honour" policy of marine insurance under the Marine Insurance Act, 1745 (19 Geo. 2, c. 37), s. 1 (which Act is now repealed and re-enacted by Marine Insurance Act, 1906 (6 Edw. 7, c. 41; see also Marine Insurance (Gambling Policies) Act, 1909 (9 Edw. 7, c. 12)), and refused to entertain an action upon it, although in neither case was the illegality pleaded or relied upon by the defendants. See, however, *Buchanan & Co.* v. *Faber* (1899), 4 Com. Cas. 223, 227, n., where BIGHAM, J., at the request of the parties heard an action upon a similar policy as if it did not contain the clause which rendered it null and void, and *Connolly* v. *Consumers' Cordage Co.* (1903), 89 L. T. 347, P. C.; see also *Royal Exchange Assurance Corporation* v. *Sjoforsakrings Aktiebologet Vega*, [1902] 2 K. B. 384, C. A.; *Luckett* v. *Wood* (1908), 24 T. L. R. 617; and *Chatterton* v. *Secretary of State for India in Council*, [1895] 2 Q. B. 189, 191, C. A. (judge at the trial bound to refuse to allow an action for libel based upon an official state communication to proceed, whether objection were taken by the parties or not). In *Willis* v. *Lovick*, [1901] 2 K. B. 195, it was held that the Gaming Act, 1892 (55 & 56 Vict. c. 9), if relied on in a county court, must be pleaded, but now the plaintiff is not entitled to maintain an action contrary to the provisions of this Act or of the Gaming Act, 1845 (8 & 9 Vict. c. 109), by reason of such Acts not having been pleaded as a defence (County Court Rules, Ord. 10, r. 18, as amended 1909).

(*m*) *Stokes* v. *Mason* (1808), 9 East, 424, 426; *Walford* v. *Fleetwood* (1845), 14 M. & W. 449; *Day* v. *Ward* (1886), 17 Q. B. D. 703; *Re A Solicitor, Ex parte Hales*, [1907] 2 K. B. 539; and see Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 87, and, as to the privileges and obligations of solicitors as officers of the court, title SOLICITORS.

(*n*) *Cobbett* v. *Wood*, [1908] 2 K. B. 420, C. A.

(*o*) *Whitaker* v. *Wisbey* (1852), 12 C. B. 44, 56.

SECT. 2. **Judicial Notice.**

part of the British dominions are treated as foreign (*p*). Such laws must be pleaded and proved as facts by properly qualified witnesses (*q*), or ascertained by the machinery provided, in the case of the law of any part of the British dominions, by the British Law Ascertainment Act, 1859 (*r*).

And also foreign law.

The court requires the foreign law to be proved in each case in which it is material that it should be ascertained, and will not act upon the authority of a previous decision upon it in a similar case in this country (*s*).

Conflict of laws.

Where reliance is placed by any party upon a difference between the law of England and any foreign law, the burden of proving such a difference lies upon the party who asserts its existence (*t*).

Competency of witness to foreign law.

A witness is not accepted as competent to prove foreign law unless he possesses special knowledge of the subject in question derived from practical experience. Knowledge acquired by study alone is not a sufficient qualification (*a*), but it is required that the witness should have had experience as judge or practising advocate in a court in which the foreign law to be proved is administered, or have held some office or position in which he has become familiar with it (*b*).

(*p*) But as to colonial statutes, see Evidence (Colonial Statutes) Act, 1907 (7 Edw. 7, c. 16).

(*q*) *Fremoult* v. *Dedire* (1718), 1 P. Wms. 429, 431; *Mostyn* v. *Fabrigas* (1774), 1 Cowp. 161, 174; *Ganer* v. *Lanesborough* (1790), 1 Peake, 18; *R.* v. *Brenan* (1847), 16 L. J. (Q. B.) 289, *per* PATTESON, J., at p. 290; *R.* v. *Povey* (1852), 22 L. J. (M. C.) 19, C. C. R.; *Nelson* (*Earl*) v. *Bridport* (*Lord*) (1845), 8 Beav. 527, *per* Lord LANGDALE, M.R., at p. 536; *R.* v. *Brixton Prison* (*Governor*), *Ex parte Percival* (1907), 71 J. P. 148, *per* Lord ALVERSTONE, C.J., at p. 150; *Brailey* v. *Rhodesia Consolidated, Ltd.*, [1910] 2 Ch. 95, *per* WARRINGTON, J., at p. 102. It seems formerly to have been the practice to refer questions of foreign law to a master to report. Questions of Scotch law were so referred in *Glover* v. *Strothoff* (1786), 2 Bro. C. C. 33; *Anstruther* v. *Adair* (1834), 2 My. & K. 513; *Williams* v. *Williams* (1841), 3 Beav. 547; and *M'Call* v. *M'Call* (1843), 2 Con. & Law. 184, but as to evidence of the law of Scotland by affidavit, see *Re Fitzgerald, Surman* v. *Fitzgerald*, [1904] 1 Ch. 573, C. A.

(*r*) 22 & 23 Vict. c. 63; and see p. 490, *post*.

(*s*) *M'Cormick* v. *Garnett* (1854), 5 De G. M. & G. 278, C. A.

(*t*) *Spain* (*King*) v. *Machado* (1827), 4 Russ. 225; *Smith* v. *Gould, The Prince George* (1842), 4 Moo. P. C. C. 21; *Pickering* v. *Stephenson* (1872), L. R. 14 Eq. 322; *Male* v. *Roberts* (1800), 3 Esp. 163.

(*a*) *Bristow* v. *Sequeville* (1850), 5 Exch. 275; *In the Goods of Bonelli* (1875), 1 P. D. 69; and *Re Turner, Meyding* v. *Hinchcliff*, [1906] W. N. 27, *per* KEKEWICH, J.

(*b*) *Re Todd, Shand* v. *Kidd* (1854), 19 Beav. 582 (evidence as to Scotch law given by a solicitor practising in Scotland rejected, and evidence required to be given by an advocate); *Cartwright* v. *Cartwright* (1878), 26 W. R. 684 (evidence of English barrister practising in Canadian appeals before the Privy Council held inadmissible to prove Canadian law); *R.* v. *Savage* (1876), 13 Cox, C. C. 178 (Roman Catholic priest, who had on many occasions performed the marriage ceremony in Scotland, held incompetent to prove Scotch marriage law). On the other hand, in *The Sussex Peerage* (1844), 11 Cl. & Fin. 85, 134, H. L., a Roman Catholic bishop, who was bound in order to discharge his duties to make himself acquainted with the matrimonial law of Rome, was held competent to give evidence upon it as being *peritus virtute officii;* and see *Vander Donckt* v. *Thellusson* (1849), 8 C. B. 812 (merchant and stockbroker at Brussels, held capable of proving the Belgian law of negotiable instruments); *In the Goods of Dost Aly Khan* (1880), 6 P. D. 6 (Persian law proved by a secretary to the Persian embassy in London and the Persian minister at Vienna, it being shown

In giving evidence as to foreign law the witness may refer to authorities, laws, and treatises thereon, for the purpose of refreshing his memory and as part of the materials on which he bases his opinion (*c*), and is entitled to refer to and state the effect of any written law without being bound to produce a copy of it (*d*).

Reference to documents etc.

If, however, the witness produces any text-book, decision, code, or other legal document, as stating or representing the foreign law, the court is entitled to deal with it and give the same effect to it as to any other portion of the evidence (*e*), and, in the event of conflicting oral evidence being given, may itself examine the documents referred to, or construe the written law, and form its own conclusion thereon (*f*).

The court may examine documents referred to.

677. The construction of a foreign document by the application to it of the foreign law when ascertained is for the judge, and not for the witness. Where a written contract is made in a foreign country, and in a foreign language, the court, in order to interpret it, must first obtain a translation of the instrument; secondly, an explanation of the terms of art (if it contains any); thirdly, evidence of any foreign law applicable to the case; and fourthly, evidence of

Construction of foreign documents.

that all persons in the Persian diplomatic service were required to be thoroughly versed in Persian law); *In the Goods of Whitelegg*, [1899] P. 267 (evidence of notary public, acquainted with the law of Chili, though not a Chilian lawyer nor practising in Chili, accepted with hesitation, to prove Chilian law); *Cooper-King* v. *Cooper-King*, [1900] P. 65 (ex-governor of Hong-Kong permitted to prove the law of that colony); and *Wilson* v. *Wilson*, [1903] P. 157 (English barrister admitted to prove the Maltese marriage laws, of which he had in the exercise of his profession made a special study). In *Lacon* v. *Higgins* (1822), 3 Stark. 178, French law was proved by a French vice-consul in London, but no question as to his qualification or competence appears from the report to have been raised. See also pp. 480, 481, *ante*.

(*c*) *The Sussex Peerage* (1844), 11 Cl. & Fin. 85, 114—117, H. L.; *Nelson* (*Earl*) v. *Bridport* (*Lord*) (1845), 8 Beav. 527, *per* Lord LANGDALE, M.R., at p. 538.

(*d*) *De Bode's* (*Baron*) *Case* (1845), 8 Q. B. 208, 251, where the earlier cases are discussed.

(*e*) See *Concha* v. *Murrietta*, *De Mora* v. *Concha* (1889), 40 Ch. D. 543, C. A., *per* LOPES, L.J., at p. 554.

(*f*) *Craster* v. *Thomas*, [1909] 2 Ch. 348, 357. In *Lindo* v. *Belisario* (1795), 1 Hag. Con. 216, and *Dalrymple* v. *Dalrymple* (1811), 2 Hag. Con. 54, Lord STOWELL followed this course. In *Lacon* v. *Higgins* (1822), 3 Stark. 178, ABBOTT, C.J., construing the French marriage code, expressed the opinion that the formalities prescribed were merely directory, but, after hearing further oral evidence, held the contrary; in *Trimbey* v. *Vignier* (1834), 1 Bing. (N. C.) 151, after hearing conflicting opinions from French advocates upon the French code, the court construed the code itself; in *Bremer* v. *Freeman* (1857), 10 Moo. P. C. C. 306, the Judicial Committee decided between the opposite opinions of French advocates by examining the decisions of French courts and the works of text-writers referred to in the argument; in *Prowse* v. *European and American Steam Shipping Co.* (1860), 13 Moo. P. C. C. 484, an Act of the Legislative Council of India and rules as to navigation and compulsory pilotage being admitted, the court decided their proper effect and construction; see also *United States of America* v. *McRae* (1867), 3 Ch. App. 79 (construction of an American Act of Congress); *Craster* v. *Thomas*, *supra* (construction of Indian Succession Act, 1865 (Act X. of 1865)); *Macdonald* v. *Macdonald* (1872), L. R. 14 Eq. 60 (inference from written opinion of a Scotch advocate on point of Scotch law not expressly stated in the opinion). See, however, *Cocks* v. *Purday* (1846), 2 Car. & Kir. 269, 270; *The Sussex Peerage*, *supra*; and *Nelson* (*Earl*) v. *Bridport* (*Lord*), *supra*, at pp. 534—539.

SECT. 2. Judicial Notice.

any peculiar rules of construction, if any such rules exist, by the foreign law. With this assistance the court must interpret the contract itself on ordinary principles of construction (*g*).

The court follows its own laws of evidence and procedure.

678. In considering a question of foreign law, the court follows its own rules of evidence and procedure, and not those of the foreign country (*h*), and all questions which relate to the enforceability, as opposed to the validity, of a contract are matters of procedure, and therefore governed by the law of the tribunal in which the remedy is sought (*i*). In this connection it is to be observed that the provisions of the English Statutes of Limitation and of the Statute of Frauds are regarded as matters of procedure and evidence, and are applied, as part of the *lex fori*, to cases otherwise determined in accordance with the appropriate foreign law (*k*).

British Law Ascertainment Act, 1859.

679. Instead of deciding a question of the law of any part of the British dominions as a question of fact upon the evidence of witnesses, the court may have recourse to the provisions of the British Law Ascertainment Act, 1859 (*l*). Under this Act the court may, if of opinion that it is necessary or expedient for the proper disposal of any action (*m*) pending before it to ascertain such law, remit a case stating the facts to one of the superior courts in such part of the British dominions for its opinion upon the law (*n*). The facts to be stated in the case may be ascertained by the verdict of a jury or other competent mode, or may be agreed by the parties, or settled by such person or persons as may have been appointed by the court for the purpose in the event of the parties not agreeing (*o*).

Practice.

When the case has been prepared, the court or a judge thereof must approve it and settle the questions of law arising upon the facts stated, and the questions of law, together with the case, are then remitted to the court whose opinion is desired (*p*).

The court has a discretion whether it will send a case for the

(*g*) *Di Sora* v. *Phillipps* (1863), 10 H. L. Cas. 624, *per* Lord CRANWORTH, at p. 633. Compare *Stearine Kaarsen Fabrick Gonda Co.* v. *Heintzmann* (1864), 17 C. B. (N. S.) 56; and *Chatenay* v. *Brazilian Submarine Telegraph Co.*, [1891] 1 Q. B. 79, C. A. The report in *Williams* v. *Williams* (1841), 3 Beav. 547, that the construction of a Scotch settlement according to Scotch law was referred to a master for report is inaccurate (*Di Sora* v. *Phillipps*, *supra*, *per* Lord CHELMSFORD, at p. 641).

(*h*) *Appleton* v. *Braybrook* (*Lord*) (1817), 6 M. & S. 34; *Yates* v. *Thomson* (1835), 3 Cl. & Fin. 544, H. L.; *Clark* v. *Mullick* (1840), 3 Moo. P. C. 252, 268; *Fergusson* v. *Fyffe* (1841), 8 Cl. & Fin. 121; and see title CONFLICT OF LAWS, Vol. VI., pp. 302—308.

(*i*) See title CONFLICT OF LAWS, Vol. VI., p. 302.

(*k*) *Ibid.*, pp. 306, 307.

(*l*) 22 & 23 Vict. c. 63; and see title PRACTICE AND PROCEDURE.

(*m*) "Action" here includes every judicial proceeding instituted in any court, civil, criminal, or ecclesiastical (*ibid.*, s. 5).

(*n*) *Ibid.*, s. 1.

(*o*) *Ibid.*

(*p*) *Ibid.*; see *Lord* v. *Colvin* (1860), 1 Drew. & Sm. 24 (case for opinion of Scotch court); *Login* v. *Coorg* (*Princess*) (1862), 30 Beav. 632 (case for opinion of court in India); *Topham* v. *Portland* (*Duke*) (1863), 1 De G. J. & Sm. 517, C. A.; *Wilson* v. *Moore* (1864), 12 W. R. 1137; and *Eglinton* (*Earl*) v. *Lamb* (1867), 15 L. T. 657 (cases ordered to be sent for the opinion of the Court of Session in Scotland); and *Re Moses*, *Moses* v. *Valentine*, [1908] 2 Ch. 235 (case for the opinion of the Transvaal court suggested but not sent).

opinion of another court or itself decide the question raised upon evidence (*q*).

The court whose opinion is desired may hear the parties or counsel on the case, or may pronounce its opinion without so doing, and may take such further procedure as it thinks proper for pronouncing its opinion (*r*). Upon the opinion being pronounced a copy, certified by an officer of the court pronouncing it, is given to each of the parties to the action requiring it (*s*), and any of the parties may lodge the copy of the opinion with the court in which the action is pending, and move it to apply the opinion to the facts stated in the case (*t*).

The opinion may be applied as a statement of the foreign law to the facts of the case, or be submitted to the jury with the other facts of the case as evidence, or conclusive evidence, as the court trying the action may think fit, of the foreign law therein stated (*a*). The House of Lords and the Privy Council, in the event of an appeal thereto in the action, may review, adopt, or reject any such opinion pronounced by any court whose judgments are respectively reviewable by them (*b*).

Foreign Law Ascertainment Act, 1861.

Similar provisions are made by the Foreign Law Ascertainment Act, 1861 (*c*), for ascertaining the law of any foreign country or State with the Government of which this country may enter into a convention for the purpose, but, as up to the present no such convention has been made with any foreign Government, the Act cannot be applied.

Colonial acts of state.

680. All proclamations, treaties, and other acts of state of any foreign State or of any British colony may be proved in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, by production of a copy purporting to be sealed with the seal of the foreign State or British colony to which the original document belongs (*d*).

Colonial statutes.

By the Colonial Laws Validity Act, 1865 (*e*), the certificate of the clerk or other proper officer of a legislative body in any colony, to the effect that the document to which it is attached is a true copy of any colonial law assented to by the governor of such colony, or of any bill reserved for the signification of the pleasure of the Crown by the governor, is made *primâ facie* evidence that the document so certified is a true copy of the law or bill, and, as the case may be, that the law has been duly and properly passed and assented to, or that the bill has been duly and properly passed and presented to the governor; and any proclamation purporting to be published by authority of the governor in any newspaper in the colony signifying

(*q*) *Lord* v. *Colvin* (1860), 1 Drew. & Sm. 24, *per* KINDERSLEY, V.-C.
(*r*) British Law Ascertainment Act, 1859 (22 & 23 Vict. c. 63), s. 1.
(*s*) *Ibid.*, s. 2.
(*t*) *Ibid.*, s. 3.
(*a*) *Ibid.*
(*b*) *Ibid.*, s. 4.
(*c*) 24 & 25 Vict. c. 11.
(*d*) Evidence Act, 1851 (14 & 15 Vict. c. 99), s. 7.
(*e*) 28 & 29 Vict. c. 63, s. 6.

SECT. 2. Judicial Notice.

the Crown's disallowance of such law or assent to such bill is made *primâ facie* evidence of such disallowance or assent.

Prints of Colonial Acts etc.

Copies of Acts, ordinances, and statutes passed by the Legislature of any British possession, and of orders, regulations, and other instruments issued or made thereunder, are admissible in evidence in all courts of justice in the United Kingdom, if purporting to be printed by the Government printer (*f*).

SUB-SECT. 3.—*Time.*

The almanack.

681. The almanack is part of the common law and established by statute (*g*), and the court takes judicial notice of the succession of years, months, and days (*h*), of the years of each sovereign's reign and the years in the calendar to which they correspond (*i*), and of the days of the week upon which the days in the calendar fall (*k*).

Time.

Any expression of time in Acts of Parliament, deeds, and other legal instruments means, in the case of Great Britain, Greenwich mean time, and in the case of Ireland, Dublin mean time, unless otherwise specifically stated (*l*), but judicial notice is taken, if necessary, of the fact that a place lies east or west of Greenwich, and therefore has a different time from Greenwich time (*m*), though not of the times at which the sun rises and sets (*n*).

SUB-SECT. 4.—*Affairs of State, States of War and Peace, Foreign Rulers, Officers of State.*

Home Government.

682. The courts take judicial cognisance of the Government of the country and the great officers of state by whom it is carried on (*o*), of the order and course of proceedings in Parliament (*p*),

(*f*) Evidence (Colonial Statutes) Act, 1907 (7 Edw. 7, c. 16), s. 1 (1). The Act applies to all such documents both prior and subsequent to the date on which it came into force (*ibid.*), and obviates the difficulty which arose in *R.* v. *Brixton Prison (Governor), Ex parte Percival* (1907), 71 J. P. 148. This case, in so far as it decided that a colonial statute must be proved, is rendered obsolete by the Act.

(*g*) *R.* v. *Dyer* (1703), 6 Mod. Rep. 41; *Brough* v. *Parkings* (1704), 2 Ld. Raym. 992; Calendar (New Style) Act, 1750 (24 Geo. 2, c. 23); Calendar Act, 1751 (25 Geo. 2, c. 30); see also title TIME.

(*h*) *R.* v. *Brown* (1828), Mood. & M. 163; *Harvy* v. *Broad* (1704), 2 Salk. 626.

(*i*) *Holman* v. *Burrow* (1702), 2 Ld. Raym. 794; *R.* v. *Smith* (1838), 2 Mood. & R. 109; *R.* v. *Pringle* (1840), 2 Mood. & R. 276; *Henry* v. *Cole* (1702), 2 Ld. Raym. 811.

(*k*) *Hoyle* v. *Cornwallis (Lord)* (1720), 1 Stra. 387; *Hanson* v. *Shackleton* (1835), 4 Dowl. 48; *Pearson* v. *Shaw* (1844), 7 I. L. R. 1.

(*l*) Statutes (Definition of Time) Act, 1880 (43 & 44 Vict. c. 9). The words "sunset" and "sunrise" in the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 85 (1), are not expressions of time within the meaning of the Definition of Time Act, but mean the actual time of sunset and sunrise according to local and not Greenwich mean time (*Gordon* v. *Cann* (1899), 63 J. P. 324). See also title TIME.

(*m*) *Curtis* v. *March* (1858), 3 H. & N. 866.

(*n*) *Collier* v. *Nokes* (1849), 2 Car. & Kir. 1012; *Tutton* v. *Darke*, *Nixon* v. *Freeman* (1860), 5 H. & N. 647.

(*o*) In *Whaley* v. *Carlisle* (1866), 17 I. C. L. R. 792, the court took notice that Lord Hawkesbury was foreign minister in 1803; and see *R.* v. *Jones* (1809), 2 Camp. 131.

(*p*) *Lake* v. *King* (1668), 1 Wms. Saund. 131 b.

and of the commencements, prorogations, and sessions of Parliaments (*q*).

Foreign States.

They also take notice of the existence and titles of foreign States recognised by the British Government as independent (*r*), and of the territorial limits of their dominions (*s*).

The status of a foreign ruler will be noticed by the court in accordance with the recognition afforded to him by the British Government (*t*). In order to inform itself upon such points the court will, if necessary, communicate with the proper Government authority in this country (*a*).

Existence of a state of war.

Judicial notice will be taken of the fact that this country is at war with any other, when such is the case (*b*), and of the existence of a state of war between other countries, when that fact is officially recognised by the Government of this country (*c*).

SUB-SECT. 5.—*Geography.*

Geography.

683. The court takes judicial notice of the existence, extent, and geographical position of the British dominions and of the territory of foreign States (*d*).

(*q*) *R.* v. *Wilde* (1670), 1 Lev. 296; *Birt* v. *Rothwell* (1697), 1 Ld. Raym. 210, 343.

(*r*) *Taylor* v. *Barclay* (1828), 2 Sim. 213; *United States of America* v. *Wagner* (1867), 2 Ch. App. 582. The existence and status of foreign States not so recognised are not noticed by the judges (*Berne (City)* v. *Bank of England* (1804), 9 Ves. 347), but must be proved by evidence (*Yrisarri* v. *Clement* (1826), 3 Bing. 432).

(*s*) *Foster* v. *Globe Venture Syndicate, Ltd.*, [1900] 1 Ch. 811.

(*t*) *Mighell* v. *Johore (Sultan)*, [1894] 1 Q. B. 149, C. A.

(*a*) In *Foster* v. *Globe Venture Syndicate, Ltd.*, *supra*, the court applied for information to the Foreign Office; in *Mighell* v. *Johore (Sultan)*, *supra*, to the Colonial Office. In *The Charkieh* (1873), L. R. 4 A. & E. 59, in addition to communicating with the Foreign Office, the court had recourse to other sources of information for the purpose of determining the status of the Khedive of Egypt. Such a course, however, is incorrect, the answer of the appropriate Government Office alone being conclusive (*Mighell* v. *Johore (Sultan)*, *supra*, *per* Lord ESHER, M.R., at p. 158).

(*b*) *R.* v. *De Berenger* (1814), 3 M. & S. 67; *Alcinous* v. *Nigreu* (1854), 4 E. & B. 217.

(*c*) It being the duty of the court to take notice of such facts as affecting the Government of the country, it is submitted that the law is as stated in the text, although in *Dolder* v. *Huntingfield (Lord)* (1805), 11 Ves. 283, Lord ELDON said during argument, "You would be obliged upon an indictment for a libel to prove that France is now at war with Austria, not as to the war with this country, the courts taking judicial notice of that with reference to our own country;" see also *Thelluson* v. *Cosling* (1803), 4 Esp. 266.

(*d*) In *Cooke* v. *Wilson* (1856), 1 C. B. (N. S.) 153, CROWDER, J., at p. 164, held that the court was bound to take notice of the existence of the colony of Victoria, and CRESSWELL, J., at p. 163, that it must recognise that that colony was out of England. In *Birrell* v. *Dryer* (1884), 9 App. Cas. 345, where the question was whether the words "St. Lawrence" in a policy of marine insurance included the Gulf of St. Lawrence, or were confined to the river of that name, Lord BLACKBURN said, at p. 352: "I think that the court should take judicial notice of the geographical position and general names applied to such districts as this, in short, of all that we see on the Admiralty chart of this part of the sea." In *Foster* v. *Globe Venture Syndicate, Ltd.*, *supra*, FARWELL, J., held himself bound to take judicial notice whether a tract of land between the Atlas Mountains and the river Nun was the territory of the tribes of Suss or of the Sultan of Morocco, and applied to the Foreign Office for information

SECT. 2. Judicial Notice.

County etc. divisions.

Judicial notice is taken of the counties into which England and Wales are divided, and of those which are maritime counties, but not of the distance of one county from another, nor of the particular places situated within each county (*e*), unless such situation is recognised by statute (*f*), nor of the particular diocese within which any town is situated (*g*).

A court of quarter sessions for a county takes judicial notice of the petty sessional divisions into which the county is divided (*h*).

SUB-SECT. 6.—*Notorious Facts.*

Notorious facts

684. Judicial notice is taken of various facts the universal notoriety or regular recurrence of which in the ordinary course of nature or business has made them familiar to the judges (*i*).

upon the question. The Foreign Jurisdiction Act, 1890 (53 & 54 Vict. c. 37), s. 4, provides that any question as to the existence or extent of any jurisdiction of the Crown in a foreign country, arising in proceedings in a court in the British dominions or held under British authority, is to be submitted to the Secretary of State, whose decision for the purpose of the proceedings is final. It is to be observed that the provisions under which service of a writ of summons, or notice of a writ of summons, issuing out of the High Court may be allowed out of the jurisdiction assume a knowledge of geography in the court. See, *e.g.*, R. S. C., Ord. 11, r. 5, under which, in such cases, the court is required to limit a time for appearance, such time to depend on the place or country where or within which the writ is to be served or the notice given. It is submitted, however, that the court, in accordance with the authorities as to English geography, will not, in general, take judicial notice of the exact position of particular places abroad, or of their relative distances from one another or from places in this country. In *Kearney* v. *King* (1819), 2 B. & Ald. 301, the court declined to take judicial notice that there was only one place named Dublin in the world, and therefore refused to construe an allegation in the declaration that a bill was drawn in Dublin as meaning drawn in Dublin in Ireland.

(*e*) *Deybel's Case* (1821), 4 B. & Ald. 243, *per* BAYLEY, J., and BEST, J. The court refused to take notice that Ivelchester was in the county of Somerset (*R.* v. *Burridge* (1735), 3 P. Wms. 439, 496); that the Tower of London was in the city of London (*Brune* v. *Thompson* (1842), 2 Q. B. 789); that Bedford Row was in the county of Middlesex (*Thorne* v. *Jackson* (1846), 3 C. B. 661); that the board room of the Holborn Union Workhouse was in Middlesex (*R.* v. *St. George, Bloomsbury* (*Inhabitants*) (1855), 4 E. & B. 520); that Holborn might not be in Surrey (*Humphreys* v. *Budd* (1841), 9 Dowl. 1000). In *R.* v. *Sharpe* (1838), 8 C. & P. 436, the court took notice that the county of Stafford was in England; in *R.* v. *St. Maurice* (*Inhabitants*) (1851), 16 Q. B. 908, that the city of York was the county of a city, having, by statute, the same limits; and in *R.* v. *Isle of Ely* (*Inhabitants*) (1850), 15 Q. B. 827, that by statute the Isle of Ely was a division of a county. In every statute passed after the year 1850 and before January 1st, 1890, "county" is to be construed, unless the contrary intention appears, as including a county of a city and a county of a town (Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 4).

(*f*) *R.* v. *Holborn Union Guardians* (1856), 6 E. & B. 715.

(*g*) *R.* v. *Sympson* (1724), 2 Ld. Raym. 1379.

(*h*) *R.* v. *Whittles* (1849), 13 Q. B. 248, *per* Lord DENMAN, C.J., at p. 253.

(*i*) Thus, notice has been taken of the impossibility of predicting fortunes by reference to the aspect of the stars (*Penny* v. *Hanson* (1887), 18 Q. B. D. 478); of the great difference in the value of money in the years 1189 and 1868 (*Bryant* v. *Foot* (1868), L. R. 3 Q. B. 497, Ex. Ch.); of the position of the University of Oxford as a national institution created for the advancement of religion and learning (*Oxford Poor Rate Case* (1857), 8 E. & B. 184); and of the position of an undergraduate at college rendering it, *primâ facie*, not unreasonable that he should require a watch (*Peters* v. *Fleming* (1840), 6 M. & W. 42).

SECT. 2. Judicial Notice.

The court takes notice of the usual period of gestation, so that proof of non-access by a husband to his wife during the time within which a child of which she is delivered must, in the ordinary course of nature, have been conceived, is sufficient to establish the fact that he was not the child's father (*k*). Period of gestation.

The ordinary nature of young children, their tendency to do mischievous acts, and their propensity to meddle with anything which comes in their way, have on several occasions formed the subject of judicial notice (*l*), and it has been held reasonable and natural to expect that a horse should bite and kick one of his own kind (*m*), but not that he should so act towards a child (*n*). Mischievous nature of children.

With regard to matters of business, the judges will take notice of the usual hours during which the business of banking is carried on (*o*), and of the nature and incidents of the employment of a broker on the London Stock Exchange (*p*). So, too, in questions relating to the publication of a libel, the court takes notice of the ordinary course of the business of the post office and of the stamps of the post office upon letters, and recognises that the contents of a telegram are necessarily communicated to all the clerks through whose hands it passes (*q*), and that a post-card is an unclosed document capable of being read by the servants both of the post office and of the place at which it is delivered (*r*). Ordinary course of business.

SUB-SECT. 7.—*Official Seals and Signatures.*

685. Courts will take judicial notice of the following seals:— Seals of public offices.

The Great Seals of the United Kingdom, and of England, Ireland, and Scotland (*s*); the Privy Seal (*a*); the Wafer Seals (Great and

(*k*) *R.* v. *Luffe* (1807), 8 East, 193; *Heathcote's Divorce Bill* (1851), 1 Macq. 277, H. L., where non-access until within a fortnight, and six lunar months and one week of the birth, respectively, were proved; *Bosvile* v. *A.-G.* (1887), 12 P. D. 177, 178; and see title HUSBAND AND WIFE.

(*l*) See *Lynch* v. *Nurdin* (1841), 1 Q. B. 29; *Williams* v. *Eady* (1893), 10 T. L. R. 41, C. A., *per* BRETT, M.R.; *Sullivan* v. *Creed*, [1904] 2 I. R. 317, C. A.; *Cooke* v. *Midland Great Western Railway of Ireland*, [1909] A. C. 229, *per* Lord ATKINSON, at p. 237.

(*m*) *Lee* v. *Riley* (1865), 18 C. B. (N. S.) 722; *Ellis* v. *Loftus Iron Co.* (1874), L. R. 10 C. P. 10.

(*n*) *Cox* v. *Burbidge* (1863), 13 C. B. (N. S.) 430.

(*o*) See *Parker* v. *Gordon* (1806), 7 East, 385; *Elford* v. *Teed* (1813), 1 M. & S. 28; *Jameson* v. *Swinton* (1810), 2 Taunt. 224; *Wilkins* v. *Jadis* (1831), 2 B. & Ad. 188.

(*p*) *Johnson* v. *Kearley*, [1908] 2 K. B. 514, C. A., *per* FLETCHER MOULTON, L.J., at p. 528.

(*q*) *Williamson* v. *Freer* (1874), L. R. 9 C. P. 393.

(*r*) *Robinson* v. *Jones* (1879), 4 L. R. Ir. 391, approving and following *Williamson* v. *Freer*, *supra*; *Sadgrove* v. *Hole*, [1901] 2 K. B. 1, C. A. In practice the judges, no doubt, make use of their own private knowledge and experience of many matters of which, if in issue in an action, they would not take judicial notice. Thus, in speaking of the evidence given to support an alleged custom governing dealings between brewers and distillers, in the course of which Messrs. Meux & Co. were referred to, JAMES, V.-C., is reported to have said that he might take judicial notice that they were very large brewers in London (*Daun* v. *City of London Brewery Co.* (1869), L. R. 8 Eq. 155, 164).

(*s*) *Melville's* (*Lord*) *Case* (1806), 29 State Tr. 550.

(*a*) *Lane's Case* (1586), 2 Co. Rep. 16 b, 17 b.

SECT. 2. Judicial Notice.

Privy) (*b*); the Seals (Great and Privy) of the Duchies of Cornwall (*c*) and Lancaster (*d*); the Seal of the Corporation of London (*e*); the Seals of the old Superior Courts of Justice, the old Admiralty Court (*f*), and any other court authorised by statute to use a seal (*g*), *e.g.*, the Probate (*h*), Divorce (*i*), and Bankruptcy Courts, and those of the judge and registrars of the last-named (*k*); the seals of the Central Office of the Royal Courts of Justice, and its various departments (*l*); those of the various District Registries (*m*), the Enrolment Office in Chancery (*n*), the County Courts (*o*), and the Court of the Vice-Warden of the Stannaries (*p*). Moreover, many public offices and bodies are authorised by statute to use distinctive seals, which are directed either to be noticed judicially, or to be received in evidence without proof of genuineness, *e.g.*, the seals of the Patent (*q*) and Record (*r*) Offices, and of the Local Government Board (*s*) and the Board of Education (*t*).

Seals of persons authorised to administer oaths.

With regard to affidavits and similar documents required for the purpose of any court or matter in England, but sworn in any place out of England, judicial notice will be taken of the seals of any person authorised (otherwise than by the law of any foreign country) to administer oaths therein. Such persons are, in Scotland and Ireland, the Channel Islands, or His Majesty's dominions, whether colonial or foreign, any court, judge, notary public, or other duly authorised official; and in foreign countries the various British diplomatic and consular agents (*u*).

Corporate bodies.

On the other hand courts will not take judicial notice of the seals of the Bank of England (*x*), nor of corporations (*y*) (other than that of London (*z*)); nor, perhaps, of county councils, unless expressly so provided (*a*).

(*b*) Crown Office Act, 1877 (40 & 41 Vict. c. 41), s. 4.
(*c*) Duchy of Cornwall Management Act, 1863 (26 & 27 Vict. c. 49), s. 2.
(*d*) Taylor, Law of Evidence, 10th ed., s. 6.
(*e*) *Doe* d. *Woodmass* v. *Mason* (1793), 1 Esp. 53.
(*f*) *Tooker* v. *Beaufort* (1756), Say. 297; *Green* v. *Waller* (1703), 2 Ld. Raym. 891, 893.
(*g*) *Doe* d. *Duncan* v. *Edwards* (1839), 9 Ad. & El. 554.
(*h*) Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 22.
(*i*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 13.
(*k*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 137.
(*l*) R. S. C., Ord. 61, rr. 6, 7.
(*m*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 61.
(*n*) Petty Bag Act, 1849 (12 & 13 Vict. c. 109).
(*o*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 180.
(*p*) Stannaries Act, 1836 (6 & 7 Will. 4, c. 106), s. 19.
(*q*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 64.
(*r*) Public Record Office Act, 1838 (1 & 2 Vict. c. 94), s. 11.
(*s*) Local Government Board Act, 1871 (34 & 35 Vict. c. 70), s. 5.
(*t*) Board of Education Act, 1899 (62 & 63 Vict. c. 33), s. 7.
(*u*) R. S. C., Ord. 38, r. 6; Commissioners for Oaths Act, 1889 (52 & 53 Vict. c. 10), ss. 3, 6, extended by the Commissioners for Oaths Act, 1891 (54 & 55 Vict. c. 50), s. 2. The court does not recognise the consular agent of another country (*In the Goods of De Salazar* (1873), 21 W. R. 776).
(*x*) *Doe* d. *Bank of England* v. *Chambers* (1836), 4 Ad. & El. 410.
(*y*) *Ibid.*
(*z*) See p. 486, *ante*.
(*a*) Taylor, Law of Evidence, 10th ed., s. 14. As to a document which ought

SECT. 2. Judicial Notice.

686. Courts will take judicial notice of the following signatures:— Signatures.

The Royal Sign Manual, and the signatures of the principal Secretaries of State (*c*); those of the judges of the superior courts to any judicial or official document (*d*), of the judges and registrars in bankruptcy (*e*), of the examiners (*f*), and, with respect to company matters, of any officer of the Courts of Chancery and Bankruptcy in England and Ireland, or of Session in Scotland, or of the Registrar of the Stannaries (*g*). So, also, the signatures to affidavits etc. of the various persons mentioned as authorised to administer oaths in places out of England (*h*), as well as those of a colonial notary (*i*), or of a foreign notary to a protest abroad of a foreign bill (*k*), though not to an affidavit (*l*).

It has been said, however, that the signatures of the Lords of the Treasury (*m*) will not be judicially noticed, nor, apparently, will those of the Attorney-General, or Public Prosecutor (*n*). Lords of the Treasury and law officers.

SECT. 3.—*Presumptions.*

SUB-SECT. 1.—*In General.*

687. Where facts are not proved directly, but are inferred with more or less probability from facts that have been so proved, the inference is called a presumption of fact, or *præsumptio hominis.* Presumptions.

The practical necessities of a trial, however, often oblige the court to treat as established some fact of which there has been given either no evidence at all, or evidence whose probative force depends, not on its own power to carry conviction to the mind of a jury, but on a rule of law giving it such force. Such rules are called presumptions of law. Of these, some do not permit evidence of a contrary tendency to be given, and are, therefore, called irrebuttable, conclusive, or absolute presumptions, or *præsumptiones juris et de jure.* Others take effect *primâ facie*, but may be displaced by evidence, and are called rebuttable, conditional, inconclusive, or disputable presumptions, or *præsumptiones juris.* Distinctions.

In some cases the same rule has, at different periods of its history, been treated as a presumption of fact, a rebuttable presumption of law, an irrebuttable presumption, or a rule of substantive law (*o*); and the remedy, if any, open to a party to

to have been sealed but could not be owing to there being no official seal, see *Re Court Bureau, Ltd.*, [1891] W. N. 9.

(*c*) *Mighell* v. *Johore* (*Sultan*), [1894] 1 Q. B. 149, C. A.

(*d*) Evidence Act, 1845 (8 & 9 Vict. c. 113), s. 2 (*Blades* v. *Lawrence* (1874), L. R. 9 Q. B. 374.

(*e*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 137.

(*f*) R. S. C., Ord. 37, r. 18.

(*g*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 225.

(*h*) See p. 496, *ante.*

(*i*) *Brooke* v. *Brooke* (1881), 17 Ch. D. 833 (*Nye* v. *Macdonald* (1870), L. R. 3 P. C. 331, 343; *Re Davies, Davies* v. *Atkinson*, [1909] W. N. 212.

(*k*) *Chesmer* v. *Noyes* (1815), 4 Camp. 129.

(*l*) *Re Earl's Trust* (1858), 4 K. & J. 300, C. A.

(*m*) *R.* v. *Jones* (1809), 2 Camp. 131.

(*n*) *R.* v. *Turner*, [1910] 1 K. B. 346, C. C. A.

(*o*) See Thayer on Evidence, 1898, pp. 323, 324, "We find the rule about

SECT. 3. Presumptions.

whose detriment the rule has been disregarded has varied accordingly.

688. A presumption of fact is an inference which a jury, or a judge when an action is being tried without a jury, in their discretion, may or may not draw; a rebuttable presumption of law is a legal rule to be applied by the court, in the absence of conflicting evidence; while between an irrebuttable presumption and a rule of substantive law the difference is often a mere matter of terms (*p*).

Effect of presumption of law.

The nature of a presumption of law is that the court treats as established some fact of which no evidence has been given, and when rebuttable, it can have no weight capable of being put in the balance against opposing evidence which is believed. It does not follow that such a presumption may be rebutted in every case by any evidence, however slight. The rebutting evidence is to be considered on its merits: its credibility is neither increased nor diminished by the existence of the presumption; but, if it is believed, the presumption is displaced. Where, however, two rebuttable presumptions of inconsistent character arise, they neutralise each other, and the matter must be decided on the evidence actually adduced (*a*). The chief effects of rebuttable presumptions of law are to determine the incidence of the burden of proof, and to prove negative assertions, which very often can be established in no other way (*b*).

SUB-SECT. 2.—*Conclusive.*

Conclusive presumptions.

689. Irrebuttable presumptions of law are a small and unsatisfactory class, and almost all the rules which have at various times been regarded as such are now treated either as rebuttable (*c*) or as belonging, not to the domain of evidence, but to that of substantive

a seven years' absence (i.) coming into existence in the form of a judicial declaration about what may or may not fairly be inferred by a jury in the exercise of their logical faculty" (presumption of fact) . . . "(ii.) passing into the form of an affirmative rule of law requiring that death be assumed under the given circumstances" (rebuttable presumption of law); and at p. 317 it is shown that "The familiar doctrine about prescription used to be put as an ordinary rule of presumption; in twenty years there arose a *primâ facie* case of a lost grant or of some other legal origin. The judges at first laid it down that, if unanswered, twenty years of adverse possession justified the inference, then that it 'required the inference,' *i.e.*, it was the jury's duty to do what they themselves would do in settling the same question, namely, to find the fact of the lost grant; and at last this conclusion was announced as a rule of the law of property, to be applied absolutely."

(*p*) *E.g.*, the rule that a child under seven cannot commit a crime may be classed indifferently under either head. As to this presumption and the rebuttable presumption that a child between seven and fourteen has no *animus malus*, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 239.

(*a*) *R.* v. *Willshire* (1881), 6 Q. B. D. 366, C. C. R. In *Jayne* v. *Price* (1814), 5 Taunt. 326, it was said by HEATH, J., that "a presumption may be rebutted by a contrary and stronger presumption"; but this, apparently, refers to presumptions of fact, as in that case it had been left to the jury to draw the proper inference from the evidence.

(*b*) *Over* v. *Harwood*, [1900] 1 Q. B. 803, *per* CHANNELL, J.

(*c*) *E.g.*, the presumption that a child born of a married woman is legitimate used to be regarded as indisputable (Co. Litt. 244 a), but it may now be rebutted (see p. 504, *post*).

law (*d*). Thus, the rule that ignorance of the law does not excuse, or relieve from the consequences of, a crime, or from liability under a contract, has sometimes been expressed as an irrebuttable presumption that every person who is subject to the law is acquainted with it (*e*).

SUB-SECT. 3.—*Rebuttable.*

Rebuttable presumptions.

690. The most important of the rebuttable presumptions of law are those relating to innocence, intention, death, marriage, legitimacy, and the regularity and validity of official acts and documents.

Presumption of innocence.

691. There is a general presumption that all acts and conduct are in accordance with law and morality. A party, therefore, who charges another with any description of wrong-doing must always give at least *primâ facie* evidence of guilt before the party accused can be called on for an answer (*f*). The sufficiency of the evidence of guilt is, of course, a further question; and, in general, the more serious the charge, the more clearly must it be proved (*g*). Thus, to justify a conviction for crime, the jury must be satisfied of the guilt of the accused beyond any reasonable doubt (*h*); while, in civil cases, they may act on a mere preponderance of probability (*i*). Persons between the ages of seven and fourteen are presumed innocent of criminal intent, but if such intent be proved, then *malitia supplet ætatem* (*k*). Homicide, however, will be presumed to be felonious, unless the contrary appears (*l*).

Intention.

Where intention is material, it is usually, though not invariably, presumed that a man intended the natural and probable consequences of his acts (*m*).

(*d*) *E.g.*, as to the rebuttable presumption of valid delivery of a bill in favour of a holder in due course, see Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 21 (2); as to the so-called irrebuttable presumptions that a child under seven cannot be guilty of crime, and that a boy under fourteen cannot commit rape, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 239, 389, note (*q*).

(*e*) *Brett* v. *Rigden* (1568), 1 Plowd. 340, 343; *Mildmay's Case* (1584), 1 Co. Rep. 175 a, 177 b; *Bilbie* v. *Lumley* (1802), 2 East, 469; *Stevens* v. *Lynch* (1810), 12 East, 38; *R.* v. *Esop* (1836), 7 C. & P. 456; *Martindale* v. *Falkner* (1846), 2 C. B. 706; *R.* v. *Tewkesbury Corporation* (1868), L. R. 3 Q. B. 629; *R.* v. *Coote* (1873), 9 Moo. P. C. C. (N. S.) 463.

(*f*) *R.* v. *Burdett* (1820), 4 B. & Ald. 95; *Williams* v. *East India Co.* (1802), 3 East, 192 (where omission to give a certain notice amounts to a crime, there is a presumption that the notice was given, so as to put the burden of proof on the party denying the notice). But see *Huggins* v. *Ward* (1873), L. R. 8 Q. B. 521; *Over* v. *Harwood*, [1900] 1 Q. B. 803 (breach of the duty to notify a child's vaccination will not be presumed, therefore absence of such notification is *primâ facie* evidence of non-vaccination); *Lord* v. *Lord*, [1900] P. 297 (co-respondent to a divorce petition presumed not to know that the respondent was married). As to evidence of a breach of covenant involving forfeiture of a lease, see *Toleman* v. *Portbury* (1870), L. R. 5 Q. B. 288, Ex. Ch., and title LANDLORD AND TENANT.

(*g*) *R.* v. *Hobson* (1823), 1 Lew. C. C. 261, *per* HOLROYD, J.

(*h*) *R.* v. *White* (1865), 4 F. & F. 383.

(*i*) *Cooper* v. *Slade* (1858), 6 H. L. Cas. 746, *per* WILLES, J., at p. 772.

(*k*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 239, 240.

(*l*) *R.* v. *Cavendish* (1873), 8 I. R. C. L. 178, C. C. R.; and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 570.

(*m*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 236, 389, note (*q*); *R.* v. *Burdett*, *supra*.

SECT. 3. Presumptions.

Life and death.

692. With regard to human life, there is no presumption of law by which the fact that a particular person was alive on a given date can be established, it being in every case a question of fact for the jury, or judge sitting as such (*n*). As to death, on the other hand, there exists an important presumption, for if it is proved that for a period of seven years no news of a person has been received by those who would naturally hear of him if he were alive (*o*), and that such inquiries and searches as the circumstances naturally suggest have been made, there arises a legal presumption that he is dead (*p*). There is no legal presumption, however, either that he was alive up to the end of that period (*q*), or that he died at any particular point of time during the seven years (*r*). And if it be necessary to establish that a person, who, after the lapse of seven years, is presumed to be dead, died at any particular date within that period, this must be proved as a fact by evidence raising that inference, *e.g.*, that when last heard of he was in bad health, or exposed to unusual perils, or had failed to apply for a periodical

(*n*) *Re Phené's Trusts* (1870), 5 Ch. App. 139; *Re Aldersey, Gibson* v. *Hall*, [1905] 2 Ch. 181; *Benson* v. *Olive* (1731), 2 Stra. 920 (even after sixty years); *R.* v. *Willshire* (1881), 6 Q. B. D. 366, C. C. R. (after twelve years); *R.* v. *Jones* (1883), 15 Cox, C. C. 284, C. C. R. (after seventeen years).

(*o*) As to what constitutes news of a person, see *Prudential Assurance Co.* v. *Edmonds* (1877), 2 App. Cas. 487, where the House of Lords was equally divided.

(*p*) *Wills* v. *Palmer* (1904), 53 W. R. 169; *Re Bowden* (1904), 21 T. L. R. 13; *Re Callicott*, [1899] P. 189. A person who marries again, whose wife or husband has been absent for seven years and has not been known by such person to be living, cannot be convicted of bigamy; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 533.

(*q*) *Nepean* v. *Doe* d. *Knight* (1837), 2 M. & W. 894, Ex. Ch., see especially *per* Lord DENMAN, C.J., at p. 913; *Re Phené's Trusts, supra; Re Aldersey, Gibson* v. *Hall, supra; Re Benham's Trusts* (1867), 37 L. J. (CH.) 265 (discharging the order made in S. C., L. R. 4 Eq. 416, upon a presumption that life continues for seven years from last news of a person); *R.* v. *Lumley* (1869), L. R. 1 C. C. R. 196 (a question of fact for the jury whether a person was alive four years after he was last heard of); *Re Rhodes, Rhodes* v. *Rhodes* (1887), 36 Ch. D. 586 (disapproving *Re Westbrook's Trusts*, [1873] W. N. 167); *In the Goods of Matthews*, [1898] P. 17. The following statement of the rule, therefore, cannot now be accepted: "The presumption of the duration of life, with respect to persons of whom no account can be given, ends at the expiration of seven years from the time when they were last known to be living" (*Doe* d. *George* v. *Jesson* (1805), 6 East, 80, *per* Lord ELLENBOROUGH, C.J., at p. 85); nor can the case (*Hopewell* v. *De Pinna* (1809), 2 Camp. 113) decided in accordance with such statement.

(*r*) *Nepean* v. *Doe* d. *Knight, supra; Re Phené's Trusts, supra; In the Goods of How* (1858), 1 Sw. & Tr. 53; *In the Goods of Peck* (1860), 29 L. J. (P. M. & A.) 95; *In the Goods of Smith* (1861), 2 Sw. & Tr. 508; *Dunn* v. *Snowden* (1862), 2 Drew. & Sm. 201 (the marginal note is inaccurate in saying that a person presumed dead under the rule as to seven years' absence "must be taken to have lived to the end of the seven years" (*Thomas* v. *Thomas* (1864), 2 Drew. & Sm. 298, *per* KINDERSLEY, V.-C., at p. 302)); *In the Goods of Turner* (1864), 3 Sw. & Tr. 476; *Re Lewes' Trusts* (1871), 6 Ch. App. 356; *Re Rhodes, Rhodes* v. *Rhodes, supra; Re Aldersey, Gibson* v. *Hall, supra; In the Goods of Winstone*, [1898] P. 143 (grant of letters of administration to remain in registry to end of the seven years). *Re Tindall's Trust* (1861), 30 Beav. 151, seems not to have been seriously argued, and to be inconsistent with the leading cases. On an application for leave to presume death it is essential that the applicant should state a belief that the death occurred on or after the alleged date (*In the Goods of Hurlston*, [1898] P. 27; *Re Jackson* (1903), 87 L. T. 747).

payment upon which he was dependent for support (*s*). While, where a party's case depends on establishing that a given person, who is presumed to be dead, was alive or dead at a particular time within the seven-years period, and there is no evidence at all on the subject, success or failure will depend on the incidence of the burden of proof (*t*). A legatee, for example, now presumed to be dead, may have disappeared less than seven years before the death of the testator, and no evidence may be forthcoming as to the date of his death. The party, then, on whom lies the burden of proving either that the legatee died before, or that he survived, the testator will fail to make out his case (*a*). It seems, however, that where a settlement contains a trust for a person named, that person must, in proceedings based on the trust, be taken, until the contrary is shown, to have been in existence at the date of the settlement (*b*).

Life and death.

The presumption of death, it is to be observed, will not arise in the mere absence of evidence with regard to the person whose life is in question, for, when it has been shown that he was alive at some particular date, it is open to the jury to find that he continued alive (*c*), unless there is sufficient reason for the presumption

(*s*) *Webster* v. *Birchmore* (1807), 13 Ves. 362 (J. H. not heard of for twenty-three years. When he last appeared he was in a very bad state of health, and was to have returned in six months. Death within six years from last news was presumed); *Dowley* v. *Winfield* (1844), 14 Sim. 277; *Lakin* v. *Lakin* (1865), 34 Beav. 443, *per* ROMILLY, M.R., at p. 450; *Re Beasney's Trusts* (1869), L. R. 7 Eq. 498; *Re Henderson's Trusts* (1868), cited in L. R. 7 Eq. 500; *Hickman* v. *Upsall* (1875), L. R. 20 Eq. 136 (a person dependent on quarterly payments made his last application for such payment in March; he was presumed to have died soon after the June payment became due); *Patterson* v. *Black* (1780), 1 Park on Insurance, 8th ed., 920 (7th ed., 644); *Watson* v. *King* (1815), 1 Stark. 121; *R.* v. *Twyning, Gloucestershire* (*Inhabitants*) (1819), 2 B. & Ald. 386 (a soldier on active service); *Sillick* v. *Booth* (1841), 1 Y. & C. Ch. Cas. 117; *Ommaney* v. *Stilwell* (1856), 23 Beav. 328 (decision on probabilities as to a member of Sir John Franklin's expedition). A ship left port, and was never heard of again. She encountered a violent storm the day after she sailed. A man on board was held to have died within two days of sailing (*Re Rhodes, Rhodes* v. *Rhodes* (1887), 36 Ch. D. 586, *ex rel.* NORTH, J., citing a case, in which he was counsel, decided by JAMES, V.-C., at p. 591); *In the Goods of Connor* (1892), 29 L. R. Ir. 261 (child, born in 1868, who was motherless in Paris during the siege, presumed as a fact to have died before 1872).

(*t*) *Lambe* v. *Orton* (1859), 8 W. R. 111; *Re Green's Settlement* (1865), L. R. 1 Eq. 288; *Re Lewes' Trusts* (1871), 6 Ch. App. 356; *Re Walker* (1871), 7 Ch. App. 120, followed in *Re Benjamin, Neville* v. *Benjamin*, [1902] 1 Ch. 723.

(*a*) The case given by way of illustration in the text arose in *Thomas* v. *Thomas* (1864), 2 Drew. & Sm. 298; and in *Re Phené's Trusts* (1870), 5 Ch. App. 139. In the former, the onus lay on the next of kin, who failed in the action through inability to prove the pre-decease of the legatee; in the latter, the onus lay on the representatives of the legatee, whose survival they were unable to prove, and therefore failed, although the two cases, therefore, seem to be governed by the same principle the head-note in *Re Phené's Trusts, supra*, states that that case overruled *Thomas* v. *Thomas, supra*. See, further, *In the Goods of Nicholls* (1872), L. R. 2 P. & D. 461; *Elliott* v. *Smith* (1882), 22 Ch. D. 236 (testator and a legatee both drowned in the *Princess Alice*).

(*b*) *Re Corbishley's Trusts* (1880), 14 Ch. D. 846.

(*c*) *R.* v. *Willshire* (1881), 6 Q. B. D. 366, C. C. R. (W. was convicted of bigamy in 1868. There was no evidence other than the conviction to show that W.'s then wife was alive in 1868, and no evidence that she continued alive thereafter; nevertheless it was a question for the jury whether she was still alive in 1880); *R.* v. *Jones* (1883), 15 Cox, C. C. 284, C. C. R. (J. married in 1865, and lived with his

SECT. 3. Presumptions.

of death coming into force (*d*). Once, however, this does come into force, then, although the presumption does not fix the date of death, yet it raises a legal inference that such person died at some date within that period, and so displaces any presumption of fact that life continued for the whole of the seven years (*e*).

The presumption of death, however, even where it arises, is not always applied in a uniform manner. Thus, in an action by a lessor, or reversioner, to recover an estate dependent on a life, the presumption of the death of the *cestui que vie* will arise on the mere proof of his absence for seven years (*f*). While, where an application for the payment of funds out of court is made upon presumption of death, advertisements for the missing person must have been issued, in addition to the making of proper inquiries (*g*). On the other hand, as against the Commissioners for the Reduction of the National Debt, death will not be presumed at all, but must be proved by evidence (*h*).

Life and death.

The presumption of death has been thought to be confined to cases where there are in evidence no circumstances which afford ground for a different conclusion; and it has accordingly been held to have no application to the case of a person who would have been unlikely to communicate with his friends (*i*). More recent decisions, however, appear to throw doubt on this restriction (*k*).

wife; but how long, or when they separated, or whether she was still alive, or what he knew as to her continued existence, were not shown. He was convicted of bigamy in 1882); *R.* v. *Harborne* (*Inhabitants*) (1835), 2 Ad. & El. 540 (the writer of a letter, dated 17th March, taken to be alive on the following 11th April). But the presumption is of fact, not of law (*R.* v. *Twyning, Gloucestershire* (*Inhabitants*) (1819), 2 B. & Ald. 386 (W. enlisted for a soldier, went abroad on active service, and was never again heard of. His wife, about a year after his departure, married again. The second marriage held to be valid), explained in *Lapsley* v. *Grierson* (1848), 1 H. L. Cas. 498, 505). In *Wilson* v. *Hodges* (1802), 2 East, 312, Lord ELLENBOROUGH, C.J., following the old case of *Throgmorton* v. *Walton* (1624), 2 Roll. Rep. 461, held that "where the issue is upon the life or death of a person once shown to be living, the proof of the fact lies on the party who asserts the death." But as he based that proposition upon the principle "that the presumption is that the party continues alive until the contrary be shown," it must be received subject to the later decisions.

(*d*) *Doe* d. *Frances* v. *Andrews* (1850), 15 Q. B. 756 (the mere fact that no witness called has heard of the person in question is not sufficient to raise the presumption); *Doe* d. *Lloyd* v. *Deakin* (1821), 4 B. & Ald. 433 (unanswered evidence that a tenant for life had not been seen for fourteen years by a person who was not related to him, but resided in the neighbourhood, raised the presumption of death); *Re Creed* (1852), 1 Drew. 235 (effective inquiry must be made before the presumption will arise); *M'Mahon* v. *M'Elroy* (1869), 5 I. R. Eq. 1.

(*e*) *Pennefather* v. *Pennefather* (1872), 6 I. R. Eq. 171, is, perhaps, inconsistent with the text. A son went abroad, and a month later his father died. The son was never again heard of, but the Vice-Chancellor presumed, as a fact, that he survived his father.

(*f*) Stat. (1666) 18 & 19 Car. 2, c. 11.

(*g*) *Re Allin's Legacy* (1867), 17 L. T. 60.

(*h*) *Woodhouselee* (*Lord*) v. *Dalrymple* (1861), 4 L. T. 455, C. A.

(*i*) *Watson* v. *England* (1844), 14 Sim. 28 (a girl of seventeen ran away from home; four years later she wrote to her sister that she was going abroad. Nothing more was heard of her. No ground for the presumption of death after seven years); *Bowden* v. *Henderson* (1854), 2 Sm. & G. 360.

(*k*) *Willyams* v. *Scottish Widows Fund Life Assurance Society* (1888), 52 J. P.

Where several persons perish in the same disaster, there is, in the absence of evidence on the point (*l*), no presumption as to the order in which they died, or that they died at the same time (*m*). The *onus probandi* lies on the party who asserts survival, or concurrent decease, or pre-decease (*n*).

Life and death.

Where legal rights, dependent on the fact, or date, of the death of a person have to be adjudicated, and such fact or date cannot be determined on evidence or presumption, and the question cannot be solved by the incidence of the burden of proof, the court will make the best order that it can in the circumstances (*o*).

With regard to trustees, it has been held that they must guide themselves by the presumption of death, in the same manner as a court of law would do (*p*).

471; *Wills* v. *Palmer* (1904), 53 W. R. 169 (in each of which cases the death was presumed after seven years' absence of a man who, under the circumstances, was not likely to communicate with friends).

(*l*) *Broughton* v. *Randall* (1596), Cro. Eliz. 502 (of two men who were "hanged in one cart," one was found to have survived the other, from movements of the limbs, etc.).

(*m*) *Wing* v. *Angrave* (1860), 8 H. L. Cas. 183; *Underwood* v. *Wing* (1855), 4 De G. M. & G. 633; *Hitchcock* v. *Beardsley* (1738), West *temp.* Hard. 445 (husband and wife); *Mason* v. *Mason* (1816), 1 Mer. 308 (father and son); *In the Goods of Wainwright* (1858), 1 Sw. & Tr. 257; *In the Goods of Ewart* (1859), 1 Sw. & Tr. 258 (husband and wife); *Wollaston* v. *Berkeley* (1876), 2 Ch. D. 213 (husband and wife); *In the Goods of Alston*, [1892] P. 142; *In the Goods of Johnson* (1897), 78 L. T. 85; *In the Estates of Bruce* (1909), 26 T. L. R. 381; *In the Goods of Beynon*, [1901] P. 141. In the following cases, presumptions as to *commorientes* were adopted, but it is to be observed that they were decided in the ecclesiastical courts, and under the influence of the civil law (as to the extensive use of presumptions in that system, see Thayer on Evidence (ed. 1898), pp. 341—345):—Presumption that the parties died at the same moment (*Wright* v. *Netherwood* (1793), 2 Salk. 593, n. (6th ed. by Evans); *Taylor* v. *Diplock* (1815), 2 Phillim. 261; *Satterthwaite* v. *Powell* (1838), 1 Curt. 705). Presumption that husband survived wife (*Colvin* v. *Procurator-General* (1827), 1 Hag. Ecc. 192; *In the Goods of Selwyn* (1831), 3 Hag. Ecc. 748; *In the Goods of Murray* (1837), 1 Curt. 596).

(*n*) *Wing* v. *Angrave, supra*; *Barnett* v. *Tugwell* (1862), 31 Beav. 232.

(*o*) *Bailey* v. *Hammond* (1802), 7 Ves. 590 (payment ordered on a recognisance to refund in the event of a claim); *Cuthbert* v. *Purrier* (1847), 2 Ph. 199 (successive orders in respect of a fund in court to answer an annuity to a person who had been heard of since 1815); *Re Mileham's Trust* (1852), 15 Beav. 507 (M. transported for seven years in 1838. He fulfilled the period of his sentence, but no more was known of him. His children claimed a fund to which they were entitled on his death. No order as to capital: future dividends to be paid to the applicants on their undertaking to refund if M. should prove to be alive); *Danby* v. *Danby* (1859), 5 Jur. (N. S.) 54 (a young man, who was likely to correspond with his friends, went abroad in delicate health, and had not been heard of for some years. A fund was ordered into court on a *primâ facie* presumption that he had pre-deceased his father, who died within two years of his going abroad); *Re Rhodes, Fraser* v. *Renton* (1873), 28 L. T. 392 (uncertain whether legatee had or had not survived testator); *Wollaston* v. *Berkeley* (1876), 2 Ch. D. 213 (husband and wife perished in same disaster. Failure of trusts of their marriage settlement, in the absence of evidence or presumption of survivorship); *In the Estate of Walker*, [1909] P. 115 (modification of the usual form of administrator's oath in case of presumption of death).

(*p*) *Dobson* v. *Pattinson* (1857), 3 Jur. (N. S.) 1202. But the Bank of England is not obliged to act on evidence of death which a court would accept as sufficient (*Prosser* v. *Bank of England* (1872), L. R. 13 Eq. 611).

SECT. 3. Presumptions.

Issue.

Marriage.

693. There is no presumption of law as to whether a deceased person had issue or not (*q*), nor as to whether a woman is or is not past child-bearing at any particular age (*r*).

If it is proved that two persons lived together as man and wife, and were esteemed and reputed as such by those who knew them, it will be presumed, until the contrary is shown, that they had been lawfully and validly married (*s*).

But in proceedings of a penal nature, such as bigamy or adultery, the presumption, if it were set up, would be neutralised by that of the innocence of the party charged, and therefore in such cases the marriage must be proved by evidence (*t*).

Legitimacy.

694. A child born of a married woman, during the continuance of the marriage, or within the period of gestation (*u*) after its termination, is presumed to be legitimate. This presumption may only be rebutted by proof that the husband was impotent at the time when the child might have been begotten, or had no opportunity at such time for sexual intercourse with his wife, or by cogent evidence that, though such opportunity existed, nevertheless the child was not the offspring of the husband (*a*); but from the moment when

(*q*) *Richards* v. *Richards* (1731), 15 East, 294, n.; *Doe* d. *Banning* v. *Griffin* (1812), 15 East, 293; *Re Jackson, Jackson* v. *Ward*, [1907] 2 Ch. 354.

(*r*) *Re White, White* v. *Edmond*, [1901] 1 Ch. 570; *Re Hocking, Michell* v. *Loe* (1898), 67 L. J. (CH.) 662, C. A.; and compare *Re Thornhill, Thornhill* v. *Nixon*, [1904] W. N. 112, C. A., and *Re Summers's Trusts* (1874), 22 W. R. 639.

(*s*) *Piers* v. *Piers* (1849), 2 H. L. Cas. 331 (validity of a ceremony of marriage impugned on slight evidence that a special licence, which was necessary, had not been obtained. The evidence distrusted, on a balance of probabilities); *Doe* d. *Fleming* v. *Fleming* (1827), 4 Bing. 266; *Patrickson* v. *Patrickson* (1865), L. R. 1 P. & D. 86; *Sastry Velaider Aronegary* v. *Sembecutty Vaigalie* (1881), 6 App. Cas. 364, P. C.; *Fox* v. *Bearblock* (1881), 44 L. T. 508; *Re Thompson, Langham* v. *Thompson* (1904), 91 L. T. 680; *Re Shephard, George* v. *Thyer*, [1904] 1 Ch. 456; *Re Haynes, Haynes* v. *Carter* (1906), 94 L. T. 431 (divided repute).

(*t*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 389, note (*q*), 393, note (*i*), 534; and *Birt* v. *Barlow* (1779), 1 Doug. (K. B.) 171 (crim. con.); *Evans* v. *Evans and Robinson* (1859), 28 L. J. (P. & M.) 137, n. (divorce).

(*u*) As to which see *Bosvile* v. *A.-G.* (1887), 12 P. D. 177, and p. 495, *ante*.

(*a*) *Morris* v. *Davies* (1837), 5 Cl. & Fin. 163, H. L. (the mother was living in adultery at the time when the child was begotten, she concealed the child's birth from her husband and denied it to him; the husband ignored the child; and the wife's paramour treated it as his own. These facts were held to rebut the presumption of legitimacy, although the husband was not impotent and had opportunities of intercourse with his wife); *Banbury Peerage Case* (1811), 1 Sim. & St. 153, H. L.; *Head* v. *Head* (1823), 1 Sim. & St. 150; *Cope* v. *Cope* (1833), 1 Mood. & R. 269; *R.* v. *Mansfield* (*Inhabitants*) (1841), 1 Q. B. 444 (refusal to infer illegitimacy from the fact that the wife was living in adultery at all material times); *Hargrave* v. *Hargrave* (1846), 9 Beav. 552; *Plowes* v. *Bossey* (1862), 2 Drew. & Sm. 145 (this report is free from a misapprehension which occurs in others: *per* KINDERSLEY, V.-C., in *Atchley* v. *Sprigg* (1864), 10 L. T. 16); *Re Parsons' Trust* (1868), 18 L. T. 704 (presumption of legitimacy of child born three weeks after his parents' marriage); *Gardner* v. *Gardner* (1877), 2 App. Cas. 723; *Hawes* v. *Draeger* (1883), 23 Ch. D. 173; *Bosvile* v. *A.-G.* (1887), 12 P. D. 177; *Gordon* v. *Gordon*, [1903] P. 141. Declarations or testimony of husband or wife cannot be accepted as evidence of illegitimacy of wife's child (*Cope* v *Cope, supra*; *R.* v. *Sourton* (*Inhabitants*) (1836), 5 Ad. & El. 180; *R.* v. *Mansfield* (*Inhabitants*), *supra*; *Re Walker and Re Jackson* (1885), 53 L. T. 660). But if non-access (*i.e.*, absence of opportunity for intercourse) is established by admissible evidence, the mother's declarations or testimony as to paternity may be received (*R.* v. *Luffe* (1807), 8 East, 193; *Legge* v. *Edmonds* (1855), 25 L. J. (CH.) 125).

an order is made authorising the parties to live apart the presumption as to access and legitimacy of children is reversed (*b*).

Ancient documents.

695. Written documents, as to which more than thirty years have elapsed between their signature or execution and their production in court, and which are produced from proper custody, *i.e.*, from the keeping of some person who, on the supposition of their authenticity, would reasonably be expected to have them, are presumed, in the absence of circumstances of suspicion, to be what they purport to be, and to have been duly signed, sealed, attested, delivered, or published, according to their purport (*c*).

Presumption of validity of documents.

There is a general presumption in favour of the regularity and validity of such documents. No evidence need be given *primâ facie* that they were made on the date they bear (*d*). Upon proof of the signature of a deed, sealing and delivery are presumed; and so delivery, on proof of sealing and signature (*e*).

And acts and conduct (including therein words written or spoken) of husband, wife or paramour, tending indirectly to throw light upon the question of the legitimacy of the child, may be proved (*The Aylesford Peerage* (1885), 11 App. Cas. 1; *Burnaby* v. *Baillie* (1889), 42 Ch. D. 282).

(*b*) *Hetherington* v. *Hetherington* (1887), 12 P. D. 112; compare *Re R.'s Trusts* (1870), 39 L. J. (CH.) 192.

(*c*) *R.* v. *Farringdon* (*Inhabitants*) (1788), 2 Term Rep. 466 (certificate over fifty years old, signed by overseers, churchwardens, and justices of the peace, presumed valid); *Marsh* v. *Collnett* (1798), 2 Esp. 665, *per* Lord KENYON, C.J., at p. 666 (no need to call attesting witness to deed of thirty years' standing, though he be actually in court); *Wynne* v. *Tyrwhitt* (1821), 4 B. & Ald. 376; *Doe* d. *Oldham* v. *Wolley* (1828), 8 B. & C. 22 (the thirty years are computed from date, whether of will or other instrument); *Doe* d. *Spilsbury* v. *Burdett* (*Sir Francis*) (1835), 4 Ad. & El. 1; *Man* v. *Ricketts* (1844), 7 Beav. 93; *Doe* d. *Jenkins* v. *Davies* (1847), 10 Q. B. 314 (curate's signature to copy of marriage certificate); *Foster* v. *Plumbers' Co.* (1900), 44 Sol. Jo. 211 (accounts); *R.* v. *Bathwick* (*Inhabitants*) (1831), 2 B. & Ad. 639 (doubted whether the rule applies to the seal of a court or corporation). Pedigrees appear to be exceptional; their handwriting must be proved, even if they purport to be ninety years old; and if they are admitted, they are not proof that all the statements contained in them are true; "pedigrees are sometimes made to deceive, being for the most part true, except a link or two, the most material of all" (*The Fitzwalter Peerage* (1843), 10 Cl. & Fin. 193, 199, H. L.). Where a deed over thirty years old comes from an unsuspected repository and purports to be executed by one person on behalf of another, it will be presumed that it was so executed; but if the execution was discretionary, and not merely ministerial (in which case the question is open), it will not be presumed that the person executing was duly authorised so to do (*Re Airey, Airey* v. *Stapleton*, [1897] 1 Ch. 164). When the party tendering a document is himself a proper custodian of it, no evidence of custody is required (*R.* v. *Ryton* (*Inhabitants*) (1793), 5 Term Rep. 259; *R.* v. *Netherthong* (*Inhabitants*) (1814), 2 M. & S. 337; *Brett* v. *Beales* (1829), Mood. & M. 416; *Evans* v. *Rees* (1839), 10 Ad. & El. 151; *Doe* d. *Jacobs* v. *Phillips* (1845), 8 Q. B. 158; *Doe* d. *Shrewsbury* (*Earl*) v. *Keeling*) (1848), 11 Q. B. 884). But otherwise, *primâ facie* evidence must be given, showing whence the document has been obtained (*Bidder* v. *Bridges* (No. 2) (1885), 34 W. R. 514; *Doe* d. *Jacobs* v. *Phillips*, *supra*, *per* Lord DENMAN, C.J.). A grant of property is not in proper custody for this purpose if in the keeping of a person who has no interest in the property (*Lygon* v. *Strutt* (1795), 2 Anst. 601; *Swinnerton* v. *Stafford* (*Marquis*) (1810), 3 Taunt. 91; *Bidder* v. *Bridges* (No. 2), *supra*). See also p. 512, *post*.

(*d*) *In the Goods of Adamson* (1875), L. R. 3 P. & D. 253, 256 (a date attached to an alteration is not, in itself, sufficient to establish that the alteration was made at that time).

(*e*) *Hall* v. *Bainbridge* (1848), 12 Q. B. 699; *Re Sandilands* (1871), L. R. 6 C. P. 411.

SECT. 3. **Presumptions.**

Alterations.

Where a document which needs a stamp has been lost, or is not produced after notice to produce, it is presumed to have been properly stamped (*f*).

Erasures or interlineations in a deed are presumed to have been made before, but in a will after, the execution of the instrument (*g*).

There is no presumption as to the period when an apparent alteration was made in a bill of exchange (*h*).

Lost grant.

696. A lawful origin will be presumed for proprietary rights that have been exercised for a long time, and whose exercise might have been interrupted or prevented by the person against whom the right is claimed (*i*).

Omnia præsumuntur rite esse acta.

Formal requisites to judicial, official, or public acts, or to titles to property which are good in substance, will be presumed (*k*).

(*f*) *Closmadeue* v. *Carrel* (1856), 18 C. B. 36 (charterparty, when last seen, was unstamped. This might have justified a presumption of fact that it continued unstamped. But the party relying on the charterparty proved that he had taken steps to get the instrument stamped, but that it had been lost. This rebutted the inference of non-stamping, and restored the presumption of law); *Marine Investment Co.* v. *Haviside* (1872), L. R. 5 H. L. 624 (where it is proved that an instrument was unstamped when executed, and continued unstamped for a considerable time thereafter, the presumption of stamping is rebutted).

(*g*) *Cooper* v. *Bockett* (1846), 4 Moo. P. C. C. 419 (will); *Doe* d. *Tatum* v. *Catomore* (1851), 16 Q. B. 745. A deed cannot be altered, after execution, without fraud or wrong, which will not be presumed. A testator may alter his will after execution, without fraud or wrong, and therefore there is no ground for any presumption that the alteration was made before execution (*per* Lord CAMPBELL, C.J., at p. 747), but this reason for the rule does not explain why the same presumption is not applied to bills of exchange as well as to deeds; see cases cited in note (*h*), *infra*; *Doe* d. *Shallcross* v. *Palmer* (1851), 16 Q. B. 747. But alterations in a will, to be valid, must be executed substantially in the same way as the will itself (Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 21). Declarations of intention by testator, made before (not if after) execution of his will, can be received as evidence on the question whether alterations were made before or after execution.

(*h*) *Knight* v. *Clements* (1838), 8 Ad. & El. 215; *Clifford* v. *Parker* (1841), 2 Man. & G. 909.

(*i*) *Dalton* v. *Angus* (1881), 6 App. Cas. 740; *Goodtitle* d. *Parker* v. *Baldwin* (1809), 11 East, 488; *Doe* d. *Devine* v. *Wilson* (1855), 10 Moo. P. C. C. 502; *Chasemore* v. *Richards* (1859), 7 H. L. Cas. 349; *Webb* v. *Bird* (1863), 13 C. B. (N. S.) 841; *Leconfield* v. *Lonsdale* (1870), L. R. 5 C. P. 657; *Whitmores* (*Edenbridge*) *Ltd.* v. *Stanford*, [1909] 1 Ch. 427, following *Baily & Co.* v. *Clark, Son and Morland*, [1902] 1 Ch. 649, C. A., and distinguishing *Burrows* v. *Lang*, [1901] 2 Ch. 502. There is no corresponding presumption of obligations (*Simpson* v. *A.-G.*, [1904] A. C. 476). There will not be presumed any right that could not have had a legal origin (*Chesterfield* (*Lord*) v. *Harris*, [1908] 2 Ch. 397, C. A.).

(*k*) *Monke* v. *Butler* (1614), 1 Roll. Rep. 83; *Doe* d. *Hammond* v. *Cooke* (1829), 6 Bing. 174; *Macdougall* v. *Purrier* (1830), 2 Dow & Cl. 135, H. L.; *Harrison* v. *Southampton Corporation* (1853), 4 De G. M. & G. 137, C. A. (father's consent to his child's marriage presumed); *R.* v. *Cresswell* (1876), 1 Q. B. D. 446, C. C. R. Where a will appears to have been executed in due form it will be presumed to have been duly attested if the witnesses recognise their signatures, although they do not remember the circumstances (*Woodhouse* v. *Balfour* (1887), 13 P. D. 2; and see further as to wills under title WILLS). A certificate that a bill of sale has been registered is no evidence that an affidavit complying with the Act was filed with it (*Mason* v. *Wood* (1875), 1 C. P. D. 63); and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 389, note (*q*).

SECT. 3. Presumptions.

As between an innocent and a guilty party, unexplained circumstances are to be presumed unfavourably to the wrong-doer (*l*).

Many statutes establish particular presumptions, in order to facilitate proof of material facts (*m*).

Omnia præsumuntur contra spoliatorem.

Equitable presumptions.

697. Many presumptions are dealt with elsewhere, such as the presumption that if property is conveyed to a child, it is a gift, but if to a stranger, it is subject to a resulting trust in favour of the donor (*n*), presumptions as to the boundaries of property (*o*), as to satisfaction of portion by legacy or of legacy by portion (*p*), or of debt by legacy (*q*), or of performance of covenants to purchase and settle lands by a purchase of suitable land (*r*), or as to payment being made by way of advancement (*s*), or presumptions in favour of or against merger (*a*), presumptions as to title to land (*b*), or as to rights of riparian owners (*c*), or as to easements (*d*).

SUB-SECT. 4.—*Of Fact.*

Presumptions of fact.

698. Presumptions of fact are merely logical inferences of the existence of one fact from the proved existence of other facts. They are the inferences, or presumptions, which render circumstantial evidence admissible, and have already been considered (*e*).

SECT. 4.—*Inspection.*

Inspection.

699. Information as to the facts of a case may be gained by the court or jury, not only from the spoken words of witnesses, or the written words of documents (*f*), but also by means of their own observation of persons, places, or things (*g*); or of verified pictures,

(*l*) *Armory* v. *Delamirie* (1722), 1 Stra. 505; 1 Smith, L. C., 11th ed., 356; *Williamson* v. *Rover Cycle Co.*, [1901] 2 I. R. 615, C. A.).

(*m*) *E.g.*, any person who sends a circular containing an invitation to make bets to a person under age at a university is deemed to have known that such person was an infant, unless he proves that he had reasonable ground for believing him to be of full age (Betting and Loans (Infants) Act, 1892 (55 & 56 Vict. c. 4), s. 3; *Milton* v. *Studd*, [1910] 2 K. B. 118). There is a rebuttable presumption that a bill has been validly delivered by all parties (Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 21 (3)).

(*n*) See title TRUSTS AND TRUSTEES.

(*o*) As to boundaries, see title BOUNDARIES, Vol. III., pp. 118—125.

(*p*) See title EQUITY, p. 129, *ante*.

(*q*) *Ibid.*, p. 136, *ante*.

(*r*) *Ibid.*, p. 139, *ante*.

(*s*) See title DESCENT AND DISTRIBUTION, Vol. XI., p. 20.

(*a*) See title EQUITY, p. 147, *ante*.

(*b*) See title REAL PROPERTY AND CHATTELS REAL.

(*c*) *Ecroyd* v. *Coulthard*, [1897] 2 Ch. 554; affirmed [1898] 2 Ch. 358, C. A.; and see title WATERS AND WATERCOURSES.

(*d*) See title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., pp. 259, 265.

(*e*) See pp. 439—455, *ante*.

(*f*) As to inspection of documents, see title DISCOVERY, INSPECTION, AND INTERROGATORIES, Vol. XI., pp. 88—92; and as to inspection of privileged documents by the court, see *ibid.*, p. 64.

(*g*) In an action in respect of a dog's bite, the dog itself may be brought into the presence of the jury, in order that its temper may be judged by its demeanour (*Line* v. *Taylor* (1862), 3 F. & F. 731). In this case the plaintiff had given the defendant notice to produce the dog, but failing consent except in the case of documents, if a party desires inspection, by himself or agent, or the

SECT. 4. **Inspection.**

photographs, plans, or models; or of experiments made in the presence of the court (*h*).

Witness's demeanour.

The commonest instance of this mode of proof is supplied by the demeanour and manner of a witness under examination. These constitute material elements in the consideration of the truthfulness of his statements (*i*).

The appearance of a person is, in some cases, *primâ facie* evidence as to his age (*j*).

Health.

With regard to health, there is, in certain cases, power to compel a person to submit himself to inspection (*k*), while in others refusal so to do may be evidence against him (*l*).

Handwriting.

Disputed handwriting may be compared in court by judge, jury, or a witness, with a specimen which is proved to be genuine (*m*).

jury, of anything which is under the control of the opposite party, he must apply to the court or judge for an order (see note (*q*), p. 509, *post*).

(*h*) *Bigsby* v. *Dickinson* (1876), 4 Ch. D. 24, C. A.; *Twentyman* v. *Barnes*, (1848), 2 De G. & Sm. 225.

(*i*) *Bigsby* v. *Dickinson*, *supra*.

(*j*) *R.* v. *Turner* (1909), 3 Cr. App. Rep. 103; *R.* v. *Viasani* (1866), 30 J. P. 758. This applies to cases under the Employment of Children Act, 1903 (3 Edw. 7, c. 45), and the Prevention of Cruelty to Children Act, 1904 (4 Edw. 7, c. 15), s. 17. See also *R.* v. *Cox*, [1898] 1 Q. B. 179, C. C. R. (on a similar provision in the repealed Prevention of Cruelty to Children Act, 1894 (57 & 58 Vict. c. 41), and the Children Act, 1908 (8 Edw. 7, c. 67), s. 123).

(*k*) The writ *de ventre inspiciendo* (see *Re Blakemore* (1845), 14 L. J. (CH.) 336, and *Ex parte Aiscough* (1731), 2 P. Wms. 591) seems practically obsolete. As to inspection by a jury of matrons of a defendant who alleges that she is quick with child, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 375. By the Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), s. 26, when a person injured in a railway accident is claiming compensation, the court may order him to submit to examination. *Agnew* v. *Jobson* (1877), 13 Cox, C. C. 625 (medical examination of female charged with concealment of birth is illegal, unless by consent); *Re Betts*, *Ex parte Board of Trade* (1887), 19 Q. B. D. 39, C. A.; affirmed *sub nom. Board of Trade* v. *Block* (1888), 13 App. Cas. 570 (bankrupt not compellable to submit to medical examination for the purpose of having an insurance on his life effected).

(*l*) *S.* v. *B.* (*falsely called S.*) (1905), 21 T. L. R. 219 (refusal to submit to medical examination is evidence against a party in nullity suits). The Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I. (4) (refusal or obstruction of medical examination suspends proceedings for, and right to, compensation). *R.* v. *Gray* (1904), 68 J. P. 327, C. C. R. (refusal of a man to be examined as to his state of health is no evidence against him on a charge of indecent assault).

(*m*) Criminal Procedure Act, 1865 (28 & 29 Vict. c. 18), s. 8, which applies to both civil and criminal procedure (s. 1), extends s. 27 of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), which is repealed by the Statute Law Revision Act, 1892 (55 & 56 Vict. c. 19). Both the writings that are compared must be in court (*Arbon* v. *Fussell* (1862), 3 F. & F. 152); writings used for this purpose need not be in evidence for any other (*Birch* v. *Ridgway* (1858), 1 F. & F. 270); *Cresswell* v. *Jackson* (1860), 2 F. & F. 24 (witness denied that the document in question was in his handwriting. Other writings, admittedly his, were put before the jury for comparison with the one in dispute). As to the evidence required on a charge of forgery to show that the part of a document which is forged is in the handwriting of the accused, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 764. A police officer is not, as such, an expert in handwriting (*R.* v. *Wilbain and Ryan* (1863), 9 Cox, C. C. 448). Where the person whose handwriting is in question is in court, he may be required to write then and there, and such writing is genuine for the purpose of the comparison (*Doe* d. *Devine* v. *Wilson* (1855), 10 Moo. P. C. 502, 530; *Cobbett* v. *Kilminster* (1865), 4 F. & F. 490). The recurrence, in

SECT. 4. **Inspection.**

Where a party complains that his exclusive right to a picture, design, mark, or name has been infringed, or where the question is whether a picture, design, mark, or name is so like another as to be calculated to deceive the public, the most satisfactory test is an appeal to the eyesight or hearing of the judge (*n*). No witness, indeed, should be asked whether the thing complained of is likely to deceive, inasmuch as that is the very question that the court has to decide (*o*). But an action for deceit, based on the resemblance between the defendant's article and the plaintiff's, cannot be decided merely by the judge's inspection (*p*).

Copyright; trade mark; design.

Passing off.

Not only may a judge himself inspect any property or thing in question, but he has wide powers of ordering inspection by the jury, a party, or other person (*q*).

Inspection by jury.

A view by the jury of any place, if necessary to the understanding of the evidence, may be ordered by the court or a judge, whether in a civil or criminal case (*r*).

View by jury.

different writings, of an identical mis-spelling, tends to prove the identity of the writers (*Brookes* v. *Tichborne* (1850), 5 Exch. 929).

(*n*) *Holdsworth* v. *M'Crea* (1867), L. R. 2 H. L. 380; *Hecla Foundry Co.* v. *Walker, Hunter & Co.* (1889), 14 App. Cas. 550; *Re Bourne's Trade-marks, Bourne* v. *Swan and Edgar, Ltd.*, [1903] 1 Ch. 211.

(*o*) *North Cheshire and Manchester Brewery Co.* v. *Manchester Brewery Co.*, [1899] A. C. 83, *per* Lord HALSBURY, L.C., at p. 85; *Payton & Co.* v. *Snelling, Lampard & Co.*, [1901] A. C. 308, *per* Lord MACNAGHTEN, at p. 311; *Edelsten* v. *Edelsten* (1863), 1 De G. J. & Sm. 185, *per* Lord WESTBURY, L.C., at p. 200. In an action for infringement of copyright in a picture, it is not necessary to produce the original picture. It is enough if a witness says that he knows the original, and that the work complained of is in his opinion an exact copy (*Lucas* v. *Williams & Sons*, [1892] 2 Q. B. 113, C. A.). But where the question is as to resemblance, not of appearance (shape, design, title), but in respect of musical or literary composition expressed in written signs, the alleged infringement or anticipation must itself be produced, or its absence accounted for before other evidence of its contents will be received (*Boosey* v. *Davidson* (1849), 13 Q. B. 257; this decision, however, appears to have been doubted, *Geralopulo* v. *Wieler* (1851), 10 C. B. 690, *per* JERVIS, C.J., at p. 696).

(*p*) *London General Omnibus Co., Ltd.* v. *Lavell*, [1901] 1 Ch. 135, C. A. (as explained by FARWELL, J., in *Re Bourne's Trade-marks, Bourne* v. *Swan and Edgar, Ltd., supra*); *Mitchell* v. *Henry* (1880), 15 Ch. D. 181; *London General Omnibus Co.* v. *Felton* (1896), 12 T. L. R. 213.

(*q*) *East India Co.* v. *Kynaston* (1821), 3 Bli. 153, H. L.; *Lonsdale* (*Earl*) v. *Curwen* (1799), 3 Bli. 168, n.; *Walker* v. *Fletcher* (1801), 3 Bli. 172, n.; *Browne* v. *Moore* (1816), 3 Bli. 178, n.; *Bennitt* v. *Whitehouse* (1860), 8 W. R. 251; *Ennor* v. *Barwell* (1860), 8 W. R. 300; *Whaley* v. *Brancker* (1864), 12 W. R. 570, 595; *Lumb* v. *Beaumont* (1884), 27 Ch. D. 356; *The Duke of Buccleuch* (1889), 15 P. D. 86, C. A. (inspection by Elder Brethren); R. S. C., Ord. 50, rr. 3, 4, 5, and see title PRACTICE; *Sidebottom* v. *Fielden* (1891), 8 R. P. C. 266 (limits to right to inspect the working of patents). County courts have similar powers under County Court Rules, 1903 and 1904, Ord. 12, r. 3; *Mitchell* v. *Stephens* (1894), 29 L. J. N. C. 389 (refusal to order inspection of patient's mouth, on application of dentist suing for professional charges). Pending an arbitration or reference, the order may be made either by referee, by arbitrator, or by the court (R. S. C., Ord. 36, rr. 48—50; *Macalpine & Co.* v. *Calder & Co.*, [1893] 1 Q. B. 545, C. A.; *Barnett* v. *Aldridge Colliery Co.* (1887), 4 T. L. R. 16). An award may be set aside if made after a view by arbitrator and one party, of which the other party had no notice (*Re Gregson and Armstrong* (1894), 70 L. T. 106).

(*r*) *R.* v. *Whalley* (1847), 2 Car. & Kir. 376; *R.* v. *Martin and Webb* (1872), 12 Cox, C. C. 204, C. C. R. (view after judge's summing-up). The jury should

SECT. 4. Inspection.

Material evidence of crime.

When a person is lawfully arrested on a criminal charge, any property or thing in his possession which would be material may be seized and detained for the purpose of being produced in evidence (*s*), but may not be detained after the charge has been dismissed (*t*).

Part IV.—Documentary Evidence.

SECT. 1.—*Proof of Execution of Documents.*

SUB-SECT. 1.—*Handwriting.*

Proof of handwriting.

700. The handwriting or signature of unattested documents may be proved in the following ways: (1) By calling the writer; or (2) a witness who saw the document written or signed; or (3) a witness who has a general knowledge of the writing, acquired in any of the ways already mentioned (*u*); or (4) by comparison of the disputed document with other documents proved to the satisfaction of the judge to be genuine (*v*); or (5) by the admissions of the party against whom the document is tendered.

SUB-SECT. 2.—*Sealing, Delivery and Attestation* (*a*).

Sealing.

701. As in the case of execution by a natural person, so in the case of sealing by a corporation (*b*) there is in general a presumption that a seal was affixed with due regard to all preliminary formalities required by the constitution (*c*); in general, a corporation seal may be proved by anyone familiar with it, without calling a witness who saw it affixed (*d*); but where attestation is required by law, the signature of an independent witness is probably necessary, since that of the directors and secretary when affixing the common

receive no communications during the view (*R.* v. *Martin and Webb, supra*); see title JURIES.

(*s*) *Dillon* v. *O'Brien and Davis* (1887), 16 Cox, C. C. 245; *R.* v. *Lushington, Ex parte Otto*, [1894] 1 Q. B. 420 (property produced by a witness detained as evidence); *Crozier* v. *Cundey* (1827), 6 B. & C. 232; *R.* v. *Barnett* (1829), 3 C. & P. 600, and see reporter's note; *R.* v. *Frost* (1839), 9 C. & P. 129, 131; and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 309, 310.

(*t*) *Gordon* v. *Metropolitan Police* (*Chief Commissioner*) (1910), 26 T. L. R. 645, C. A.

(*u*) See p. 508, *ante*.

(*v*) Criminal Procedure Act, 1865 (28 & 29 Vict. c. 18), s. 8.

(*a*) See titles CORPORATIONS, Vol. VIII., pp. 382 *et seq.*; DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 386 *et seq.* As to the conditional delivery of a document as an escrow, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 387—390.

(*b*) As to how far affixing a seal is tantamount to delivery, see *Mowatt* v. *Castle Steel and Iron Works Co.* (1886), 34 Ch. D. 58, C. A.; and see title CORPORATIONS, Vol. VIII., p. 309. As to the question of how far the corporation, having affixed its seal, is bound by estoppel, see title ESTOPPEL, pp. 371, 381, *ante*.

(*c*) See title CORPORATIONS, Vol. VIII., p. 310, 382.

(*d*) *Moises* v. *Thornton* (1799), 8 Term Rep. 303, 307; this case is doubted by Taylor, Law of Evidence, 10th ed., s. 1852

seal of a company merely forms part of the execution of the document (*e*).

Proof of attestation.

702. When a document is required by law to be attested, it must, subject to the exceptions stated below, be proved by calling the attesting witnesses (*f*). And this rule applies even though the document is lost, cancelled, or destroyed, provided that the names of the witnesses are known, and that they are capable of being called (*g*). If there are several such witnesses, only one need be examined; but the absence of all must be explained before other evidence is receivable. When all the witnesses are incapable of being called, "secondary" evidence of attestation, *i.e.*, by proof of the handwriting of any one of them, may be given, and is sufficient (*h*); and if this is not obtainable the execution may be proved by presumptive or other evidence (*i*). So, also, if the attesting witnesses deny the execution (*k*), or if the document is lost, and their names are unknown (*l*).

Competency of witness.

703. In general, anyone competent to testify is competent to attest, except the parties to a deed or bill of sale (*m*), or a proxy with regard to the instrument appointing him (*n*). Warrants of attorney and cognovits, however, must be attested by a solicitor (*o*).

When proof not required.

704. Even where attestation is required by law, and the witnesses are obtainable, they need not be called when, (1) The document is an ancient one (*i.e.*, thirty years old) (*p*); or (2) its execution has been admitted for the purposes of the trial (*q*); or (3) it is in possession of the adversary, who refuses to produce it on notice (*r*); or (4) it is tendered against a public officer bound by law to have it executed, and who has dealt with it as such (*s*); or (5) under the Merchant Shipping Act, 1894 (*t*).

A document which, though in fact attested is not required by law to be so, may be proved by admission or otherwise as if unattested (*u*).

(*e*) *Doe* d. *Bank of England* v. *Chambers* (1836), 4 Ad. & El. 410; *Deffell* v. *White* (1866), L. R. 2 C. P. 144.

(*f*) As to attestation of wills, see p. 512, *post*, and title WILLS.

(*g*) *Keeling* v. *Ball* (1796), Peake, Add. Cas. 88; *Breton* v. *Cope* (1791), Peake, 43, 44.

(*h*) *Nelson* v. *Whittall* (1817), 1 B. & Ald. 19; *Adam* v. *Kerr* (1798), 1 Bos. & P. 360.

(*i*) *Clarke* v. *Clarke* (1879), 5 L. R. Ir. 47, C. A.; *Byles* v. *Cox* (1896), 74 L. T. 222.

(*k*) *Bowman* v. *Hodgson* (1867), L. R. 1 P. & D. 362; *In the Goods of Ovens* (1892), 29 L. R. Ir. 451.

(*l*) *Keeling* v. *Ball*, *supra*.

(*m*) *Seal* v. *Claridge* (1881), 7 Q. B. D. 516, C. A.; *Peace* v. *Brookes*, [1895] 2 Q. B. 451. See title BILLS OF SALE, Vol. III., p. 45.

(*n*) *Re Parrott*, *Ex parte Cullen*, [1891] 2 Q. B. 151.

(*o*) Taylor, Law of Evidence, 10th ed., ss. 1111—1118.

(*p*) *Doe* d. *Oldham* v. *Wolley* (1828), 8 B. & C. 22.

(*q*) *Whyman* v. *Garth* (1853), 8 Exch. 803.

(*r*) *Cooke* v. *Tanswell* (1818), 8 Taunt. 450.

(*s*) *Plumer* v. *Brisco* (1847), 11 Q. B. 46; *Bailey* v. *Bidwell* (1844), 13 M. & W. 73.

(*t*) 57 & 58 Vict. c. 60, s. 694. See title SHIPPING AND NAVIGATION.

(*u*) Criminal Procedure Act, 1865 (28 & 29 Vict. c. 18), ss. 1, 7. S. 7 applies to criminal proceedings and re-enacts s. 26 of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), which was repealed by the Statute Law Revision Act, 1892 (55 & 56 Vict. c. 19) (see *Worthington* v. *Moore* (1891), 64 L. T. 338).

SECT. 1. Proof of Execution of Documents.

This provision, however, has been held not to apply to proceedings *ex parte* (*x*).

Wills.

705. If a will has been proved, the probate copy of the will or a copy stamped with the seal of the court that granted the probate is conclusive evidence of the validity and contents of the will in suits relating to personal estate, and attestation need not be proved. If the will is proved in solemn form, the probate is conclusive evidence even in matters relating to real estate (*a*), and if the will has not been proved in solemn form the probate is sufficient evidence in matters relating to real estate if ten days before action notice has been given of the intention to use it and a counter notice has not been given of intention to dispute the validity of the devise (*b*).

SUB-SECT. 3.—*Ancient Documents.*

Documents thirty years old prove themselves.

706. Where a private document thirty years old is produced from its proper custody (*c*), no proof of the handwriting or signature of the writer, or of sealing, delivery, or attestation, need be given (*d*): in other words, the document is said to prove itself.

In the case of wills the period of thirty years runs from the date of execution, not from the death of the testator (*e*).

The rule applies to private documents of every kind (*f*), and the only difficulties that arise in any given case are connected with the question of custody.

Proper custody.

707. The following are examples of what has been held to be the proper custody for certain classes of instruments:—For steward's books, the custody of the steward (*g*); for rate books, the union workhouse (*h*); for court rolls, the custody either of the lord of the manor or of the steward (*i*); for books relating to the estate of an ancient monastery, the custody of a person owning part of its estates (*k*); for the endowment of a vicarage, the registry of the diocese

(*x*) *Re Reay's Estate* (1855), 3 W. R. 312; *Re Rice, a Person of Unsound Mind* (1886), 32 Ch. D. 35, C. A.

(*a*) See Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 62, and title EXECUTORS AND ADMINISTRATORS.

(*b*) *Ibid.*, s. 64.

(*c*) See p. 505, *ante*.

(*d*) "When a deed comes from an unsuspected repository, the court, in the absence of evidence to the contrary, is bound to presume that, so far as the deed appears to have been executed by the parties to it, it was in fact executed by them—that is to say, executed under seal and delivered by them so as to be a complete deed" (*Re Airey, Airey* v. *Stapleton*, [1897] 1 Ch. 164, 169). As regards handwriting, see *Wynne* v. *Tyrwhitt* (1821), 4 B. & Ald. 376; and as regards execution, see *Doe* d. *Oldham* v. *Wolley* (1828), 8 B. & C. 22; see, further, *R.* v. *Farringdon* (*Inhabitants*) (1788), 2 Term Rep. 466; *Doe* d. *Jenkins* v. *Davies* (1847), 10 Q. B. 314; *Exeter Corporation* v. *Warren* (1844), 5 Q. B. 773; *Doe* d. *Ashburnham* (*Earl*) v. *Michael* (1851), 17 Q. B. 276; *A.-G.* v. *Stephens* (1855), 6 De G. M. & G. 111. The rule applies notwithstanding the fact that one of the subscribing witnesses is alive (*Doe* d. *Oldham* v. *Wolley, supra*); and in court (*Marsh* v. *Collnett* (1798), 2 Esp. 665); and, generally, see cases cited under this sub-section.

(*e*) *Doe* d. *Oldham* v. *Wolley, supra*; *Doe* d. *Spilsbury* v. *Burdett* (*Sir Francis*) (1835), 4 Ad. & El. 1, 19; *Man* v. *Ricketts* (1844), 7 Beav. 93, 101; compare *M'Kenire* v. *Fraser* (1803), 9 Ves. 5.

(*f*) *Wynne* v. *Tyrwhitt, supra.*

(*g*) *Ibid.*

(*h*) *Smith* v. *Andrews*, [1891] 2 Ch. 678, 680.

(*i*) *Re Jennings, a Solicitor*, [1903] 1 Ch. 906.

(*k*) *Bullen* v. *Michel* (1816), 2 Price, 399.

in which it is kept (*l*), or the augmentation office (*m*); for a deed creating a term to attend the inheritance, the custody of the attorney of the administrator of the trustee of the term (*n*); for a case for the opinion of counsel, the family papers of a descendant of the person who submitted it (*o*); for diocesan documents, the registry of the diocese (*p*), or the bishop's private papers (*q*); for a certificate of ordination, the clergyman's private papers (*r*); for a schedule setting out payments of tithes, the custody of the solicitor of the last purchaser of the tithes (*s*); for a parish certificate, the parish chest (*t*), or the custody of an overseer of the parish (*u*); for an expired lease, the custody of the lessor (*a*) or the lessee (*b*); for an expired indenture of apprenticeship, the custody of the apprentice or the master (*c*); for a receipt by a rector for money payments in lieu of tithes, the custody of the solicitor of the lord of the manor by whose predecessor in title the payments had been made (*d*); for ancient grants, the custody of some person connected with the estate to which they relate (*e*); for family Bibles, the custody of a member of the family (*f*); for documents, the custody of which is imposed on a certain person, the custody of such person (*g*); for a settlement, the custody of the trustees (*h*), or even the settlor himself (*i*); for a bond, the custody of the person in whose favour it is made (*j*).

Need not be that most strictly proper.

It will be seen that the custody required is not necessarily that which is most strictly proper; in fact, all that is necessary is that the custody be one in which the document may reasonably be expected to be found, and this must of course depend on the facts of each particular case (*k*). But in the case of documents the

(*l*) *Bullen* v. *Michel* (1816), 2 Price, 399, explained in *Meath* (*Bishop*) v. *Winchester* (*Marquis*) (1836), 3 Bing. (N. C.) 183, H. L.

(*m*) This is apparently the more regular mode; see *Meath* (*Bishop*) v. *Winchester* (*Marquis*), *supra*.

(*n*) *Doe* d. *Jacobs* v. *Phillips* (1845), 8 Q. B. 158.

(*o*) *Meath* (*Bishop*) v. *Winchester* (*Marquis*), *supra*.

(*p*) See *Doe* d. *Arundel* (*Lord*) v. *Fowler* (1850), 14 Q. B. 700, 701.

(*q*) *Meath* (*Bishop*) v. *Winchester* (*Marquis*), *supra*; but *semble* this only applies where the document is dated prior to the establishment of the registry; see *Doe* d. *Arundel* (*Lord*) v. *Fowler*, *supra*.

(*r*) *R.* v. *Bathwick* (*Inhabitants*) (1831), 2 B. & Ad. 639, 648.

(*s*) *Foster* v. *Plumbers' Co.* (1900), 44 Sol. Jo. 211.

(*t*) *R.* v. *Ryton* (*Inhabitants*) (1793), 5 Term Rep. 259.

(*u*) *R.* v. *Netherthong* (*Inhabitants*) (1814), 2 M. & S. 337.

(*a*) *Plaxton* v. *Dare* (1829), 10 B. & C. 17; *Rees* v. *Walters* (1838), 3 M. & W. 527; *Hall* v. *Ball* (1841), 3 Man. & G. 242, 247; *Doe* d. *Shrewsbury* (*Earl*) v. *Keeling* (1848), 11 Q. B. 884.

(*b*) *Hall* v. *Ball*, *supra*, at p. 253.

(*c*) Compare *Hall* v. *Ball*, *supra*.

(*d*) *Bertie* v. *Beaumont* (1816), 2 Price, 303.

(*e*) *Swinnerton* v. *Stafford* (*Marquis*) (1810), 3 Taunt. 91.

(*f*) *Hubbard* v. *Lees and Purden* (1866), L. R. 1 Exch. 255.

(*g*) *Doe* d. *Arundel* (*Lord*) v. *Fowler*, *supra*.

(*h*) *Doe* d. *Neale* v. *Samples* (1838), 8 Ad. & El. 151.

(*i*) *Ibid.*

(*j*) *Chelsea Waterworks Co.* v. *Cowper* (1795), 1 Esp. 275.

(*k*) "Reasonable evidence of proper custody is all that can be required" (*Bertie* v. *Beaumont*, *supra*, *per* THOMSON, C.B., at p. 308). "It is enough if the person be so connected with the deed that he may reasonably be

SECT. 1. Proof of Execution of Documents.

custody of which is by statute imposed on a particular person the rule is, perhaps, more strict, and any unusual custody must be properly accounted for (*l*).

Parish books.

The custody of parish books is provided for by statute (*m*).

How custody proved.

The fact of custody must be properly established by evidence; it is not enough that the document be produced in court (*n*), but when the fact of proper custody is established there is no need to inquire what happened to the document between execution and production (*o*).

Improper custody.

708. The following are examples of custody not regarded as proper for this purpose:—For private maps (*p*), ancient grants (*q*), notes of a case tried *temp.* Henry III. (*r*), or a priory register (*a*), the British Museum; for ancient grants, the Bodleian Library at Oxford (*b*); for a book containing an account of the possessions of a monastery, the Herald's Office (*c*); for an ancient grant, the custody of one of the parties to whom it had been given as a curiosity by a person not connected with the estate (*d*).

Documents executed under power of attorney.

709. Although, as stated above, the rule applies to all documents thirty years old, yet where such a document purports to have been

supposed to be in possession of it without fraud, no such fraud being proved" (*Doe* d. *Neale* v. *Samples*, (1838), 8 Ad & El. 151, *per* PATTESON, J., at p. 154). "It is not necessary to show the strictest legal custody" (*Doe* d. *Jacobs* v. *Phillips* (1845), 8 Q. B. 158, *per* DENMAN, C.J., at p. 160). "Most of the reported cases are decisions in favour of receiving documents on the ground that they have come from proper custody, and the courts ought, I think, to be liberal in this respect" (*Doe* d. *Shrewsbury* (*Earl*) v. *Keeling* (1848), 11 Q. B. 884, *per* DENMAN, C.J., at p. 889; and see *Bullen* v. *Michel* (1816), 2 Price, 399; *Meath* (*Bishop*) v. *Winchester* (*Marquis*) (1836), 3 Bing. (N. C.) 183, H. L.; *Doe* d. *Arundel* (*Lord*) v. *Fowler* (1850), 14 Q. B. 700). For a case very near the line, see *Croughton* v. *Blake* (1843), 12 M. & W. 205, 208. As to a map in the custody of bridge reeves, see *R.* v. *Norfolk County Council* (1910), 26 T. L. R. 269.

(*l*) See *Doe* d. *Arundel* (*Lord*) v. *Fowler*, *supra*, where the document in question was a parish register; by the Parochial Registers Act, 1812 (52 Geo. 3, c. 146), s. 5, "an important duty is cast upon the clergyman in respect to the due custody of the register. . . . The person who had the custody in this case was the parish clerk. But no explanation was offered to account for his custody, as that the parson was unwell or had sent the register to him for a special purpose. If any explanation had been offered, we might, perhaps, not scrutinise very closely; an excuse of some sort, although it might not show the custody to be proper, might satisfy us that it was reasonable" (*per* COLERIDGE, J., at p. 703).

(*m*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 17 (8); see *Lewis* v. *Poole* (1897), 61 J. P. 776; *R.* v. *Powell*, *Ex parte Williams*, [1899] 1 Q. B. 396; and title LOCAL GOVERNMENT. As to parish registers, see p. 536, *post*.

(*n*) *Evans* v. *Rees* (1839), 10 Ad. & El. 151, *per* COLERIDGE, J., at p. 154: "If it be necessary to prove the custody of ancient documents someone must be sworn for that purpose. The person producing them may have had them from a grocer's shop."

(*o*) See *Doe* d. *Jacobs* v. *Phillips*, *supra*; *Slater* v. *Hodgson* (1846), 9 Q. B. 727.

(*p*) *Bidder* v. *Bridges* (No. 2) (1885), 34 W. R. 514; *Mercer* v. *Denne*, [1904] 2 Ch. 534, 545.

(*q*) *Swinnerton* v. *Stafford* (*Marquis*) (1810), 3 Taunt. 91.

(*r*) *Bidder* v. *Bridges* (No. 2), *supra*.

(*a*) *Ibid.*

(*b*) *Michell* v. *Rabbetts* (1810), cited in *Swinnerton* v. *Stafford* (*Marquis*), *supra*

(*c*) *Lygon* v. *Strutt* (1795), 2 Anst. 601.

(*d*) *Swinnerton* v. *Stafford* (*Marquis*), *supra*.

executed under a power of attorney, although the actual execution is presumed to have been regular, yet it must be shown that the attorney was duly authorised (*e*), unless, perhaps, execution was a merely ministerial act (*f*).

Ancient documents.

710. Ancient documents (such as a lease or licence) coming from proper custody, and purporting upon the face of them to show exercise of ownership, are admissible without proof of possession or payment of rent as being in themselves acts of ownership (*g*).

Ancient leases are also admissible as evidence of reputation as to value (*h*).

SUB-SECT. 4.—*Stamps.*

Documents inadmissible unless properly stamped.

711. No instrument requiring a stamp which is executed in the United Kingdom (*i*), or which relates to property situate in or to anything done or to be done in the United Kingdom, is admissible in evidence in any proceedings (except criminal proceedings (*k*)), unless it is properly stamped (*l*), or unless, if it may legally be stamped after execution (*m*), payment of the duty and penalty is made at the time (*n*), or an undertaking to pay given by the solicitor of the party producing it (*o*).

(*e*) *Re Airey, Airey* v. *Stapleton*, [1897] 1 Ch. 164, where the deed produced purported to be an exercise by attorney of a special power of appointment.

(*f*) *Re Airey, Airey* v. *Stapleton, supra, per* KEKEWICH, J., at p. 170.

(*g*) *Malcolmson* v. *O'Dea* (1863), 10 H. L. Cas. 593, *per* WILLES, J., at p. 614; see also *Rogers* v. *Allen* (1808), 1 Camp. 309; compare *Blandy-Jenkins* v. *Dunraven (Earl)*, [1899] 2 Ch. 121, C. A., where a document compromising an action for trespass was admitted on similar grounds.

(*h*) See *Bullen* v. *Michel* (1816), 2 Price, 399, 478.

(*i*) As regards the stamp required on instruments executed abroad, see title REVENUE.

(*k*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 14 (h). For what are criminal proceedings, see *Mellor* v. *Denham* (1880), 5 Q. B. D. 467, C. A.; *R.* v. *Tyler and International Commercial Co.*, [1891] 2 Q. B. 588, C. A.

(*l*) See title REVENUE. As to the method, time etc. of taking the objection, see title PRACTICE AND PROCEDURE. Insufficiency or want of a stamp cannot be waived by consent (see *Nixon* v. *Albion Marine Insurance Co.* (1867), L. R. 2 Exch. 338; *Bowker* v. *Williamson* (1889), 5 T. L. R. 382). The ruling of a judge at *nisi prius* as to the sufficiency of a stamp is not subject to appeal (*Siordet* v. *Kuczynski* (1855), 17 C. B. 251; *Blewitt* v. *Tritton*, [1892] 2 Q. B. 327, C. A.). The directors of a company may refuse to register a transfer where the stamp though sufficient for the consideration stated on the face is insufficient for the consideration in fact paid (*Maynard* v. *Consolidated Kent Collieries Corporation*, [1903] 2 K. B. 121, C. A.).

(*m*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 14, partially re-enacting ss. 28 and 29 of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), which were repealed by the Inland Revenue Repeal Act, 1870 (33 & 34 Vict. c. 99), and re-enacted by the Stamp Act, 1870 (33 & 34 Vict. c. 97), s. 16 (repealed by the Stamp Act, 1891 (54 & 55 Vict. c. 39).

(*n*) An undertaking by the party is not enough; it must be a personal undertaking by the solicitor to stamp the document and produce it so stamped before the order is drawn up (*Re Coolgardie Goldfields, Ltd., Re Cannon, Son and Morten (Solicitors)*, [1900] 1 Ch. 475; compare *Re Ward, Simmons* v. *Rose, Weeks* v. *Ward* (1862), 31 Beav. 18). The Inland Revenue authorities have no power to release the solicitor from his undertaking (*Re Coolgardie Goldfields, Ltd., Re Cannon, Son and Morten (Solicitors), supra*).

(*o*) See last note and also *Rambert* v. *Cohen* (1802), 4 Esp. 213; *Jacob* v. *Lindsay* (1801), 1 East, 460; *Catt* v. *Howard* (1820), 3 Stark. 3; *Braythwayte* v. *Hitchcock* (1842), 10 M. & W. 494.

SECT. 1. Proof of Execution of Documents.

But a document insufficiently stamped may always be shown to a witness for the purpose of refreshing his memory (*p*); and, where it does not amount to an agreement but, *e.g.*, merely contains an offer, it may be looked at though not stamped (*q*).

Lost instruments.

712. Where an instrument has been lost there is a presumption that it was properly stamped (*r*). The burden of proving that it was in fact unstamped is on the party objecting (*s*), and this is discharged by showing that at some time at or after execution it was unstamped (*a*), although the burden may be shifted back again by showing facts from which a strong presumption arises that it was subsequently stamped (*b*).

The foregoing rules apply equally where the document is not produced after notice to produce (*c*).

But where it is shown that a lost instrument was in fact unstamped, secondary evidence of its contents is inadmissible (*d*).

Collateral matters.

713. Where an instrument fulfils two objects, for one of which no stamp is required, it is admissible for the purposes of such object, although it may be inadmissible, by reason of the lack of a stamp, for the other of such objects (*e*), and, generally, an unstamped or insufficiently stamped instrument is admissible to prove collateral matters (*f*).

(*p*) *Birchall* v. *Bullough*, [1896] 1 Q. B. 325.

(*q*) *Carlill* v. *Carbolic Smoke Ball Co.*, [1892] 2 Q. B. 484, 490. In *Mason* v. *Motor Traction Co., Ltd.*, [1905] 1 Ch. 419, where an injunction was asked for to restrain the defendants from carrying an agreement into effect, and the agreement was unstamped, a copy was looked at, not as an agreement, but as a document evidencing the terms upon which the defendants proposed to sell their undertaking unless restrained.

(*r*) *R.* v. *Long Buckby* (*Inhabitants*) (1805), 7 East, 45; *Pooley* v. *Goodwin* (1835), 4 Ad. & El. 94; *Hart* v. *Hart* (1841), 1 Hare, 1.

(*s*) *Hart* v. *Hart*, *supra*; *Closmadeuc* v. *Carrel* (1856), 18 C. B. 36; *Marine Investment Co.* v. *Haviside* (1872), L. R. 5 H. L. 624.

(*a*) *Crowther* v. *Solomons* (1848), 6 C. B. 758; *Closmadeuc* v. *Carrel*, *supra*; *Marine Investment Co.* v. *Haviside*, *supra*.

(*b*) See *Closmadeuc* v. *Carrel*, *supra*, where it was shown that proper steps had been taken to stamp the instrument and that the duty had been paid.

(*c*) *Crisp* v. *Anderson* (1815), 1 Stark. 35; *Crowther* v. *Solomons*, *supra*; compare *Hart* v. *Hart* (1841), 1 Hare, 1; *Braythwayte* v. *Hitchcock* (1842), 10 M. & W. 494; *Arbor* v. *Fussell* (1862), 11 W. R. 26.

(*d*) Even where the instrument was destroyed by the wrongful act of the objecting party (*Rippiner* v. *Wright* (1819), 2 B. & Ald. 478; *Smith* v. *Henley* (1844), 1 Ph. 391). See *Rose* v. *Clarke* (1842), 1 Y. & C. Ch. Cas. 534; *Blair* v. *Ormond* (1847), 1 De G. & Sm. 428; and compare *Andrew* v. *Andrew* (1856), 8 De G. M. & G. 336, C. A.; *Arbor* v. *Fussell*, *supra*. *A fortiori*, secondary evidence of an unstamped existing document is inadmissible (*Hearne* v. *James* (1788), 2 Bro. C. C. 309; *Buxton* v. *Cornish* (1844), 12 M. & W. 426; *Yorke* v. *Smith* (1851), 21 L. J. (Q. B.) 53; *Alcock* v. *Delay* (1855), 4 E. & B. 660; *Rajah Venkata Sveta* v. *Inuganti Bhavayyammi Garu* (1899), 15 T. L. R. 475, P. C.).

(*e*) *Matheson* v. *Ross* (1849), 2 H. L. Cas. 286, where an unstamped document purporting to be both a receipt and a statement of account was admitted as a statement of account, although inadmissible as a receipt (see also *Grey* v. *Smith* (1808), 1 Camp. 387; *Rutty* v. *Benthall* (1867), L. R. 2 C. P. 488).

(*f*) *Matheson* v. *Ross*, *supra*, in which case the question as to what matters are collateral was much discussed. Lord COTTENHAM, L.C., states as the principle (at p. 300), that "If you produce a receipt, not to shew the discharge of a debtor by his creditor from a particular demand, but for the purpose of establishing

714. Where the stamp on an instrument has been obliterated, the instrument is nevertheless receivable unless it be shown that the stamp was insufficient (*g*). Stamps obliterated.

715. A party cannot be cross-examined on an instrument inadmissible for want or insufficiency of stamp (*h*). Cross-examination.

SECT. 2.—*Proof of Contents of Documents.*

SUB-SECT. 1.—*Primary Evidence.*

716. When the authenticity of a document which is in possession of one of the parties is not in dispute, it is usual to take steps to secure the production and admission of it, or evidence of its contents, at the trial by means of notices to produce (*i*) and admit (*k*), followed after inspection by an agreement between the parties to admit the originals (*l*) or copies for the purposes of the trial, saving all just exceptions, or by an application for such writ of *subpœna* (*m*) or order as may be necessary to secure the production of the document or the admission of a copy of its contents (*n*). Securing production.

Where a document is not in the possession of either of the parties, or because its authenticity is in dispute or for some other reason it is not possible to secure the admission of it or of an agreed

some other fact different from that of payment of the debt, you may be said to produce it for a collateral purpose, but if the matter to be proved is payment of money, and the payment is to be proved by the production of a written document, the Stamp Acts immediately apply to such document." Other examples are (a) admitted: unstamped note for amount of bribe to prove bribery (*Dover* v. *Maestaer* (1803), 5 Esp. 92); unstamped deed of assignment, to prove an act of bankruptcy (*Ponsford* v. *Walton* (1868), L. R. 3 C. P. 167; *Re Gouldwell, Ex parte Squire* (1868), 4 Ch. App. 47); unstamped instrument, to show that the transaction with which it was connected was a fraud (*Keable* v. *Payne* (1838), 8 Ad. & El. 555; *Holmes* v. *Sixsmith* (1852), 7 Exch. 802; *Chittenden* v. *Day* (1860), 2 F. & F. 77; compare *R.* v. *Gompertz* (1846), 9 Q. B. 824, 839 *et seq.*), or illegal (*Coppock* v. *Bower* (1838), 4 M. & W. 361); letter containing an agreement for making a gun, to prove that another gun had been lent to defendant by plaintiff (*Delauney* v. *Mitchell* (1816), 1 Stark. 439); unstamped note, to prove that at the time the money was lent the party giving it was intoxicated (*Gregory* v. *Fraser* (1813), 3 Camp. 454); unstamped receipt, to prove a contract (*Evans* v. *Prothero* (1852), 1 De G. M. & G. 572, *per* Lord ST. LEONARDS, L.C.; *contra*, *Same* v. *Same* (1850), 20 L. J. (CH.) 448, *per* Lord TRURO, L.C.); unstamped bill, to prove its own invalidity (*Smart* v. *Nokes* (1844), 6 Man. & G. 911); (b) rejected: unstamped note, as an acknowledgment taking a debt out of the Statute of Limitations (*Parmiter* v. *Parmiter* (1861), 3 De G. F. & J. 461; and see, further, title BILLS OF EXCHANGE AND PROMISSORY NOTES, Vol. II., p. 576); unstamped bill of sale, to prove that a subsequent bill of sale was given *bonâ fide* (*Williams* v. *Gerry* (1842), 10 M. & W. 296). See also *Hawkins* v. *Warre* (1825), 5 Dow. & Ry. (K. B.) 512, and cases cited in last note.

(*g*) *Doe* d. *Fryer* v. *Coombs* (1842), 3 Q. B. 687.

(*h*) *Baker* v. *Dale* (1858), 1 F. & F. 271; *Interleaf Publishing Co.* v. *Phillips* (1884), Cab. & El. 315.

(*i*) R. S. C., Ord. 31, r. 16.

(*k*) R. S. C., Ord. 32, rr. 2, 3; and see title PRACTICE AND PROCEDURE. Reference may also be made to title DISCOVERY ETC., Vol. XI., pp. 58 *et seq.*

(*l*) The mere admission of documents does not make them evidence. They must be formally put in at the trial, and in the Chancery Division must be marked by the registrar (*Watson* v. *Rodwell* (1878), 11 Ch. D. 150, C. A.).

(*m*) See p. 580, *post*.

(*n*) R. S. C., Ord. 30, r. 7.

SECT. 2. Proof of Contents of Documents.

copy of it at the trial, it may become necessary not only to secure the production of it, but to give primary evidence that it is authentic, that is to say, to give the best evidence that the document is that which it purports to be or is tendered as being (*o*). The methods by which such evidence may in general be given have already been considered (*p*), but in respect of some classes of documents these methods may be replaced by some other method which, on grounds of public policy, is established either as the best and therefore the only method, or as an alternative method, of proving the contents (*q*), and where such method is so established as the best method no other can be used until the ground has been laid for giving secondary evidence.

SUB-SECT. 2.—*Secondary Evidence.*

General rule.

717. In pursuance of the rule that the best evidence obtainable must always be given (*r*), wherever a document has to be proved it must be produced, and secondary evidence of its contents is in general inadmissible. This rule is, however, subject to the following exceptions :—

Exceptions. (1) Lost documents.

(1) Where a document has been lost (*s*) or destroyed (*t*), secondary evidence of its contents is admissible (*u*). The court must first be satisfied that the document existed (*a*), and that the loss or destruction has in fact taken place (*b*), although reasonable evidence of this is all that is required (*c*). Thus, a *bonâ fide* and diligent search

(*o*) Where the document is a deed or record, this involves the production of the original document, excepting in cases where such production is dispensed with. The signature of a surveyor to an estimate under the Metropolis Management Acts is some evidence that the document is authentic and that the sum named in it has been duly determined (*Hobman* v. *Greenwich District Board* (1894), 58 J. P. 703, C. A.).

(*p*) See pp. 510, 512, *ante*.

(*q*) Thus, while the original of a will is regarded as primary evidence of the declarations of a testator contained in it relating to family history, and may be looked at for purposes of construing the will (*Re Harrison, Turner* v. *Hellard* (1885), 30 Ch. D. 390, C. A.), it has been said that the only evidence of a will of personal estate is the probate (*Pinney* v. *Hunt* (1877), 6 Ch. D. 98, 100), or the register containing an entry of the probate (see p. 553, *post*), as the probate is the only evidence of the title derived through it (*Pinney* v. *Pinney* (1828), 8 B. & C. 335). So where documents are enrolled pursuant to statute, or are entered in a notarial book, duplicates or copies may become equivalent to originals as evidence (see p. 525, *post*).

(*r*) See p. 420, *ante*; *Dupuy* v. *Truman* (1843), 2 Y. & C. Ch. Cas. 341.

(*s*) *Goodier* v. *Lake* (1737), 1 Atk. 446; *Saltern* v. *Melhuish* (1754), Amb. 247; *Bullen* v. *Michel* (1816), 2 Price, 399, 410; *Hall* v. *Dawson* (1862), 7 L. T. 519; *Sugden* v. *St. Leonards* (*Lord*) (No. 2) (1876), 24 W. R. 860. As to obtaining probate of a lost will, see title WILLS.

(*t*) *Delany* v. *Tenison* (1758), 3 Bro. Parl. Cas. 659; *Brandon* v. *Barlow* (1865), 13 L. T. 6.

(*u*) Even though the contents are required by statute to have been in writing (*Read* v. *Price*, [1909] 2 K. B. 724).

(*a*) *Whitfield* v. *Fausset* (1750), 1 Ves. Sen. 387, 389; *Askew* v. *Poulterers Co.* (1750), 2 Ves. Sen. 89.

(*b*) *Saltern* v. *Melhuish*, *supra*; *Doe* d. *Johnson* v. *Johnson* (1818), 2 Chit. 196; *Fitz* v. *Rabbits* (1837), 2 Mood. & R. 60; compare *Gilchrist* v. *Herbert* (1872), 20 W. R. 348.

(*c*) *Saltern* v. *Melhuish*, *supra*; *Gilchrist* v. *Herbert*, *supra*. Objections as to the sufficiency of the search must be taken at the trial, and cannot be raised afterwards (*Williams* v. *Wilcox* (1838), 8 Ad. & El. 314).

must have been made in the place where the instrument would most properly be found (*d*), but not necessarily in every possible place (*e*); nor need the search have been made recently or for the purposes of the cause (*f*). The question of the sufficiency of the search is for the judge (*g*), and this must vary with the circumstances of each case. Thus, if the document is of considerable value (*h*), or is of recent date (*i*), or if the party who ought to produce it appears to have some interest in withholding it, greater diligence must have been shown before secondary evidence can be admitted, while if the document is valueless (*k*) very little search will suffice (*l*), and no search is required where direct proof of the destruction or irretrievable loss of the instrument is given (*m*).

Sufficiency of search.

(2) Secondary evidence is also admissible where it is impossible or highly inconvenient to produce the original. This occurs where the original is a fixed inscription, such as that on a tombstone (*n*),

(2) Where production impossible.

(*d*) *R.* v. *Denio* (*Inhabitants*) (1827), 7 B. & C. 620; *Hart* v. *Hart* (1841), 1 Hare, 1; *Green* v. *Bailey* (1847), 15 Sim. 542; *R.* v. *St. Mary's, Islington* (1852), 1 W. R. 34; *R.* v. *Hinckley Overseers* (1863), 3 B. & S. 885. This is defined as "the place in which, if all persons did their duty, the instrument, if extant, would be" (*R.* v. *Saffron Hill* (*Inhabitants*) (1852), 1 E. & B. 93, *per* Lord CAMPBELL, C.J., at p. 95; compare *Minshall* v. *Lloyd* (1837), 2 M. & W. 450). Where the document belonged to a deceased person, inquiry of his personal representatives is in general necessary (*R.* v. *Rawden* (*Inhabitants*) (1834), 2 Ad. & El. 156); but where the management of his affairs and the custody of his papers have been taken over by his attorney, inquiry of the latter is sufficient, and it is not necessary to inquire of the widow (*R.* v. *Piddlehinton* (*Inhabitants*) (1832), 3 B. & Ad. 460). Where the document is a settlement, inquiry should be made of all the trustees (*Doe* d. *Richards* v. *Lewis* (1852), 11 C. B. 1035). For further examples of what search is sufficient, which varies in each case, see *R.* v. *Stourbridge* (*Inhabitants*) (1828), 8 B. & C. 96; *Pardoe* v. *Price* (1844), 13 M. & W. 267; *R.* v. *Kenilworth* (*Inhabitants*) (1845), 7 Q. B. 642; *Gathercole* v. *Miall* (1846), 15 M. & W. 319 (search in a public reading room for a newspaper which had been sent there held sufficient).

(*e*) "The court must be reasonably satisfied that due diligence has been used: it is not necessary to negative every possibility—it is enough to negative every reasonable probability—of anything being kept back" (*M'Gahey* v. *Alston and Sewell* (1836), 2 M. & W. 206, *per* ALDERSON, B., at p. 214; compare *Brewster* v. *Sewell* (1820), 3 B. & Ald. 296; *Hart* v. *Hart*, *supra*.

(*f*) *Fitz* v. *Rabbits* (1837), 2 Mood. & R. 60. In this case a search made three years before trial was held sufficient, but it was indicated that a recent search would have been more satisfactory.

(*g*) *Waldy* v. *Gray* (1875), L. R. 20 Eq. 238; compare *Fernley* v. *Worthington* (1840), 1 Man. & G. 491; *R.* v. *Braintree* (*Inhabitants*) (1858), 1 E. & E. 51.

(*h*) *Brewster* v. *Sewell*, *supra*, *per* BEST, J., at p. 303; compare *Freeman* v. *Arkell* (1824), 2 B. & C. 494; *Quilter* v. *Jorss* (1863), 14 C. B. (N. S.) 747; *Gully* v. *Exeter* (*Bishop*) (1827), 4 Bing. 290, 298.

(*i*) *R.* v. *Hinckley Overseers* (1863), 3 B. & S. 885.

(*k*) *E.g.*, a policy of insurance on which a claim has been paid (*Brewster* v. *Sewell*, *supra*); depositions in a prosecution for assault where the grand jury has thrown out the bill (*Freeman* v. *Arkell*, *supra*).

(*l*) *Brewster* v. *Sewell*, *supra*; compare *Freeman* v. *Arkell*, *supra*.

(*m*) *Ex parte Raine* (1816), 19 Ves. 588, where the document was shown to have been stolen from the coach office; *Quilter* v. *Jorss*, *supra*, where the bearer of a document was arrested in New York and his papers taken from him, all of them (except the document in question) being returned to him; compare *Charnley* v. *Grundy* (1854), 14 C. B. 608; *Blackie* v. *Pidding* (1848), 6 C. B. 196 *Atkins* v. *Owen* (1834), 2 Ad. & El. 35.

(*n*) *The Tracy Peerage* (1843), 10 Cl. & Fin. 154, H. L.

SECT. 2. **Proof of Contents of Documents.**

Documents abroad.

or an inscription or device on a banner or flag displayed at a public meeting (*o*), or a placard posted on a wall (*p*).

Where the document is abroad in the hands of a foreign functionary who is forbidden to produce it, secondary evidence may be given (*q*), but it seems that an application must first have been made to the person having the legal, even though he has not the actual, custody of the document, and must be shown to have been unsuccessful (*r*).

Similarly, where the document is abroad in private hands, application must be made to the person in possession of it and the purpose for which it is required disclosed (*s*).

Where, however, the document is filed in an English court, secondary evidence is inadmissible (*t*), except that in certain cases office copies are admissible to the same extent as the originals (*a*).

Documents in hands of third party.

Secondary evidence is also admissible where the document is in the possession of a person who, by virtue of privilege (*b*) or otherwise, is not compellable to produce it (*c*), provided that he has been served with a notice to produce or *subpœna duces tecum* and expressly claims his privilege (*d*).

(3) Where documents in hands of adversary who fails to produce it on notice to produce.

(3) Secondary evidence is admissible in the case of documents in the hands of an adversary who fails to produce them after being served with a notice to produce (*e*).

Where a document is in the hands of an adversary he must in general be served with a notice to produce; if this is not done, secondary evidence of its contents is inadmissible (*f*). Moreover, where a document is proved to have come into the adversary's

(*o*) *R.* v. *Hunt* (1820), 3 B. & Ald. 566, 575, 576.

(*p*) *Bruce* v. *Nicolopulo* (1855), 11 Exch. 129, 131, 133.

(*q*) *In the Goods of Lemme*, [1892] P. 89; *In the Goods of Von Linden*, [1896] P. 148 (cases of wills deposited abroad); compare *Burnaby* v. *Baillie* (1889), 42 Ch. D. 282, 291, 292 (foreign registers of birth; for such registers, see p. 534, *post*).

(*r*) *Crespin* v. *Doglioni* (1863), 32 L. J. (P. M. & A.) 109. In this case the document was filed in a foreign court, but it is apprehended that the principle is of general application.

(*s*) *Boyle* v. *Wiseman* (1855), 10 Exch. 647; compare *Crespin* v. *Doglioni*, *supra*. In *Hunt* v. *Alewyn* (1828), 1 Moo. & P. 433, secondary evidence was admitted of a bill of exchange in possession of the acceptors (who had paid it) abroad, it being treated as lost.

(*t*) *Williams* v. *Munnings* (1824), Ry. & M. 18.

(*a*) *E.g.*, office copies are admissible of all documents filed in the High Court (R. S. C., Ord. 37, r. 4).

(*b*) See p. 570, *post*.

(*c*) *Hibberd* v. *Knight* (1848), 2 Exch. 11; *Newton* v. *Chaplin* (1850), 10 C. B. 356. Where the document is in the hands of the person's solicitor, who refuses to produce it, it is not necessary to serve the client with a *subpœna duces tecum* if he attends on ordinary *subpœna* and refuses production (*ibid.*); compare *Doe* d. *Loscombe* v. *Clifford* (1847), 2 Car. & Kir. 448. See also, for the rule stated in the text, *Marston* v. *Downes* (1834), 1 Ad. & El. 31; *R.* v. *Leatham* (1861), 3 E. & E. 658; and see *Cooke* v. *Maxwell* (1817), 2 Stark. 183 (document excluded on ground of public policy).

(*d*) *Lloyd* v. *Mostyn* (1842), 10 M. & W. 478.

(*e*) *R.* v. *Watson* (1788), 2 Term Rep. 199, 201; *Sharpe* v. *Lamb* (1840), 11 Ad. & El. 805.

(*f*) *R.* v. *Doran* (1791), 1 Esp. 127; *Dwyer* v. *Collins* (1852), 7 Exch. 639; *Goodered* v. *Armour* (1842), 3 Q. B. 956; *Bate* v. *Kinsey* (1834), 1 Cr. M. & R. 38.

hands, the opposite party cannot give evidence of its loss or destruction until he has served a notice to produce (*g*).

A party who has served a notice to produce a document will not be entitled to give secondary evidence of it, unless he establishes at the trial that it was at the time of the service of the notice in the possession of the person on whom the notice was served, or of some agent or other person on his behalf over whom the party served has some authority and from whom he could obtain the document (*h*).

Where notice to produce is unnecessary.

But a notice to produce is not necessary where the document is itself a notice which has been served upon the adversary (*i*), such as a notice of dishonour in an action on the bill (*j*), a notice to quit in an action of ejectment (*k*), or a notice of assignment in an action by an assignee of a debt (*l*), or is an instrument in the nature of a notice (*m*), or where the possession of the document by the defendant forms the basis of the action so that the action itself acts as a notice (*n*), as when the action is in trover for the document (*o*), or in contract for non-delivery of the document (*p*), or in a prosecution for larceny of the document (*q*).

(*g*) *Doe* d. *Phillips* v. *Morris* (1835), 3 Ad. & El. 46.

(*h*) *Lloyd* v. *Mostyn* (1842), 10 M. & W. 478; *Partridge* v. *Coates* (1824), Ry. & M. 153, 156; *Burton* v. *Payne* (1827), 2 C. & P. 520; *Baldney* v. *Ritchie* (1816), 1 Stark. 338; *Sinclair* v. *Stevenson* (1824), 1 C. & P. 582; *Taplin* v. *Atty* (1825), 3 Bing. 164; *Suter* v. *Burrell* (1858), 2 H. & N. 867; *Martin* v. *Bell* (1816), 1 Stark. 413; *Parry* v. *May and Morret* (1833), 1 Mood. & R. 279; *Evans* v. *Sweet* (1824), Ry. & M. 83; *Knight* v. *Martin* (1819), Gow, 103. As to what is evidence of a document coming within the hands of a party, see *Henry* v. *Leigh* (1813), 3 Camp. 499.

(*i*) "On the ground that it is not necessary to give any other notice to the defendant than that which is given by the proceedings, the defendant being sufficiently warned by the issue that the plaintiff means to give secondary evidence of the contents of the notice unless the defendant produces it himself" (*Robinson* v. *Brown* (1846), 3 C. B. 754, *per* MAULE, J., at p. 762).

(*j*) *Kine* v. *Beaumont* (1822), 3 Brod. & Bing. 288; *Swain* v. *Lewis* (1835), 4 L. J. (EX.) 249; *Lanauze* v. *Palmer* (1827), Mood. & M. 31; *Robinson* v. *Brown*, *supra*; compare *Colling* v. *Treweek* (1827), 6 B. & C. 394. *Langdon* v. *Hulls* (1804), 5 Esp. 156, cannot now be upheld.

(*k*) *Doe* d. *Fleming* v. *Somerton* (1845), 7 Q. B. 58; compare *Philipson* v. *Chase* (1809), 2 Camp. 110; *Colling* v. *Treweek*, *supra*.

(*l*) *Surtees* v. *Hubbard* (1802), 4 Esp. 203.

(*m*) In *Colling* v. *Treweek*, *supra*, this rule was extended to the case of an attorney's bill, which was held to amount to a notice, and it was said by BAYLEY, J., at p. 400, that *Philipson* v. *Chase*, *supra*—a similar case—was to be supported on this ground, although not decided thereon; and see also *Anderson* v. *May* (1800), 2 Bos. & P. 237). It is submitted that *Gotlieb* v. *Danvers* (1796), 1 Esp. 455, where the document in question was a notice that certain work was unsatisfactory and requiring it to be taken down, really falls under this head. In *Grove* v. *Ware* (1817), 2 Stark. 174, which was an action against a surety, the document was a notice to pay, but it was held that a notice to produce was necessary, as the document was not a mere notice, but a statement of account between the plaintiff and the principal debtor.

(*n*) *How* v. *Hall* (1811), 14 East, 274, *per* LE BLANC, J., at p. 277; compare *R.* v. *Elworthy* (1867), L. R. 1 C. C. R. 103, *per* KELLY, C.B., at p. 105.

(*o*) *Bucher* v. *Jarratt* (1802), 3 Bos. & P. 143; *How* v. *Hall*, *supra*; *Scott* v. *Jones* (1813), 4 Taunt. 865; *R.* v. *Elworthy*, *supra*; compare *R.* v. *Moors* (1801), cited 6 East, 419, n., 421, n.; *Colling* v. *Treweek*, *supra*; *Read* v. *Gamble* (1835), 5 Nev. & M. (K. B.) 433.

(*p*) *Jolley* v. *Taylor* (1807), 1 Camp. 143.

(*q*) *R.* v. *Elworthy*, *supra*. *Secus*, where a person is indicted for perjury in swearing that a document never existed (*ibid.*).

SECT. 2. **Proof of Contents of Documents.**

Seamen.

In an action by a seaman for his wages no notice to produce the ship's articles is required (*r*), and a seaman need never give notice to produce his agreement (*s*).

Notice to produce the original is also unnecessary where the document sought to be put in is a counterpart original (*t*), or perhaps even a copy made contemporaneously (*a*).

Where a proper notice to produce has been served and a new trial is subsequently ordered, a fresh notice is unnecessary (*b*).

Form and service of notice.

A notice to produce must be in writing (*c*), and served between certain hours (*d*) within a reasonable time before trial (*e*) upon the party or his solicitor (*f*).

The notice must specify the documents required to be produced with reasonable particularity (*g*).

SUB-SECT. 3.—*Copies of Public Documents.*

Public documents.

718. The above-mentioned rules as to secondary evidence apply only to private documents. Wherever an original document is of

(*r*) *Bowman* v. *Manzelman* (1809), 2 Camp. 315.

(*s*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 123; see, further, title SHIPPING AND NAVIGATION.

(*t*) "If there are two contemporary writings, the counterparts of each other, one of which is delivered to the opposite party and the other preserved, as they may both be considered as originals and they have equal claims to authenticity, the one which is preserved may be received in evidence without notice to produce the one which was delivered" (*Philipson* v. *Chase* (1809), 2 Camp. 110, *per* Lord ELLENBOROUGH, C.J., at p. 111; see, as to this case, note (*m*), p. 521, *ante*; *Surtees* v. *Hubbard* (1802), 4 Esp. 203; compare *Kine* v. *Beaumont* (1822), 3 Brod. & Bing. 288; *Colling* v. *Treweek* (1827), 6 B. & C. 394, 398; *Houghton* v. *Koenig* (1846), 3 C. B. 754). There was formerly some confusion between cases of counterparts and cases of notices (see *Jory* v. *Orchard* (1799), 2 Bos. & P. 39), but the distinction is now well established.

(*a*) See *Kine* v. *Beaumont*, *supra*, *per* DALLAS, C.J., at p. 291; *Philipson* v. *Chase*, *supra*; *Gotlieb* v. *Danvers* (1796), 1 Esp. 455.

(*b*) *Hope* v. *Beadon* (1851), 17 Q. B. 509.

(*c*) R. S. C., Ord. 66, r. 1; for form, see *ibid.*, App. B, No. 14.

(*d*) For these, see R. S. C., Ord. 64, r. 11. For proof of service, see R. S. C., Ord. 32, r. 8.

(*e*) *Lloyd* v. *Mostyn* (1842), 10 M. & W. 478. This is a question for the judge (*ibid.*, at p. 484). In *Doe* d. *Wartney* v. *Grey* (1816), 1 Stark. 283, service on the wife of the defendant's attorney at his lodgings on the evening before trial was held insufficient.

(*f*) See *Lloyd* v. *Mostyn*, *supra*, where notice was served on a party's present solicitor to produce a document which was in possession of his former solicitor, and the notice was held good on the ground that the latter could be compelled by the party to produce it (see *Doe* d. *Wartney* v. *Grey*, *supra*).

(*g*) The proper course appears to be as far as possible in drawing the notice to refer to the descriptions of documents given in the affidavit of documents on which the notice is generally founded (see *Anon.* (1899), 44 Sol. Jo. 95). The following notices have been held too vague: "All the plaintiffs' books of account containing entries of dealings between them and the defendant for September, 1896, and also all letters written by the defendant or any other person to the plaintiffs relating to relevant matters" (*ibid.*); "Letters and copies of letters, also all books relating to this cause" (*Jones* v. *Edwards* (1825), M'Cle. & Yo. 139); "All letters, papers, and documents touching or concerning the bill of exchange mentioned in the declaration and the debt sought to be recovered" (*France* v. *Lucy* (1825), Ry. & M. 341).

a public nature, and would of itself be evidence if produced from the proper custody, certain kinds of copies of the document are admissible in evidence (*h*). And by virtue of statutory provisions a number of documents can now be proved by means of copies of a prescribed kind. To be admissible in evidence such copies must fall under one or other of the five following heads :— (i.) Exemplifications; (ii.) Office copies; (iii.) Examined copies; (iv.) Certified copies; (v.) Copies printed by the King's printers or under the superintendence or authority of His Majesty's Stationery Office or in the *Gazette* (*k*), or by the printer to either House of Parliament.

(i.) *Exemplifications.*

Exemplifications.

719. An exemplification is a copy of a record of a court either under the Great Seal or under the seal of the court where the record is (*l*). Exemplifications are rarely used in modern practice, as judgments of the High Court are generally now proved by office copies (*m*).

(ii.) *Office Copies.*

Office copies.

720. Office copies are copies of documents in the custody of a superior court made and authenticated by an officer of the court, who is intrusted with the power of furnishing copies (*n*). Such copies were before the Judicature Acts evidence without proof that they had been actually examined, if they were tendered in evidence in the same court and in the same cause, and were in such cases regarded as equivalent to the record itself (*o*). And now office copies of all writs, records, pleadings and documents filed in the High Court of Justice are admissible in evidence in all causes and matters and between all persons or parties to the same extent as the original would be admissible (*p*).

All copies, certificates, and other documents appearing to be sealed with a seal of the Central Office of the Supreme Court are to be presumed to be office copies or certificates or other documents issued from the Central Office and, if duly stamped, may be received in evidence, and no signature or other formality, except the sealing with a seal of the Central Office, is to be required for the authentication of any such copy etc. (*q*).

(*h*) This is a common law rule (*Lynch* v. *Clerke* (1697), 3 Salk. 154) enacted by statute; see Evidence Act, 1851 (14 & 15 Vict. c. 99), s. 14. As to what is a public document, see p. 525, *post*.

(*k*) *I.e.*, the London, the Edinburgh or the Dublin Gazette (Documentary Evidence Act, 1868 (31 & 32 Vict. c. 37), s. 5).

(*l*) Buller, Nisi Prius, 226. See Sidney Smith, Chancery Practice, 7th ed., 888; 1 Seton's Judgments and Orders, 195.

(*m*) R. S. C., Ord. 37, r. 4.

(*n*) Gilbert on Evidence, 6th ed., 19.

(*o*) See *Denn* d. *Lucas* v. *Fulford* (1761), 2 Burr. 1177, 1181; *Jack* d. *Boyle* v. *Kiernan* (1840), 2 Jebb & S. 231.

(*p*) R. S. C., Ord. 37, r. 4.

(*q*) R. S. C., Ord. 61, r. 7. There are also a number of statutes which make office copies of documents filed in the Supreme Court admissible in evidence,

SECT. 2.

Proof of Contents of Documents.

(iii.) *Examined Copies.*

Examined copies.

721. An examined copy is a copy of a document which a witness swears he has compared with the original, or with what the officer of the court which has custody of the original or any other person read as the contents of the original, and which copy the witness swears is correct (*r*). Such copies are admissible in evidence in all cases where the original is a public document (*s*), and in many other cases where such copies are made admissible by statute (*t*). Before such a copy can be read in evidence it must be proved that the original came from the proper place of deposit or out of the hands of the officer in whose custody it was kept (*a*).

(iv.) *Certified Copies.*

Certified copies.

722. Copies of records in the Public Record Office in the custody of the Master of the Rolls may be made at the request and cost of any person desirous of procuring the same; any copy so made is to be examined and certified as a true and authentic copy by the deputy keeper of the records, or one of the assistant record keepers, and sealed and stamped with the seal of the Record Office; every copy so certified and purporting to be sealed or stamped with such seal is admissible in evidence without any further or other proof thereof in every case in which the original record could have been received in evidence (*b*).

A copy of a public document or an extract therefrom is admissible in evidence, provided it purports to be signed and certified as a true copy or extract by the officer to whose custody the original is intrusted (*c*). There are a great number of statutes making admissible in evidence copies of particular documents certified by officials who have the custody of the originals (*d*).

If by any statute a certified copy of any document is made admissible in evidence, the copy is to be admitted, provided it purports to be sealed or impressed with a stamp, or sealed and signed, or signed alone as required, or impressed with a stamp and signed as directed by any such statute, without any proof of the

see 2 Taylor on Evidence, 10th ed., p. 1153. As to office copies of documents in the probate registry, see Probate Rules (Non-Contentious), 1862, rr. 80, 81; Matrimonial Causes Rules, 1865, rr. 119, 120.

(*r*) *Reid* v. *Margison* (1808), 1 Camp. 469; *Gyles* v. *Hill* (1809), 1 Camp. 471, n.; *Rolf* v. *Dart* (1809), 2 Taunt. 52; *R.* v. *M'Donald* (1841), Arm. M. & O. 112; *R.* v. *Hughes* (1839), 1 Craw. & D. 13; but see as to peerage cases, *The Slane Peerage* (1835), 5 Cl. & Fin. 23, 42, H. L. An examined copy must not contain abbreviations which are not in the original (*R.* v. *Christian* (1842), Car. & M. 388).

(*s*) Evidence Act, 1851 (14 & 15 Vict. c. 99), s. 14.

(*t*) See p. 539, *post*.

(*a*) *Adamthwaite* v. *Synge* (1816), 1 Stark. 183; *Doe* d. *Arundel* (*Lord*) v. *Fowler* (1850), 14 Q. B. 700.

(*b*) Public Record Office Act, 1838 (1 & 2 Vict. c. 94), ss. 12, 13.

(*c*) Evidence Act, 1851 (14 & 15 Vict. c. 99), s. 14. If such a copy is not properly certified, it may be proved by *viva voce* evidence to be an examined copy (*R.* v. *Manwaring* (1856), Dears. & B. 132, C. C. R.).

(*d*) See 2 Taylor on Evidence, 10th ed., p. 1153, for a list of such statutes.

seal or stamp or official character of the person appearing to have signed the same (*e*).

(v.) *Copies printed by Public Authority.*

King's printer's copies.

723. Acts of Parliament and certain other official documents are proved by copies printed by public authority (*f*).

SUB-SECT. 4.—*Proof of Particular Public or Official Documents.*

(i.) *Statutes, Parliamentary Proceedings, and Orders.*

Statutes judicially noticed.

724. Public statutes are judicially noticed and no proof of them is required (*g*).

The same is the case with local, personal, and private Acts which were passed since January 1st, 1851 (*h*), or which, though passed before that date, contained a declaration that they are to be treated as public (*i*).

Local, personal, and private Acts passed before January 1st, 1851, which do not contain a declaration that they are to be treated as public, are proved by a copy purporting to be printed by the King's printers (*k*), or under the superintendence or authority of His Majesty's Stationery Office (*l*).

Royal etc., proclamations, how proved.

725. Proclamations, orders, and regulations issued by the King, the Privy Council, the Lord Lieutenant of Ireland, or a Government department are most conveniently (*m*) proved by a copy of the *Gazette* (*n*) purporting to contain them (*o*), or by a copy purporting to be printed by the Government printer (*o*), or under the superintendence or authority of His Majesty's Stationery Office (*p*), or by a certified copy or extract (*q*).

(*e*) Evidence Act, 1845 (8 & 9 Vict. c. 113), s. 1; see *R.* v. *Parsons* (1866), L. R. 1 C. C. R. 24. As to the proof of a conviction or acquittal by a certified copy, see Evidence Act, 1851 (14 & 15 Vict. c. 99), s. 13; Criminal Procedure Act, 1865 (28 & 29 Vict. c. 18), ss. 1, 6 (re-enacting Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 25); Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), s. 18; *R.* v. *Parsons, supra; Richardson* v. *Willis* (1873), L. R. 8 Exch. 69.

(*f*) See *infra*.

(*g*) See p. 485, *ante*. The Parliament Roll may be inspected to test the accuracy of any print produced (see *R.* v. *Jefferies* (1721), 1 Stra. 446; *Price* v. *Hollis* (1813), 1 M. & S. 105).

(*h*) See stat. (1850) 13 & 14 Vict. c. 21, s. 7, which provides that such Acts are to be deemed public Acts in the absence of express provision to the contrary. Acts in which such provision to the contrary is inserted must of course be proved in the ordinary way by copy.

(*i*) *Beaumont* v. *Mountain* (1834), 10 Bing. 404; *Brett* v. *Beales* (1830), 10 B. & C. 508, is no longer law on this point.

(*k*) Lord Brougham's Evidence Act, 1845 (8 & 9 Vict. c. 113), s. 3.

(*l*) Documentary Evidence Act, 1882 (45 & 46 Vict. c. 9), s. 2; compare *Re Yarmouth and Ventnor Rail. Co.*, [1871] W. N. 236; examined copies are also admissible; as to these, see p. 524, *ante*.

(*m*) But this evidence is only *primâ facie*, and, where necessary, examined copies should be produced.

(*n*) This includes the London, the Edinburgh, and the Dublin Gazettes (Documentary Evidence Act, 1868 (31 & 32 Vict. c. 37), s. 5).

(*o*) *Ibid.*, s. 2 (1), (2).

(*p*) Documentary Evidence Act, 1882 (45 & 46 Vict. c. 9), s. 2. These provisions apply to copies printed in the same way in Ireland (*ibid.*, s. 4).

(*q*) In cases of proclamations etc. issued by the King or the Privy Council,

SECT. 2.
Proof of Contents of Documents.

Bye-laws.

726. Bye-laws are generally made provable in some particular manner by the statute under which they are made (*r*). Where no such provision exists proof must be given of the fulfilment of the conditions precedent to the validity of the bye-laws, or such fulfilment may be presumed from sufficiently long use.

or the Lord Lieutenant of Ireland or his Privy Council, the copy or extracts must be certified by the clerk to the Privy Council or one of the lords thereof, and in the case of proclamations etc. by Government departments officers, by the various officers respectively mentioned in the schedule to the Documentary Evidence Act, 1868 (31 & 32 Vict. c. 37), as altered by subsequent legislation. This schedule now stands as follows:—

COLUMN I. (Name of Department or Officer.)	COLUMN II. (Name of Certifying Officers.)
The Commissioners of the Treasury.	Any Commissioner, Secretary, or Assistant Secretary of the Treasury.
The Commissioners for executing the office of Lord High Admiral.	Any of the Commissioners for executing the office of Lord High Admiral, or either of the Secretaries to the said Commissioners.
Secretaries of State	Any Secretary or Under-Secretary of State.
Committee of Privy Council for Board of Trade.	Any Member of the Committee of Privy Council for Trade or any Secretary or Assistant Secretary of the said Committee.
The late Poor-law Board (abolished by Local Government Board Act, 1871 (34 & 35 Vict. c. 70), s. 2).	Any Commissioner of the Poor-law Board, or any Secretary or Assistant Secretary of the said Board.
The Local Government Board (Local Government Board Act, 1871 (34 & 35 Vict. c. 70), s. 5. See, also, Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 130, 135, 297 (7); and Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52), s. 265).	Any Member of the Local Government Board, or any Secretary or Assistant Secretary of that Board.
Board of Education (Board of Education Act, 1899 (62 & 63 Vict. c. 33)) (formerly the Education Department (Elementary Education Act, 1870 (33 & 34 Vict. c. 75), s. 83).	Any Member of the Education Department, or any Secretary or Assistant Secretary of that Department, or the Board, or a Secretary or person authorised by the President or some member of the Board to act on behalf of a Secretary.
The Postmaster-General (Post Office Act, 1908 (3 Edw.7, c. 48)).	Any Secretary or Assistant Secretary of the Post Office.
A Secretary of State acting under "The Artillery and Rifle Ranges Act, 1885" (48 & 49 Vict. c. 36), s. 6; and Drill Grounds Act, 1886 (49 & 50 Vict. c. 5).	Any of His Majesty's Principal Secretaries of State.
The Board of Agriculture and Fisheries (Documentary Evidence Act, 1895 (58 Vict. c. 9), s. 1).	The President, Secretary, or any member of the Board, or any person authorised by the President to act on behalf of the Secretary.

No proof of the handwriting or official position of the certifying officer is required (Documentary Evidence Act, 1868 (31 & 32 Vict. c. 37), s. 2 (3)).

(*r*) As to bye-laws made by companies and railways, see titles COMPANIES, Vol. V.; RAILWAYS AND CANALS. As to bye-laws made by municipal corporations, see *Robinson* v. *Gregory*, [1905] 1 K. B. 534, and title LOCAL GOVERNMENT; or by other public health authorities, see title PUBLIC HEALTH. As to bye-laws for open spaces, see title OPEN SPACES. Bye-laws of a county council must be proved by a copy sealed with the council's seal, see *Timothy* v. *Fenn* (1910), 102 L. T. 283.

SECT. 2. Proof of Contents of Documents.

727. The journals of either House of Parliament are proved by copies purporting to be printed by the printer to either House (*a*), and are admissible as evidence of the facts relating to parliamentary procedure therein recorded (*b*).

Journals of Houses of Parliament.

(ii.) *Foreign Judgments and Acts of State.*

728. Proclamations, treaties, and other acts of state of a foreign state or British colony, and judgments, and other judicial proceedings of foreign (*c*) or colonial (*d*) courts, and affidavits, pleadings, and other legal documents filed or deposited in such courts, may be proved by examined (*e*) or authenticated (*f*) copies (*g*).

Foreign judicial documents.

For the purposes of the Extradition Act, 1870 (*h*), foreign warrants, depositions, convictions etc. are provable by authenticated copies (*i*). Under this provision, the depositions are admissible even though neither taken in the presence of the accused nor in relation to the particular charge upon which extradition is demanded (*k*).

Various statutory provisions have been made as to the admissibility and proof of depositions etc. taken abroad (*l*).

Depositions etc. taken abroad.

(iii.) *Ancient Public Surveys, Inquisitions, and Assessments.*

729. A public document embodying the results of a public inquiry or public act made or done by a public officer is evidence

Public documents evidence of the facts stated in them.

(*a*) Evidence Act, 1845 (8 & 9 Vict. c. 113), s. 3. No proof is necessary that such copies were in fact so printed (*ibid.*).

(*b*) *A.-G.* v. *Bradlaugh* (1885), 14 Q. B. D. 667, C. A.

(*c*) For the effect in England of judgments given by foreign courts, see title CONFLICT OF LAWS, Vol. II., pp. 281 *et seq.*

(*d*) This extends to all British possessions but not to Scotland. As to proof of colonial statutes, see *R.* v. *Brixton Prison* (*Governor*), *Ex parte Percival* (1907), 71 J. P. 148, and p. 492, *ante*.

(*e*) As to examined copies, see *Mottram* v. *Eastern Counties Rail. Co.* (1859), 7 C. B. (N. S.) 58.

(*f*) The authenticated copy of an act of state must purport to be sealed with the seal of the state or colony to which the original document belongs; the authenticated copy of a judgment etc. or affidavit etc. in the court of any foreign state or British colony must purport either to be sealed with the seal of the court to which the original document belongs, or if the court has no seal, to be signed by the judge or one of the judges of the court, who must attach to his signature a statement in writing on the copy that the court has no seal (Evidence Act, 1851 (14 & 15 Vict. c. 99), s. 7; see *Re Betts' Patent* (1862), 1 Moo. P. C. C. (N. S.) 49, 52; *Leishman* v. *Cochrane* (1863), 1 Moo. P. C. C. (N. S.) 315; *Loibl* v. *Strampfer* (1867), 16 L. T. 720; *Cavan* v. *Stewart* (1816), 1 Stark. 525.

(*g*) The Evidence Act, 1851 (14 & 15 Vict. c. 99), s. 7. This Act contains (s. 10) provisions as to proof of Irish documents in England (see *Re Mahon's Trust* (1852), 9 Hare, 459).

(*h*) 33 & 34 Vict. c. 52. See also the Extradition Act, 1873 (36 & 37 Vict. c. 60), s. 4.

(*i*) Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 14; and see *R.* v. *Ganz* (1882), 9 Q. B. D. 93. The provisions as to authentication are contained in s. 15. See title EXTRADITION AND FUGITIVE OFFENDERS.

(*k*) *Re Counhaye* (1873), L. R. 8 Q. B. 410.

(*l*) The statutes deal mostly with the method of taking evidence on commission in certain cases, and are dealt with elsewhere (see p. 609, *post*). In proceedings under the Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69), s. 29,

SECT. 2. **Proof of Contents of Documents.**

Documents made on behalf of the Crown.

of the truth of such facts therein stated as are within the scope of the inquiry (*m*).

Thus, records or conveyances relating to Crown property (*n*), records directly affecting the revenues of the Crown (*n*), and surveys of Crown property made for public purposes (*o*), are public documents in this sense, and the same applies to records in the Exchequer of acts done by officers of the Crown in assertion or derogation of the King's title (*p*), returns to a commission directing an inquiry as to Crown lands (*q*), an ancient extent of Crown lands (*r*), accounts

duly authenticated copies of depositions are admissible. See title EXTRADITION AND FUGITIVE OFFENDERS.

(*m*) The limits within which the documents dealt with in this sub-section are admissible are laid down by Lord BLACKBURN in *Sturla* v. *Freccia* (1880), 5 App. Cas. 623, at p. 643: "It should be a public inquiry, a public document, and made by a public officer. I do not think that 'public' there is to be taken in the sense of meaning the whole world. I think an entry in the books of a manor is public in the sense that it concerns all the people interested in the manor. And an entry probably in a corporation book concerning a corporate matter, or something in which all the corporation is concerned, would be public within that sense. But it must be a public document, and it must be made by a public officer. I understand a public document there to mean a document that is made for the purpose of the public making use of it, and being able to refer to it. It is meant to be where there is a judicial, or *quasi*-judicial, duty to inquire, as might be said to be the case with the bishop acting under the writs issued by the Crown. That may be said to be *quasi*-judicial. He is acting for the public when that is done; but I think the very object of it must be that it should be made for the purpose of being kept public, so that the persons concerned in it may have access to it afterwards." See this case explained in *Mercer* v. *Denne*, [1905] 2 Ch. 538, C. A.; and compare *North Staffordshire Rail. Co.* v. *Hanley Corporation* (1909), 73 J. P. 477, C. A.; and see, further, *Daniel* v. *Wilkin* (1852), 7 Exch. 429, *per* PARKE, B., at p. 437. Note that cases falling under this head must not be confused with cases of entries by deceased persons made in course of private duty: the latter are private, not public documents. As to them, see p. 464, *ante*; *Short* v. *Lee* (1821), 2 Jac. & W. 464, seems to be a case of that kind.

(*n*) *Mercer* v. *Denne*, *supra*, *per* VAUGHAN WILLIAMS, L.J., at p. 556; compare *Sturla* v. *Freccia*, *supra*; *Beaufort* (*Duke*) v. *Smith* (1849), 4 Exch. 450; *Daniel* v. *Wilkin*, *supra*; *Rowe* v. *Brenton* (1828), 8 B. & C. 737, cited in note (*o*), *infra*; *Newcastle* (*Duke*) v. *Broxtowe Hundred* (1832), 4 B. & Ad. 273.

(*o*) See *Smith* v. *Brownlow* (*Earl*) (1870), L. R. 9 Eq. 241, survey of manor belonging to the Duchy of Cornwall held admissible as evidence of the boundaries and customs of the manor; compare *Beaufort* (*Duke*) v. *Smith*, *supra*; *Daniel* v. *Wilkin*, *supra*; *Manchester Corporation* v. *Lyons* (1882), 22 Ch. D. 287, 299, C. A. Generally, all documents coming under this head which relate to the possessions or revenues of the Duchies of Cornwall and Lancaster are admissible as public documents owing to the special interest which the Crown has in the duchies; see *Rowe* v. *Brenton*, *supra*, in which case (1) a grant by Edward II. to Piers de Gaveston of the County of Cornwall, and the confirmation thereof; (2) accounts relating to the Duchy of Cornwall produced from the King's Remembrancer's office; (3) a roll called an Assession Roll containing accounts of acts done by commissioners appointed in 7 Edward III. (1333) by the Earl of Cornwall; and (4) ancient leases and grants of duchy lands by the Duke of Cornwall, were admitted (compare *Brisco* v. *Lomax* (1838), 8 Ad. & El. 198; *Blandy-Jenkins* v. *Dunraven* (*Earl*) (1898), 62 J. P. 661).

(*p*) *Mercer* v. *Denne*, *supra*, *per* VAUGHAN WILLIAMS, L.J., at p. 558.

(*q*) *Rowe* v. *Brenton*, *supra*.

(*r*) *Rowe* v. *Brenton*, *supra*. This document was found in the proper office, and purported to have been taken by a steward of the King's lands. The commission under which it was taken could not be found, but it was presumed to

of receivers-general and other Crown officers (*s*), but not to documents made on behalf of the Crown for merely temporary or private (*t*) purposes, such as a survey of Walmer Castle taken by direction of the Lord Warden of the Cinque Ports, or an estimate made by the King's engineer for the repair of Walmer Castle (*a*), or depositions taken in an information by the Attorney-General against persons claiming to be entitled to the manor of Walmer for suffering the destruction of a sea wall between the sea and Walmer Castle (*b*).

These cases must be distinguished from those of documents operating merely as admissions by the Crown, which are evidence only as against the Crown or persons claiming under it (*c*).

730. The following are further instances of documents held to fall within the rule above stated:—Documents drawn up by public commissioners (*d*), surveyors (*e*), valuers (*f*), customs house

Other examples of public documents.

have been taken under a proper authority. "Considering that this document was found in the proper office, and that it would have been a breach of duty in the person having the custody of that office to admit any extent not duly taken, I think we must, at this distance of time, presume that it was taken under competent authority. The stat. 4 Edw. 1 says that extents are to be taken, not by whom. I therefore think it was the duty of each steward under the Crown to take extents from time to time of the lands under his care" (*ibid.*, *per* BAYLEY, J., at p. 749). For another example, see *Doe* d. *William IV.* v. *Roberts* (1844), 13 M. & W. 520, 533.

(*s*) *Doe* d. *William IV.* v. *Roberts*, *supra*; *A.-G.* v. *Hotham* (*Lord*) (1823), Turn. & R. 209.

(*t*) See, for example, *Beaufort* (*Duke*) v. *Smith* (1849), 4 Exch. 450; and see *Phillips* v. *Hudson* (1867), 2 Ch. App. 243, where a survey of a Crown manor made under order of the Crown was held to have been "a survey made for the purposes of the Crown and just the same as if it had been a survey made by a private owner," and therefore inadmissible in an action by copyholders against the lord. See also *Evans* v. *Taylor* (1838), 7 Ad. & El. 617, where a survey of a manor belonging to the Duchy of Lancaster produced from the duchy office was held inadmissible, it not being shown to have been made for any public purpose. *Sed quære*, whether on the facts this objection is correct; the document was in any event inadmissible, as the scope of the inquiry does not appear to have been regarded.

(*a*) *Mercer* v. *Denne*, [1905] 2 Ch. 538, C. A.; such documents, if not otherwise admissible, are not admissible as entries by a deceased person (as to which see p. 463, *ante*) (*ibid.*).

(*b*) *Mercer* v. *Denne*, *supra*.

(*c*) *E.g.*, *Irish Society* (*Governors etc.*) v. *Derry* (*Bishop*) (1846), 12 Cl. & Fin. 641, H. L. (surrender made by a former bishop to the Crown of all livings in Londonderry, followed by a grant of such livings by the Crown and two letters from the Crown, recognising this grant, admitted). And as to admissions generally, see p. 456, *ante*.

(*d*) *E.g.*, under the Tithe Commutation Acts (*Giffard* v. *Williams* (1869), 38 L. J. (CH.) 597, 604); *A.-G.* v. *Antrobus*, [1905] 2 Ch. 188, 193, 194 (tithe maps and awards; distinguish *Wilberforce* v. *Hearfield* (1877), 5 Ch. D. 709, note (*i*), p. 531, *post*); the Statute of Sewers, 23 Hen. 8, c. 5 (1531-2) (*R.* v. *Leigh* (1840), 10 Ad. & El. 398; *New Romney Corporation* v. *New Romney* (*Commissioners of Sewers*), [1892] 1 Q. B. 840); the Charitable Trusts (Recovery) Act, 1891 (54 & 55 Vict. c. 17), s. 5; the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 18 (see *The Little Lizzie* (1870), L. R. 3 A. & E. 56); in *Doe* d. *Chetham*, *Strode* v. *Seaton* (1834), 2 Ad. & El. 171, assessments by Commissioners of Land Tax showing that at a certain date property was assessed in a certain name, were admitted to show that the property at that date belonged to a person of

(*e*), (*f*) For notes (*e*) and (*f*) see next page.

SECT. 2. Proof of Contents of Documents.

searchers (*g*) appointed under statute or otherwise; Domesday Book (*h*); returns made by a bishop in obedience to Exchequer writs (*i*); entries made by a bishop on his visitation, if he had a right to make them (*k*); collations from the bishop's registry (*l*); inquisitions taken under a commission of lunacy (*m*), and recitals in orders drawn up by a master in lunacy (*n*); public surveys taken under an order of the Crown (*o*) or the Commonwealth (*p*); the taxation of Pope Nicholas made in 1291 (*q*); an inquisition on the writ of *ad quod damnum* made in 37 Edward III. (*r*); extracts from hundred rolls taken by special commissioners in 3 Edward I. (*s*); presentments in a manor court setting forth the bounds of the manor (*t*).

In the case of a return to a royal commission, the document is not admissible unless signed and sealed by the Commissioners (*u*).

that name; compare *Newcastle* (*Duke*) v. *Broxtowe Hundred* (1832), 4 B. & Ad. 273, and *Doe* d. *Smith* v. *Cartwright* (1824), 1 C. & P. 218; *Johnson* v. *Thompson* (1850), 15 L. T. (o. s.) 437. For allowances of poor rate by justices, see Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41), s. 18, and p. 541, *post*. Other examples are an inquisition under an order of the House of Commons as to fees payable in certain offices (*Green* v. *Hewett* (1793), Peake, 243, [182]); inquisition under the Exchequer seal as to seisin of lands (*Tooker* v. *Beaufort* (*Duke*) (1757), 1 Burr. 146).

(*e*) *Evans* v. *Merthyr Tydfil Urban Council*, [1899] 1 Ch. 241, C. A., distinguishing *Phillips* v. *Hudson* (1867), 2 Ch. App. 243; compare *R.* v. *Norfolk County Council* (1910), 26 T. L. R. 269, cited note (*n*), p. 532, *post*.

(*f*) Under the Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), s. 45, valuation lists made under this Act are conclusive evidence for the purpose of certain rates, taxes, and qualifications.

(*g*) *Johnson* v. *Ward* (1806), 6 Esp. 47.

(*h*) *Rowe* v. *Brenton* (1828), 8 B. & C. 737; *Newcastle* (*Duke*) v. *Broxtowe Hundred*, *supra*.

(*i*) *Irish Society* (*Governors etc.*) v. *Derry* (*Bishop*) (1846), 12 Cl. & Fin. 641, H. L.

(*k*) *Sturla* v. *Freccia* (1880), 5 App. Cas. 623, *per* Lord BLACKBURN, at p. 646.

(*l*) *Irish Society* (*Governors etc.*) v. *Derry* (*Bishop*), *supra*; *Graves* (*Lord*) v. *Fisher* (1834), 3 Cl. & Fin. 1, H. L.

(*m*) *Faulder* v. *Silk* (1811), 3 Camp. 126; *Prinsep and East India Co.* v. *Dyce Sombre* (1856), 10 Moo. P. C. C. 232.

(*n*) *Harvey* v. *R.*, [1901] A. C. 601, P. C.

(*o*) *E.g.*, the survey of 26 Hen. 8, 1534-5; *Bullen* v. *Michel* (1816), 2 Price, 399; *Graves* (*Lord*) v. *Fisher*, *supra*. In *Armstrong* v. *Hewitt* (1817), 4 Price, 216, a statement in this survey that the vicar was entitled to tithe-hay generally was held not to supply the absence of proof of perception from the lands in question; compare *Drake* v. *Smyth* (1818), 5 Price, 369.

(*p*) *Freeman* v. *Read* (1863), 4 B. & S. 174, where the *de facto* authority of the Commonwealth Parliament appears to have been the ground on which the document was received; distinguish *Beaufort* (*Duke*) v. *Smith* (1849), 4 Exch. 450, where the document was rejected not because it was made under order of the Commonwealth Parliament, but because it was a private document being a survey of a manor and seignory granted by Parliament to Oliver Cromwell, see *per* PARKE, B., at p. 470.

(*q*) *Bullen* v. *Michel*, *supra*, where this survey was held admissible as to the rate and value at which the persons employed on it thought fit to estimate the living; compare *Drake* v. *Smyth*, *supra*.

(*r*) *Bullen* v. *Michel*, *supra*; this was only held admissible to prove contemporary reputation as to the value of the land in question.

(*s*) *Newcastle* (*Duke*) v. *Broxtowe Hundred*, *supra*.

(*t*) *Evans* v. *Rees* (1839), 10 Ad. & El. 151.

(*u*) *The Slane Peerage* (1835), 5 Cl. & Fin. 23, H. L.

Other examples are provided by statements and reports made by persons in a public position (*a*) as to matters in which the public are interested, such as memoranda entered by a former vicar in an ancient parochial register (*b*), papers handed over to an incumbent by the representatives of his predecessor as papers belonging to the parish (*c*), answers by a clergyman to questions addressed by the bishop on the occasion of an augmentation by the Governors of Queen Anne's Bounty (*d*), ecclesiastical terriers (*e*), entries in books kept at the First Fruits Office (*f*), plans deposited by a railway company with a local authority in connection with a proposal to make a light railway (*g*).

Not evidence of facts outside the scope of the writer's authority.

But although the document may be properly of a public nature, it is not admissible to prove any facts therein stated which do not fall within the scope of the writer's authority (*h*).

Moreover, documents falling under the present head are not necessarily admissible to prove the facts therein stated against all the world and for every purpose; whether or not this is so, must depend upon the nature of the document and the objects for which it was drawn up (*i*).

(*a*) Or having competent means of knowledge in the matter (*Vyner* v. *Wirrall Rural District Council* (1909), 73 J. P. 242).

(*b*) *Drake* v. *Smyth* (1818), 5 Price, 369.

(*c*) *Earl* v. *Lewis* (1801), 4 Esp. 1, where the boundary of the parish was the question in issue.

(*d*) *Carr* v. *Mostyn* (1850), 5 Exch. 69.

(*e*) *Drake* v. *Smyth*, *supra*; *R.* v. *Hall* (1866), L. R. 1 Q. B. 632. The terrier must be signed by parishioners or parish officers (*Earl* v. *Lewis*, *supra*).

(*f*) *Irish Society* (*Governor etc.*) v. *Derry* (*Bishop*) (1846), 12 Cl. & Fin. 641, H. L., where the entries were held admissible to show the fact of a collation to a living by the bishop at a particular time.

(*g*) *A.-G.* v. *Antrobus*, [1905] 2 Ch. 188, 192, where the question was whether a certain track was a public way; and plans were admitted to show that the company proposed to carry their line upon an embankment across it without making provision for continuing the alleged way.

(*h*) See *Nothard* v. *Pepper* (1864), 17 C. B. (N. S.) 39, in an action for damages by collision, examination of the master of the plaintiff's ship taken by the Receiver of Wrecks held not admissible for the purpose of proving that the damage done to the plaintiff's ship was on her port bow, the question which ship caused the damage not being one into which the receiver had authority to inquire. See also *A.-G.* v. *Antrobus*, *supra*, at p. 194. In *Jones* v. *White* (1717), 1 Stra. 68, it was left open whether a finding on a coroner's inquest that a suicide was insane is admissible (compare *R.* v. *Gregory* (1846), 15 L. J. (M. C.) 38); *Glossop* v. *Pole* (1814), 3 M. & S. 175 (action against a sheriff for a false return of *nulla bona*; inquisition as to goods taken under a *fi. fa.* and finding that they were property of a third person rejected as outside the scope of the sheriff's duty); compare *Leighton* v. *Leighton* (1720), 1 Stra. 308; *Latkow* v. *Eamer* (1795), 2 Hy. Bl. 437.

(*i*) *Wilberforce* v. *Hearfield* (1877), 5 Ch. D. 709, tithe commutation map rejected in a case of disputed ownership, *non obst.* s. 64 of the Tithe Act, 1836 (6 & 7 Will. 4, c. 71). "Tithe commutation maps were never intended by the legislature to be evidence as between two parties of their title to land," *per* JESSEL, M.R., at p. 710; distinguish *Giffard* v. *Williams* (1869), 38 L. J. (CH.) 597. See also *The Little Lizzie* (1870), L. R. 3 A. & E. 56 (Board of Trade inquiry as to negligence of a master under the Merchant Shipping Acts not admissible against the owners); *The Solway* (1885), 10 P. D. 137 (letter of master admissible against owners as evidence of facts stated but not of opinion); compare *Admiralty* (*Lords Commissioners*) v. *Aberdeen Steam Trawling and Fishing Co., Ltd.*, [1909] S. C. 335; *Coleman* v. *Kirkaldy*, [1882] W. N. 103 (ordnance

SECT. 2. **Proof of Contents of Documents.**

Private documents not admissible under this head.

Ancient maps.

731. Where the document is of a private nature it is not admissible under this head (*k*). Some examples of documents which have been held to be private have already been given. The following may be added:—Books, pedigrees etc. drawn up by the College of Heralds otherwise than in the discharge of an official duty (*l*), a certificate by a customs house officer certifying the measurement and tonnage of a vessel (*m*), a report by the master of a foreign vessel made to customs house officers as to the burthen of his ship and the number of the crew (*m*), maps and plans prepared in the seventeenth century by direction of the Board of Ordnance (*n*), an old chart in possession of the Admiralty not shown to be an Admiralty chart (*o*), ancient private maps (*p*), a confidential report by a magistrate or other public person made under the direction of the Crown or the Executive (*q*), a report by a foreign Government on a question submitted to it as to the fitness of a person to be appointed as its diplomatic agent (*r*), a private survey of land (*s*), an old "collection of monumental inscriptions in country churches" (*t*).

The report of a public analyst is not admissible to prove the facts therein stated (*a*), nor are the returns of the Meteorological Office (*b*).

map inadmissible in case of disputed title); and compare *Hammond* v. *Bradstreet* (1854), 10 Exch. 390; *Frost* v. *Richardson* (1910), 103 L. T. 22 (tithe maps are not evidence, but a map annexed to an inclosure award may be evidence against an owner of land comprised in the award).

(*k*) It may be admissible under some other head, *e.g.*, as a statement by a deceased person (see p. 463, *ante*), or as an admission (see p. 456, *ante*).

(*l*) *The Shrewsbury Peerage* (1858), 7 H. L. Cas. 1 (the documents rejected on this ground were (a) a book called "Arms and Descents of the Nobility E. 16," produced from the Heralds' Office, and (b) a pedigree "touching the name and families of Talbots" in the handwriting of a former Garter King of Arms); see p. 533, *post*, for the special rules applicable in peerage cases.

(*m*) *Huntley* v. *Donovan* (1850), 15 Q. B. 96 (in neither case was there any public duty).

(*n*) *Mercer* v. *Denne*, [1904] 2 Ch. 534, 541; affirmed [1905] 2 Ch. 538, C. A. In *R.* v. *Norfolk County Council* (1910), 26 T. L. R. 269, JELF, J., admitted ancient maps purporting to have been made by "The King's Geographer."

(*o*) *Mercer* v. *Denne*, *supra*.

(*p*) *Hammond* v. *Bradstreet* (1854), 10 Exch. 390; and see p. 563, *post*, as to private maps.

(*q*) *Sturla* v. *Freccia* (1880), 5 App. Cas. 623, 644; compare *Polini* v. *Grey*, *Sturla* v. *Freccia* (1879), 12 Ch. D. 411, 428, C. A.

(*r*) *Sturla* v. *Freccia*, *supra*. *Quære* whether reports made by or by the direction of a foreign Government could in any event be admitted under this rule.

(*s*) *Daniel* v. *Wilkin* (1852), 7 Exch. 429 (document purporting to be a presentment by a jury of survey, but with no jurors' signatures nor anything to show under what authority the survey was made). "The ground on which a survey made by officers of the Crown under a commission is received is, that it is presumed that they acted in accordance with their public duty, and have stated nothing in their inquisition or survey which is contrary to the fact. But no such presumption of truth attaches to a survey belonging to a private individual, although the presentment of a jury might be evidence of reputation" (*ibid.*, *per* PARKE, B., at p. 437).

(*t*) Held inadmissible to show what had been the inscription on a partly defaced tomb (*The Shrewsbury Peerage*, *supra*). For inscriptions, see, further, p. 564, *post*.

(*a*) *Shortt* v. *Robinson* (1899), 63 J. P. 295.

(*b*) *Burrows* v. *Bedford School Board* (1902), 18 T. L. R. 292.

In peerage cases special principles apply (*c*), and numerous documents have been admitted which are not strictly of a public nature (*d*), and would not be admitted in other cases (*e*).

Peerage cases

(iv.) *Birth, Marriage, and Death Certificates.*

(a) *Of the Registrar-General of England.*

Certified copy of entry in register book admissible to prove facts therein stated.

732. A certified copy, purporting to be sealed or stamped with the seal of "The General Register Officer" for keeping a register of births, deaths, and marriages in England is to be received as evidence of the birth, death, or marriage to which the same relates, without any further or other proof of such entry (*f*). Every entry of a birth or a death must be signed by the informant (*g*); and in the case of a birth or death since 1874, must be signed by the superintendent registrar if the registration took place more than three but not more than twelve months after such birth or death, or must be made on the authority of the Registrar-General if the registration took place more than twelve months after such birth or death (*h*).

What a birth certificate proves.

A birth certificate of the Registrar-General proves the fact and date of birth (*i*), christian name and sex of person born, names of parents and rank or profession of father (*k*), and, where the Registrar-General thinks fit so to direct, the place of birth (*l*).

What a death certificate proves.

A death certificate of the Registrar-General proves the fact (*m*) and date of death, the sex, age, rank or profession of the dead

(*c*) See *Polini* v. *Grey*, *Sturla* v. *Freccia* (1879), 12 Ch. D. 411, C. A., *per* JAMES, L.J., at p. 428.

(*d*) *E.g.*, *The Shrewsbury Peerage* (1858), 7 H. L. Cas. 1, where a visitation was admitted purporting to have been taken by deputation from Clarenceux King of Arms, and also a record of a Royal Warrant of Precedence produced from the Heralds' Office. In *The Slane Peerage* (1835), 5 Cl. & Fin. 23, H. L., an old MS. book, purporting to be copied from contemporaneous Lords' Journals (which were not in existence) by an officer whose duty it was to prepare lists of peers present and absent was held admissible to prove that a peer had taken his seat.

(*e*) *Polini* v. *Grey*, *Sturla* v. *Freccia*, *supra*.

(*f*) Marriage Act, 1836 (6 & 7 Will. 4, c. 85); Births and Deaths Registration Act, 1836 (6 & 7 Will. 4, c. 86), s. 38; Births and Deaths Registration Act, 1874 (37 & 38 Vict. c. 88); Marriage Act, 1898 (61 & 62 Vict. c. 58), ss. 4, 7, 11; *R.* v. *Weaver* (1873), L. R. 2 C. C. R. 85; *Hubbard* v. *Lees and Purden* (1866), L. R. 1 Exch. 255; see also titles BURIAL AND CREMATION, Vol. III., p. 555; ECCLESIASTICAL LAW, Vol. XI., pp. 686, *et passim*; REGISTRATION OF BIRTHS, DEATHS, AND MARRIAGES.

(*g*) *I.e.*, the person who, under the Acts, must give the information to the registrar; see the Births and Deaths Registration Act, 1836 (6 & 7 Will. 4, c. 86), ss. 20, 21, 25, 26; and as to the duty to notify in places where the Notification of Births Act, 1907 (7 Edw. 7, c. 40), is adopted, see that Act.

(*h*) Births and Deaths Registration Act, 1836 (6 & 7 Will. 4, c. 86), s. 27; Births and Deaths Registration Act, 1874 (37 & 38 Vict. c. 88), s. 38.

(*i*) *Wilton & Co.* v. *Phillips* (1903), 19 T. L. R. 390; *In the Estate of Goodrich*, *Payne* v. *Bennett*, [1904] P. 138, disapproving *Re Wintle* (1870), L. R. 9 Eq. 373.

(*k*) Births and Deaths Registration Act, 1836 (6 & 7 Will. 4), c. 86), Sched. A.

(*l*) Births and Deaths Registration Act, 1837 (7 Will. 4 & 1 Vict. c. 22), s. 8.

(*m*) *Parkinson* v. *Francis* (1846), 15 Sim. 160; *Traill* v. *Kibblewhite* (1846), 10 Jur. 107; *Riseley* v. *Shepherd* (1873), 21 W. R. 782; *Re Valter's Trust*, [1887] W. N. 128.

SECT. 2. Proof of Contents of Documents.

person and the cause of death (*n*), and, where the Registrar-General thinks fit so to direct, the place of death (*o*).

What a marriage certificate proves.

A marriage certificate of the Registrar-General proves the fact (*p*) and date of the celebration of the marriage, the name, age or non-age, condition, rank or profession, and residence of the parties, and the name and rank or profession of the father of each party (*q*).

An extract from a register of births, deaths, or marriages, if purporting to be signed by the officer to whose custody the original is intrusted, is evidence on its mere production (*r*).

(b) *Foreign Registers.*

Foreign and colonial registers.

733. At common law, foreign registers (including in that term those of Scotland, Ireland, and the Channel Islands) and colonial registers, are admissible in English courts to prove the facts stated therein, provided they are required to be kept by the law of the country to which they belong or by English law. When the registers are themselves admissible in evidence, certified and examined copies (*s*) of entries therein are also admissible (*t*).

May be proved by copy.

(*n*) Births and Deaths Registration Act, 1836 (6 & 7 Will. 4, c. 86), Sched. B.

(*o*) Births and Deaths Registration Act, 1837 (7 Will. 4 & 1 Vict. c. 22), s. 8. For cases in which an entry or certified copy of an entry of a birth or death in a register of such birth or death is admissible in evidence, see Births and Deaths Registration Act, 1874 (37 & 38 Vict. c. 88), s. 38.

(*p*) *R.* v. *Hawes* (1847), 1 Den. 270.

(*q*) Births and Deaths Registration Act, 1836 (6 & 7 Will. 4, c. 86), Sched. C.

(*r*) Evidence Act, 1851 (14 & 15 Vict. c. 99), s. 14; *R.* v. *Weaver* (1873), L. R. 2 C. C. R. 85.

(*s*) As to examined copies, see p. 524, *ante*. A certified copy must be certified by the officer to whose custody the original is intrusted.

(*t*) *Lyell* v. *Kennedy*, *Kennedy* v. *Lyell* (1889), 14 App. Cas. 437, *per* Lord SELBORNE, at p. 448: "Foreign registers, or certified extracts from them, are receivable in evidence as to those matters which are properly and regularly recorded in them when it sufficiently appears that they have been kept under the sanction of public authority and are recognised by the tribunals of the country where they are kept as authentic records." In the following cases foreign or colonial registers, or extracts from them duly certified by the officials to whose custody the originals were intrusted, were admitted in evidence:—*Alsop* v. *Bowtrell* (1619), Cro. Jac. 541 (certificate of marriage under seal of minister at Utrecht); *Roscommon's* (*Earl*) *Claim* (1828), 6 Cl. & Fin. 97, 105, H. L. (copies of registers kept at churches in Ireland); *The Vaux Peerage* (1837), 5 Cl. & Fin. 526, H. L. (funeral certificate contained in book entitled "Funeral Certificates of the Nobility," preserved in the Heralds' College); *Milligan* v. *Mitchell* (1837), 3 My. & Cr. 72 (extract from minute book of a Scotch chapel); *Cood* (otherwise *Cocde*) v. *Cood* (otherwise *Coode*) (1838), 1 Curt. 755 (copy of entry in marriage register at Barbados); *O'Connor* v. *Malone* (1839), 6 Cl. & Fin. 572, 576, H. L.; *Malone* v. *L'Estrange* (1839), 2 I. Eq. R. 16 (entries of marriages in books kept at Roman Catholic chapels in Dublin); *The Perth Earldom* (1848), 2 H. L. Cas. 865 (copies of French registers); *Re Forbes* (1852), 1 W. R. 32 (extract from register kept at consulate of Madeira); *Ratcliff* v. *Ratcliff and Anderson* (1859), 1 Sw. & Tr. 467 (authenticated copy of entry in marriage register in India); *Abbott* v. *Abbott and Godoy* (1860), 29 L. J. (P. M. & A.) 57 (extract from marriage register in Chili); *Evans* v. *Ball* (1878), 38 L. T. 141 (copy of register in Nova Scotia); *The Lauderdale Peerage* (1885), 10 App. Cas. 692, 698 (marriage register kept at church in New York); *Burnaby* v. *Baillie* (1889), 42 Ch. D. 282 (examined copy of entry in French register of births); *Wallace* v. *Wallace* (1896), 74 L. T. 253 (certified copy of entry in marriage register kept at a church in Dublin).

In the following cases foreign or colonial registers or extracts from them duly certified by the officials to whose custody the originals were intrusted were not

Various Acts have, however, been passed by the legislature with provisions similar to those of the Births and Deaths Registration Acts, 1836 and 1874, to provide for the better registration of births, marriages and deaths, and to enable foreign and colonial registers and copies thereof to be admissible in evidence. In the case of births, marriages and deaths in Scotland, certified copies, stamped with the seal of the General Register Office in Edinburgh, of entries in certified copy register-books, kept in that office, are admissible in evidence, to prove the facts stated in such entries (*u*). Similar provisions have been made with regard to the registration of births, deaths and marriages in Ireland (*w*), and of births and deaths on board His Majesty's ships (*x*), British ships (*a*), and foreign ships carrying passengers to or from any port in the United Kingdom (*b*), and of any records made in regimental books in pursuance of military duty (*c*). Provisions have also been made for admitting in evidence certified copies of the transcripts delivered to the General Register Office in London of registers of marriages of Christians in India (*d*), and in the Ionian Islands (*e*). Lastly,

Scotland.

Ireland.

British ships.

India and abroad.

admitted in evidence:—*Huet* v. *Le Mesurier* (1786), 1 Cox, Eq. Cas. 275 (copy of register of baptism from Guernsey); *Leader* v. *Barry* (1795), 1 Esp. 353 (examined copy of entry in marriage register kept at chapel of Swedish ambassador in Paris); *Conway* (otherwise *Beazley*) v. *Beazley* (1831), 3 Hag. Ecc. 639, 651 (copies of entries in marriage register kept at episcopal chapel in Edinburgh); *Athlone's* (*Earl*) *Claim* (1841), 8 Cl. & Fin. 262, H. L. (attested copy of entry in marriage register kept at hotel of British ambassador in Paris); *Dufferin and Clanboye's* (*Lord*) *Claim* (1848), 2 H. L. Cas. 47 (certificate of baptism from the chaplain of the British ambassador at Florence); *Ennis* v. *Carroll* (1868), 17 W. R. 344 (entries in register kept at Roman Catholic chapel in Ireland). These registers of course only prove the fact of marriage, not its validity. As to the validity of marriage celebrated abroad, see title CONFLICT OF LAWS, Vol. VI., pp. 252 *et seq.*

(*u*) Registration of Births, Deaths and Marriages (Scotland) Acts, 1854 (17 & 18 Vict. c. 80), 1855 (18 & 19 Vict. c. 29), and 1860 (23 & 24 Vict. c. 85); Marriage (Scotland) Act, 1856 (19 & 20 Vict. c. 96), s. 2; and see *Wigley* v. *Treasury Solicitor*, [1902] P. 233; *Lyell* v. *Kennedy*, *Kennedy* v. *Lyell* (1889), 14 App. Cas. 437. As the Evidence Act, 1845 (8 & 9 Vict. c. 113), does not extend to Scotland (*ibid.*, s. 5), it is apparently still necessary to prove the signature and official character of the person signing the extract.

(*w*) Marriages (Ireland) Act, 1844 (7 & 8 Vict. c. 81); Marriage Law (Ireland) Amendment Acts, 1863 (26 & 27 Vict. c. 27), and 1873 (36 & 37 Vict. c. 16); Matrimonial Causes and Marriage Law (Ireland) Amendment Act, 1870 (33 & 34 Vict. c. 110); and see *Whitton* v. *Whitton* (1900), 69 L. J. (P.) 126.

(*x*) Births and Death Registration Act, 1874 (37 & 38 Vict. c. 88), s. 37.

(*a*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 254.

(*b*) *Ibid.*, ss. 254, 339.

(*c*) A record purporting to be signed by the commanding officer is evidence of the facts stated, and a copy certified by the person having the custody is evidence of the record (Army Act, 1881 (44 & 45 Vict. c. 58), s. 163 (1) (g), (h)); and see *Adams* v. *Adams*, [1900] W. N. 32, and *Gleen* v. *Gleen* (1900), 17 T. L. R. 62.

(*d*) Indian Christian Marriage Act, 1872 (Indian Act XV. of 1872). And see *Queen's Proctor* v. *Fry* (1879), 48 L. J. (P.) 68; *Regan* v. *Regan* (1892), 67 L. T. 720; *Westmacott* v. *Westmacott*, [1899] P. 183; *De Gruyther* v. *De Gruyther* (1900), *Times*, 2nd November. The copies are certified by the person intrusted under the Indian Christian Marriage Act, 1872 (Act XV. of 1872), with the custody of any marriage or certificate in duplicate required to be kept or delivered under that Act (Indian Christian Marriage Act, 1872 (Act XV. of 1872), s. 80).

(*e*) Ionian Isles Marriage Act, 1860 (23 & 24 Vict. c. 86), s. 4. The copies were

SECT. 2. Proof of Contents of Documents.

provision has been made for the registration of marriages of British subjects, celebrated anywhere abroad by marriage officers (*f*). Duplicate registers are kept, and one of them when filled up must be forwarded to the General Register Office in London (*g*). The provisions of the Births and Deaths Registration Acts, 1836 and 1874, with regard to certified copies are made applicable to this Act (*h*).

(v.) *Parish and other Registers and Records of Baptisms, Marriages, and Burials.*

Parish registers.

734. Parish registers (*i*), being public documents, are admissible in evidence to prove the facts stated therein, on their mere production from proper custody (*k*). Even at common law, duly certified copies of entries therein were receivable in evidence without the production of the registers themselves (*l*); and it has been enacted by statute that where any document is of such a public nature as to be admissible in evidence on its mere production from proper custody, any copy or extract therefrom, either proved to be an examined copy or extract or purporting to be signed and certified as a true copy or extract by the officer having the custody of the original, is admissible in proof of the contents of such document (*m*).

to be certified under the hand of the Lord High Commissioner of the Ionian Islands; but see stat. (1864) 27 & 28 Vict. c. 77, ss. 7, 8, by which the copies were to be certified under the signature and official seal of the Secretary of the Lord High Commissioner.

(*f*) Foreign Marriage Act, 1892 (55 & 56 Vict. c. 23), which repeals the Consular Marriage Acts, 1849 (12 & 13 Vict. c. 68) and 1868 (31 & 32 Vict. c. 61); Marriage Act, 1890 (53 & 54 Vict. c. 47). For definition of marriage officer, see Foreign Marriage Act, 1892 (55 & 56 Vict. c. 23), s. 11.

(*g*) *Ibid.*, ss. 9, 10.

(*h*) *Ibid.*, s. 17.

(*i*) On the subject of parish registers in general, see Burn's History of Parish Registers.

(*k*) 70th Canon of 1603; Parochial Registers Act, 1812 (52 Geo. 3, c. 146); *Sturla* v. *Freccia* (1880), 5 App. Cas. 623, *per* Lord BLACKBURN, at p. 644: "In many cases entries in the parish register of births, marriages, and deaths, and other entries of that kind, before there were any statutes relating to them, were admissible, and they were 'public' then, because the Common Law of England making it an express duty to keep the register, made it a public document in that sense kept by a public officer for the purpose of a register, and so made it admissible." The principle appears to be the same as that governing documents falling under Sub-Sect. (iii.), *ante*.

(*l*) *Lynch* v. *Clerke* (1696), 3 Salk. 154; *Birt* v. *Barlow* (1779), 1 Doug. (K. B.) 171, 174; Phillipps and Amos on Evidence, 8th ed., p. 638. It would seem that in English peerage claims, and apparently in Scotch peerage claims also (see *Marchmount Peerage Case*, 1822), the House of Lords would not receive copies of registers, but required the original registers themselves to be produced (*Roscommon's (Earl) Claim* (1828), 6 Cl. & Fin. 97, 105, H. L. As to examined copies, see p. 524, *ante*.

(*m*) Evidence Act, 1851 (14 & 15 Vict. c. 99), s. 14; and see *Re Hall's Estate* (1852), 22 L. J. (CH.) 177, C. A. (wrongly reported in 2 De G. M. & G. 748); *Re Porter's Trusts* (1856), 25 L. J. (CH.) 688. It is not clear whether the official copy of the parish register, deposited in the registry of the diocese, under the 70th Canon, is to be deemed an original public document so as to render it, or copies of it, admissible without proof of the loss or destruction of the original parish register (*Walker* v. *Beauchamp* (*Countess*) (1834), 6 C. & P. 552, *per* ALDERSON, B., at p. 558). In *Doe* d. *Wood* v. *Wilkins* (1846), 2 Car. & Kir. 328, on proof

The registers must be kept in proper custody (*m*), and an examined copy of an entry in a register-book, which is in the custody of an unauthorised person, will not be receivable in evidence unless such custody is reasonably accounted for (*o*). Facts stated in such registers must have been properly and regularly recorded therein by the person whose duty it is to make such entries (*p*).

What a register of baptism proves.

735. A register of baptism proves the baptism according to the rites of the Church of England, the date thereof, the Christian name of the child (*q*) and the names of the parents (*r*); and in the case of baptisms since 1812, is evidence of the abode and quality, trade or profession, of the parents (*s*).

It is not *per se* evidence of the date of birth (*t*) nor of the place of birth (*a*).

It may, however, be presumptive evidence of the place of birth, to be taken in conjunction with other facts—where, for example, it is shown by evidence *dehors* that the child was extremely young when baptised (*b*).

What a register of marriage proves.

736. A register of marriage proves the fact and date of the celebration of the marriage in a parish or chapel according to the rites of the Church of England before March 2nd, 1837, and the names of the parties married (*c*).

that there were no parish registers in existence earlier than a certain date, transcripts filed pursuant to Canon 70 in the diocesan registry were admitted in evidence.

(*n*) Parochial Registers Act, 1812 (52 Geo. 3, c. 146), s. 5.

(*o*) *Doe* d. *Arundel* (*Lord*) v. *Fowler* (1850), 14 Q. B. 700. As to "proper custody," see pp. 505, 512, *ante*.

(*p*) *Walker* v. *Wingfield* (1812), 18 Ves. 443; *Doe* d. *Warren* v. *Bray* (1828), 8 B. & C. 813; *Lyell* v. *Kennedy* (1887), 56 L. T. 647, C. A. But see *Bidder* v. *Bridges* (1885), 54 L. T. 529, where an entry made 438 years after the happening of the fact recorded was admitted in evidence, *quantum valeat*, in proof of such fact.

(*q*) *Webb* v. *Haycock* (1854), 19 Beav. 342.

(*r*) 70th Canon of 1603.

(*s*) Parochial Registers Act, 1812 (52 Geo. 3, c. 146), Sched. A.

(*t*) *Robinson* v. *Buccleuch and Queensberry* (*Duke*) (1887), 3 T. L. R. 472, C. A.; *Wihen* v. *Law* (1821), 3 Stark. 63; *R.* v. *Clapham* (1829), 4 C. & P. 29; *Burghart* v. *Angerstein* (1834), 6 C. & P. 690. In *Morris* v. *Davies* (1828), 1 Mood. & R. 271, n. (b); *Cope* v. *Cope* (1833), 1 Mood. & R. 269; and *Thrussell* v. *Barker* (1868), 17 L. T. 665, entries describing the party as legitimate or illegitimate were admitted as evidence of reputation in the village; and in *Re Turner*, *Glenister* v. *Harding* (1885), 29 Ch. D. 985, CHITTY, J., considering himself bound by the two former decisions, admitted an entry of the date of birth of a child as evidence, *quantum valeat*, upon an inquiry as to the legitimacy of the child in question. In view of the decision in *Robinson* v. *Buccleuch and Queensberry* (*Duke*), *supra*, in the Court of Appeal, this view can no longer be sustained; see also the Irish case of *Ryan* v. *Ring* (1889), 25 L. R. Ir. 184; a baptismal certificate verified by a person interested in settled funds has been admitted as evidence that he had attained twenty-one years (*Re Bulley's Settlement*, [1886] W. N. 80).

(*a*) *R.* v. *North Petherton* (1826), 5 B. & C. 508.

(*b*) *R.* v. *North Petherton*, *supra*; *R.* v. *Birmingham* (*Inhabitants*), called also *R.* v. *Aston* (*Inhabitants*) (1829), 8 L. J. (O. S.) (M. C.) 41; *R.* v. *St. Katherine* (*Parish or Precinct*) (1831), 5 B. & Ad. 970, n. (a); *R.* v. *Lubbenham* (*Inhabitants*) (1834), 5 B. & Ad. 968; *R.* v. *Crediton* (*Inhabitants*) (1858), E. B. & E. 231.

(*c*) 70th Canon of 1603. *Doe* d. *Wollaston* v. *Barnes* (1834), 1 Mood. & R. 386;

SECT. 2. Proof of Contents of Documents.

An entry of marriage is receivable as evidence of the marriage, although such entry is only attested by one witness (*d*); and an extract from a register of marriages, which states that a certain marriage has been celebrated by special licence from the Archbishop, is admissible as evidence of such marriage, though the licence itself is not produced (*e*).

What a register of burials proves.

737. A register of burials proves the fact and date of burial, and the name, address, and age of the person buried (*f*).

Non-parochial registers.

738. At common law, non-parochial registers, or duly certified extracts from them, are admissible in evidence, if they come under the heading of public documents (*g*). For example, a bishop's register or a duly certified extract from it, when produced from proper custody, is admissible as evidence of the facts properly and regularly recorded therein (*h*).

What registers are inadmissible.

Where, however, a register is not one which the law requires to be kept for the public benefit, neither the original nor extracts from it are admissible in evidence—for example, registers kept at dissenting chapels (*i*) or the registers of marriage kept at the Fleet and King's Bench prisons and at the May-Fair, Mint, and Savoy chapels (*k*).

Doe d. *Jenkins* v. *Davies* (1847), 10 Q. B. 314. In an old case, *Draycott* v. *Talbot* (1718), 3 Bro. Parl. Cas. 564, it was held that the entries of the names and titles of the persons married is not positive evidence of the marriage if there is other evidence showing the improbability of the correctness of such entries. As to proof of identity, see *Sayer* v. *Glossop* (1848), 2 Exch. 409; *Bain* v. *Mason* (1824), 1 C. & P. 202.

(*d*) *Doe* d. *Blayney* v. *Savage* (1844), 1 Car. & Kir. 487. Stat. (1753) 26 Geo. 2, c. 33, s. 15, since repealed by the Marriage Act, 1823 (4 Geo. 4, c. 76), s. 1, enacted that entries in the registers of marriages shall be attested by two witnesses.

(*e*) *Doe* d. *Egremont* (*Earl*) v. *Grazebrook* (1843), 3 Gal. & Dav. 334.

(*f*) 70th Canon of 1603; Parochial Registers Act, 1812 (52 Geo. 3, c. 146); Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65), ss. 32, 33; Burial Act, 1853 (16 & 17 Vict. c. 134); Burial Act, 1854 (17 & 18 Vict. c. 87); Burial Act, 1857 (20 & 21 Vict. c. 81); Registration of Burials Act, 1864 (27 & 28 Vict. c. 97); and see *Doe* d. *France* v. *Andrews* (1850), 15 Q. B. 756.

(*g*) *Lynch* v. *Clerke* (1696), 3 Salk. 154; *Birt* v. *Barlow* (1779), 1 Doug. (K. B.) 171, 174.

(*h*) *Humble* v. *Hunt* (1817), Holt (N. P.), 601; *Arnold* v. *Bath and Wells* (*Bishop*) (1829), 5 Bing. 316; *Hartley* v. *Cook* (1832), 5 C. & P. 441. And see *Bullen* v. *Michel* (1816), 2 Price, 399, H. L., where ancient entries made by the monks in a register-book kept at the abbey were admitted as evidence of the facts stated therein. As to proper custody see pp. 505, 512, *ante*.

(*i*) *Newham* v. *Raithby* (1811), 1 Phillim. 315; *Ex parte Taylor* (1820), 1 Jac. & W. 483; *Whittuck* v. *Waters* (1830), 4 C. & P. 375; and see *Davis* v. *Lloyd* (1844), 1 Car. & Kir. 275 (entry, in the handwriting of the chief rabbi, in a register of circumcision); *D'Aglie* v. *Fryer* (1844), 13 L. J. (CH.) 398 (certified copy of register of baptism kept at the chapel of the Sardinian ambassador in London).

(*k*) See Burn's History of Fleet Marriages, pp. 127—36; *Morris* v. *Miller* (1767), 4 Burr. 2057; *Reed* v. *Passer* (1795), Peake, 303 [231]; *Lloyd* v. *Passingham* (1809), 16 Ves. 59; *Doe* d. *Davies* v. *Gatacre* (1838), 8 C. & P. 578. In *Lawrance* v. *Dixon* (1792), Peake, 185, and *Doe* d. *Orrel* v. *Madox* (1794), 1 Esp. 197, although Lord KENYON admitted Fleet registers to prove certain marriages, he declared that he did so only because other judges had admitted them; and in the later cases of *Reed* v. *Passer*, *supra*, and *Doe* d. *Davies* v. *Gatacre*

Certain non-parochial registers, inadmissible at common law, have, however, been made admissible by statute, to prove the facts stated therein (*l*). Only those registers actually deposited with the Registrar-General in accordance with the statutes are admissible (*m*), and it is expressly enacted that those registers which were deposited in the registry of the Bishop of London in 1821—for example, those of the Fleet and King's Bench prisons—although transferred to the custody of the Registrar-General, shall not be made evidence (*n*).

Non-parochial registers made admissible by statute.

Extracts sealed or stamped with the seal of the General Registry Office are receivable in evidence in all civil cases (*o*), but in criminal cases the original registers themselves must be produced (*p*).

(vi.) *Other Registers.*

739. Such registers as are kept pursuant to statute for the purpose of registering facts relating to different descriptions of property or rights are dealt with under their appropriate titles, such as the registers relating to companies (*q*), copyright (*r*), designs (*s*), patents (*t*), money-lenders (*u*), ships (*a*), land (*b*), trade marks (*c*) etc.

Other registers.

(vii.) *Court Rolls.*

740. Court rolls are in general only admissible in evidence for or against the lord or tenants of the manor (*d*), but they may also be admissible for or against the whole world when they form declarations by deceased persons as to public rights (*e*) or against interest (*f*).

Court rolls admissible as between lord and tenant.

(1838), 8 C. & P. 578, he refused to receive them in evidence for any purpose whatsoever, because they came from tainted quarters (*Reed* v. *Passer* (1795), Peake, 303 [231], 305).

(*l*) Non-parochial Registers Act, 1840 (3 & 4 Vict. c. 92); Births and Deaths Registration Act, 1858 (21 & 22 Vict. c. 25), ss. 1—3. A full account of these registers will be found in the reports made in 1837 and 1858 by commissioners appointed to inquire into non-parochial registers. For a list of registers made evidence under the former Act, see 9 C. & P. 793.

(*m*) Non-parochial Registers Act, 1840 (3 & 4 Vict. c. 92), ss. 2, 6.

(*n*) *Ibid.*, s. 20.

(*o*) *Ibid.*, s. 9.

(*p*) *Ibid.*, s. 17.

(*q*) See title COMPANIES, Vol. V., pp. 151, 695.

(*r*) See title COPYRIGHT AND LITERARY PROPERTY, Vol. VIII., pp. 152—157.

(*s*) See title PATENTS AND DESIGNS.

(*t*) *Ibid.*

(*u*) See title MONEY AND MONEY-LENDING.

(*a*) See title SHIPPING AND NAVIGATION.

(*b*) See title REAL PROPERTY AND CHATTELS REAL.

(*c*) See title TRADE MARKS.

(*d*) *A.-G.* v. *Hotham* (*Lord*) (1823), Turn. & R. 209; *Portland* (*Duke*) v. *Hill* (1866), L. R. 2 Eq. 765; *Heath* v. *Deane*, [1905] 2 Ch. 86, 91; compare *Rowe* v. *Brenton* (1828), 8 B. & C. 737.

(*e*) *Evans* v. *Rees* (1839), 10 Ad. & El. 151; compare *Richards* v. *Bassett* (1830), 10 B. & C. 657 (presentment of manor jury produced from court rolls). But the presentment must be of a matter which the jurors are entitled to determine, and not, *e.g.*, as to a claim made by an individual to the freehold (*ibid.*).

(*f*) *Crease* v. *Barrett* (1835), 1 Cr. M. & R. 919. As to declarations by deceased persons, see p. 463, *ante*.

SECT. 2. **Proof of Contents of Documents.**

Court rolls are also in some circumstances (but not where the entry was made *post litem motam* (*g*)) admissible as evidence of reputation (*h*), and also as acts of ownership (*i*).

Entries of customs.

An entry of a custom on the court rolls is admissible without proof that the custom has been acted upon except so far as may be necessary to explain the particular application of the custom when it is stated in general terms (*k*), while the existence of a customary of the manor compiled since the beginning of legal memory is conclusive evidence against the existence of any custom not mentioned therein (*l*).

Court rolls containing descriptions of the tenant's holding and the amount of rent paid are evidence of those facts in an action between the lord and his tenant (*m*).

Other manorial documents.

741. On the same principle as court rolls the following documents have been admitted:—"Call books" of a manor (*n*), ancient customaries of a manor delivered together with the court rolls from steward to steward (*o*), parchment writings preserved among the manor muniments purporting to be signed by copyholders agreeing to restrict their commonable rights (*p*), and the draft of an entry produced from the manor muniments, no entry having been made on the court rolls (*q*).

But a book in which the steward had entered the fines assessed was rejected, although it had been handed down from steward to steward and was accessible to all the tenants (*r*); and an ancient document produced from the lord's muniments, and purporting to be a survey of the manor lands by certain tenants who stated that

(*g*) *Richards* v. *Bassett* (1830), 10 B. & C. 657.

(*h*) *Chapman* v. *Cowlan* (1810), 13 East, 10; *Coote* v. *Ford* (1900), 17 T. L. R. 58; compare *Johnstone* v. *Spencer* (*Earl*) (1885), 30 Ch. D. 581, 589; *Re Walton-cum-Trimley Manor, Ex parte Tomline* (1873), 21 W. R. 475.

(*i*) *A.-G.* v. *Emerson*, [1891] A. C. 649, 658 (*semble*, they must be coupled with evidence of user within legal memory (*ibid.*)); and compare *Woolway* v. *Rowe* (1834), 1 Ad. & El. 114, where a perambulation of the manor by the lord was admitted as an act of ownership by the lord over lands comprised therein, and *Rogers* v. *Allen* (1808), 1 Camp. 309, where to prove a prescriptive right of fishing entries on the court rolls of old licences granted by the lord of the manor were admitted as acts of ownership by the lord.

(*k*) *Roe* d. *Beebee* v. *Parker* (1792), 5 Term Rep. 26; compare *Doe* d. *Goodwin* v. *Spray* (1786), 1 Term Rep. 466; *Doe* d. *Askew* v. *Askew* (1809), 10 East, 520. The true view, apparently, is that the absence of such proof goes to the weight and not to the admissibility of the evidence (compare *Rogers* v. *Allen*, *supra*).

(*l*) *Portland* (*Duke*) v. *Hill* (1866), L. R. 2 Eq. 765.

(*m*) *Foljambe* v. *John Smith's Tadcaster Brewery Co.* (1904), 91 L. T. 312.

(*n*) *Ibid.*

(*o*) *Denn* d. *Goodwin* v. *Spray* (1786), 1 Term Rep. 466. The same instrument was admitted in *Portland* (*Duke*) v. *Hill*, *supra*, at p. 767; compare *Johnstone* v. *Spencer* (*Earl*) (1885), 30 Ch. D. 581.

(*p*) *Chapman* v. *Cowlan* (1810), 13 East, 10.

(*q*) *Doe* d. *Priestley* v. *Calloway* (1827), 6 B. & C. 484.

(*r*) *Ely* (*Dean and Chapter*) v. *Caldecott* (1831), 7 Bing. 433. In *Hill* v. *Wiggett* (1706), 2 Vern. 547, an entry in the steward's book was admitted to contradict an entry on the rolls.

the lord was entitled to wreck, was not admitted as evidence of such right (*s*).

How court rolls are proved.

742. Court rolls are proved by production of the original or of an examined copy (*t*); and copies of court roll authenticated by the steward are admissible although they are not the copies delivered to the tenant (*a*).

Where the admittance of a copyholder is of thirty years' standing, a copy of such admittance may be read although it is not signed by the steward (*b*).

A surrender duly made and presented, of which no entry was made upon the court rolls, may be proved by the draft of an entry produced from the muniments of the manor (*c*).

(viii.) *Rate Books, Revenue Books, Log Books, Lighthouse Journals.*

Rate books.

743. Books purporting to contain poor rates, with the allowance of the rate by the justices, are *primâ facie* evidence of the due making and publication of such rates (*d*).

As evidence of ownership.

Entries of the names of tenants in parish rate books are admissible, if the books are brought from the proper custody, to prove who was the owner or occupier of the property rated at the time when the assessment was made (*e*).

The gross estimated rental fixed by the assessment committee cannot be altered at their instance on an appeal to quarter sessions (*f*).

Revenue books.

Revenue books are documents of a public nature (*g*), and, as such, are admissible in proof of the facts therein stated (*h*), if such facts are within the scope of the object for which the books are kept (*i*).

Log book of man-of-war.

The log book of a man-of-war is admissible to prove the facts therein stated (*k*).

(*s*) *Talbot* v. *Lewis* (1834), 4 L. J. (EX.) 9. This document could not be admitted as a public survey, as it was eminently of a private nature; as to public surveys, see p. 527, *ante*.

(*t*) *Doe* d. *Croydon* (*Churchwardens*) v. *Cook* (1805), 5 Esp. 221; *Doe* d. *Burrows* v. *Freeman* (1844), 12 M. & W. 844. As to stamps, see Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 65, and title REVENUE.

(*a*) *Breeze* v. *Hawker* (1844), 14 Sim. 350.

(*b*) *Ely* (*Dean and Chapter*) v. *Stewart* (1740), 2 Atk. 44.

(*c*) *Doe* d. *Priestley* v. *Calloway* (1827), 6 B. & C. 484.

(*d*) Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41), s. 18. The rates must be made in the proper form; see title RATES AND RATING.

(*e*) *Smith* v. *Andrews*, [1891] 2 Ch. 678; *Blount* v. *Layard* (1888), [1891] 2 Ch. 681, n., C. A. As to proper custody, see pp. 505, 512, *ante*.

(*f*) *Horton & Son* v. *Walsall Assessment Committee*, [1898] 2 Q. B. 237.

(*g*) See title REVENUE.

(*h*) *R.* v. *Grimwood* (1815), 1 Price, 369 (excise books); *Dunbar* v. *Harvie* (1820), 2 Bli. 351, H. L. (excise books); compare *Ellis* v. *Watson* (1818), 2 Stark. 453 (customs house books); *Harrison* v. *Borwell* (1839), 10 Sim. 380 (stamp office books).

(*i*) *Strother* v. *Willan* (1814), 4 Camp. 24, where the entry in the office at Somerset House for licensing stage coaches was not admitted to prove the ownership of a coach. Compare *Weaver* v. *Prentice and Pratt* (1795), 1 Esp. 369.

(*k*) *D'Israeli* v. *Jowett* (1795), 1 Esp. 427, where the log book of a man-of-war was admitted to prove the time of sailing of a ship convoyed by her. See also

SECT. 2. Proof of Contents of Documents.

Log books of merchantmen.

The log books of merchant vessels are in general inadmissible (*l*); except as admissions (*m*), or as containing entries by a deceased person made in the course of duty (*n*), but a witness may look at a log book to refresh his memory, although it was not written by himself, provided that he was in the habit of regularly examining it (*o*).

Lighthouse journals.

In the Admiralty Court, lighthouse journals are admissible as public records in evidence of the facts therein stated (*p*).

(ix.) *Judicial Proceedings.*

(a) *When and how admissible* (*q*).

Judgments.

744. Every judgment (*r*) is conclusive proof as against all the world of the existence of such judgment, its date, and legal consequences (*s*); and, where an action is brought against a person for acts done in a judicial capacity, is conclusive proof in favour of such person of the truth of the facts therein stated (*t*). A judgment *in rem* (*a*) is conclusive proof not only as against parties and privies, but also as against strangers, of the truth of the facts actually decided (*b*), unless (1) the judgment is founded on evidence which would be inadmissible in the action in which such judgment is intended to be proved (*c*); (2) the judgment has been obtained by fraud, collusion, or forgery (*d*); or (3) the court which gave it had no jurisdiction (*e*).

Judgments *in rem* in general conclusive against the whole world.

Judgments *in personam* in general

A judgment *in personam* (*f*) is conclusive proof as against parties

Watson v. *King* (1815), 4 Camp. 272, where, besides the log book, the captain's official letter to the Admiralty at the end of the ship's voyage was admitted.

(*l*) *Rundle* v. *Beaumont* (1828), 4 Bing. 537; *The Singapore and the Hebe* (1866), L. R. 1 P. C. 378, 382; compare *The Sociedade Feliz* (1842), 1 Wm. Rob. 303, 311.

(*m*) *The Singapore and the Hebe, supra; The Earl of Dumfries* (1885), 10 P. D. 31; and see p. 456, *ante*, as to admissions.

(*n*) See, as to such entries, p. 464, *ante; The Henry Coxon* (1878), 3 P. D. 156.

(*o*) *Watson* v. *King* (1815), 4 Camp. 272; *The Singapore and the Hebe, supra;* and see title SHIPPING AND NAVIGATION.

(*p*) *The Maria das Dorias* (1863), 32 L. J. (P. M. & A.) 163. *Semble*, they are not so admissible in other courts (*ibid.*). In any event, it is conceived, they are only admissible to prove such facts as it was the duty of the person keeping them to record.

(*q*) See pp. 325 *et seq.*, *ante*. The question of estoppel by record will be found fully dealt with under title ESTOPPEL, p. 325, *ante*.

(*r*) *I.e.*, every final judgment. A judgment is final though an appeal is pending (*Scott* v. *Pilkington* (1862), 2 B. & S. 11; and see title ESTOPPEL, p. 326, *ante*). As to the effect of judgments of foreign courts, see title CONFLICT OF LAWS, Vol. VI., pp. 281 *et seq.*

(*s*) *Green* v. *New River Co.* (1792), 4 Term Rep. 589; *Purcell* v. *Macnamara* (1808), 9 East, 361; *Legatt* v. *Tollervey* (1811), 14 East, 302.

(*t*) *Brittain* v. *Kinnaird* (1819), 1 Brod. & Bing. 432.

(*a*) See title ESTOPPEL, p. 327, *ante*.

(*b*) *R.* v. *Kenilworth (Inhabitants)* (1788), 2 Term Rep. 598; *Geyer* v. *Aguilar* (1798), 7 Term Rep. 681; *Simpson* v. *Fogo* (1860), 1 John. & H. 18, 24; *Castrique* v. *Imrie* (1860), 8 W. R. 344, 347.

(*c*) *Stoate* v. *Stoate* (1861), 30 L. J. (P. M. & A.) 102.

(*d*) *Priestman* v. *Thomas* (1884), 9 P. D. 210, C. A.; *Wyatt* v. *Palmer*, [1899] 2 Q. B. 106, C. A.

(*e*) *R.* v. *Hutchings* (1881), 6 Q. B. D. 300, C. A.; *Wakefield Corporation* v. *Cooke*, [1904] A. C. 31; and see title ESTOPPEL, p. 353, *ante*.

(*f*) See title ESTOPPEL, p. 330, *ante*.

and privies of the truth of the facts upon which such judgment is based (*g*), but, excepting as above stated to prove its existence, date, and consequences, it is inadmissible in evidence as against strangers, except (1) where it determines a question of public right and is admissible as evidence of reputation (*h*); (2) in bankruptcy or administration proceedings (*i*); (3) in divorce cases (*k*); and (4) to some extent in patent actions (*l*).

admissible only between parties and privies.

745. Pleadings recorded in one cause are admissible in evidence in subsequent proceedings to prove the institution and subject-matter of such cause (*m*), but are generally inadmissible, even as against parties or privies, as proof of the truth of the facts stated therein (*n*).

Pleadings.

But answers and decrees in Chancery are admitted in peerage cases as evidence of matters of pedigree only incidentally stated therein, and statements made in the course of proceedings by a party upon oath may be admissible in other proceedings as admissions by the party making them (*o*).

746. The statement on a writ of the time of issue is conclusive proof of the time of issuing of such writ (*p*), and in certain cases a writ may be *primâ facie* evidence of other statements indorsed on

Writs.

(*g*) *Kingston's* (*Duchess*) *Case* (1776), 20 State Tr. 355, 538, H. L.

(*h*) See title ESTOPPEL, p. 343, *ante*; *Hemphill* v. *M'Kenna* (1845), 8 I. L. R. 43; *Mulholland* v. *Killen* (1874), 9 I. R. Eq. 471; *R.* v. *Lordsmere District* (*Inhabitants*) (1886), 16 Cox, C. C. 65, C. C. R. In *Petrie* v. *Nuttall* (1856), 11 Exch. 569, it was suggested that judgment might possibly be conclusive in such cases, *sed quære*.

(*i*) *Harvey* v. *Wilde* (1872), L. R. 14 Eq. 438; *Re Tollemache, Ex parte Anderson* (1885), 14 Q. B. D. 606, C. A.

(*k*) *Ruck* v. *Ruck*, [1896] P. 152; *Swan* v. *Swan* (1903), *Times*, 24th March.

(*l*) *Edison and Swan Electric Light Co.* v. *Holland* (1889), 6 R. P. C. 243, C. A.; *Pneumatic Tyre Co., Ltd.* v. *Leicester Pneumatic Tyre Co.* (1899), 16 R. P. C. 531, H. L.

(*m*) *Roe* d. *Trimlestown* (*Lord*) v. *Kemmis* (1843), 9 Cl. & Fin. 749, 777, H. L.; *Boileau* v. *Rutlin* (1848), 2 Exch. 665; *Malcomson* v. *O'Dea* (1863), 10 H. L. Cas. 593.

(*n*) *Woollet* v. *Roberts* (1665), 1 Cas. in Ch. 64; *Eccleston* v. *Petty, alias Speke* (1689), Carth. 79; *Ferrers* (*Lord*) v. *Shirley* (1731), Fitz-G. 195, 197; *Doe* d. *Bowerman* v. *Sybourn* (1796), 7 Term Rep. 2; *Miller* v. *Johnson* (1797), 2 Esp. 602; *Tomkins* v. *Ashby* (1827), Mood. & M. 32; *Kilbee* v. *Sneyd* (1828), 2 Mol. 186, 208; *R.* v. *Walker* (1844), 1 Cox, C. C. 99; *Burkitt* v. *Blanshard* (1848), 3 Exch. 89; *Boileau* v. *Rutlin, supra*; *R.* v. *Simmonds* (1850), 4 Cox, C. C. 277; *Re Foster, Ex parte Basan* (1885), 2 Morr. 29, C. A.; *Re Walters, Neison* v. *Walters* (1889), 61 L. T. 872. Formerly, it would seem, the law was different (Buller's Nisi Prius, 7th ed., p. 235); see *Ives* v. *Medcalfe* (1737), 1 Atk. 63, 65; and *Lorton* (*Viscount*) v. *Kingston* (*Earl*) (1838), 5 Cl. & Fin. 269, H. L.

(*o*) *Snow* d. *Crawley* v. *Phillips* (1664), 1 Sid. 220, 221; *Mildmay* v. *Mildmay* (1682), 1 Vern. 53; *Grant* v. *Jackson* (*Bart.*) (1794), Peake, 203; *Beasley* v. *Magrath* (1804), 2 Sch. & Lef. 31, 34; *Doe* d. *Digby* v. *Steel* (1811), 3 Camp. 115; *The Wharton Peerage* (1845), 12 Cl. & Fin. 295, H. L.; *Marianski* v. *Cairns* (1852), 1 Macq. 212, H. L; *The Shrewsbury Peerage* (1858), 7 H. L. Cas. 1, 32; *Fleet* v. *Perrins* (1868), L. R. 3 Q. B. 536; and see *Taylor* v. *Cole* (1799), 7 Term Rep. 3, n. (a); *Lyell* v. *Kennedy* (1889), 14 App. Cas. 437.

(*p*) *Whipple* v. *Manley* (1830), 1 M. & W. 432.

SECT. 2. Proof of Contents of Documents.

it (*q*), but is not admissible in evidence at all until returned and filed in court (*r*). A writ of execution is *primâ facie* evidence of the judgment as between parties and privies (*s*), but not as against strangers (*t*).

Affidavits.

747. At common law an affidavit made in one proceeding is admissible in evidence in a subsequent proceeding, as proof of the facts stated therein, against the party who made such affidavit (*a*), or on whose behalf it was made, on it being shown that he knowingly made use of it (*b*). An affidavit filed in court on a motion is admissible in evidence at the trial without proof of its having been sworn (*c*), but is inadmissible without proof of the handwriting (*d*). At the trial of any action (*e*) the court or a judge may order the affidavit of any witness to be read in court on such conditions as the court or judge may think reasonable, unless the opposite party *bonâ fide* desires to cross-examine the deponent and the deponent can be produced (*f*). The party intending to use such affidavit must give notice in writing of such intention to the opposite party (*g*).

Verdicts.

748. A verdict followed by judgment is conclusive proof of the facts found as between parties and privies (*h*), but is inadmissible as between strangers (*i*), except where it is admissible as evidence in the nature of reputation on a matter of public interest (*k*). A

(*q*) *Gervis* v. *Grand Western Canal Co.* (1816), 5 M. & S. 76; *Brown* v. *Dean* (1833), 5 B. & Ad. 848.

(*r*) *Whitmore* v. *Rooke* (1756), Say. 299.

(*s*) *Doe* d. *Batten* v. *Murless* (1817), 6 M. & S. 110; but see *Doe* d. *Bland* v. *Smith* (1817), 2 Stark. 199.

(*t*) *White* v. *Morris* (1852) 11 C. B. 1015, disapproving *Bessey* v. *Windham* (1844), 6 Q. B. 166; and see *Lake* v. *Billers* (1698) 1 Ld. Raym. 733; *Martyn* v. *Podger* (1770), 5 Burr. 2631; *Ackworth* v. *Kempe* (1778), 1 Doug. (K. B.) 40.

(*a*) *R.* v. *Jolliffe* (1791), 4 Term Rep. 285, 290; *Brickell* v. *Hulse* (1837), 7 Ad. & El. 454; *Pritchard* v. *Bagshawe* (1851), 11 C. B. 459.

(*b*) *Johnson* v. *Ward* (1806), 6 Esp. 47; *Gardner* v. *Moult* (1839), 10 Ad. & El. 464; *White* v. *Dowling* (1845), 8 I. L. R. 128; *Richards* v. *Morgan* (1863), 4 B. & S. 641; *Campbell* v. *Rothwell* (1877), 38 L. T. 33; *Simmons* v. *London Joint Stock Bank* (1890), 62 L. T. 427.

(*c*) *Cameron* v. *Lightfoot* (1778), 2 Wm. Bl. 1190.

(*d*) *Barnes* v. *Parker* (1866), 15 L. T. 218.

(*e*) *I.e.*, a civil proceeding commenced by writ, or in such other manner as may be prescribed by rules of court, but not including a criminal proceeding by the Crown. See Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 100.

(*f*) R. S. C., Ord. 37, r. 1; and see *Macdonald* v. *Antelme Patterson & Co.*, [1884] W. N. 72; *Drewitt* v. *Drewitt* (1888), 58 L. T. 684; *Gornall* v. *Mason* (1887), 12 P. D. 142. As to admissibility of evidence by affidavit on motion, petition, or summons, see R. S. C., Ord. 38, r. 1; *Ellis* v. *Robins* (1881), 50 L. J. (CH.) 512, and generally title PRACTICE AND PROCEDURE.

(*g*) R. S. C., Ord. 37, r. 24.

(*h*) *Clarges* v. *Sherwin* (1699), 12 Mod. Rep. 343; *Outram* v. *Morewood* (1803), 3 East, 346; see title ESTOPPEL, p. 326, *ante*.

(*i*) *Pyke* v. *Crouch* (1696), 1 Ld. Raym. 730; *Kinnersley* v. *Orpe* (1780), 2 Doug. (K. B.) 517; *R.* v. *Knaptoft* (*Inhabitants*) (1824), 4 Dow. & Ry. (K. B.) 469.

(*k*) *London Corporation* v. *Clerke* (1691), Carth. 181; *Cort* v. *Birkbeck* (1779), 1 Doug. (K. B.) 218; *R.* v. *St. Pancras* (*Inhabitants*) (1794), Peake 286 [220]; *Reed* v. *Jackson* (1801), 1 East, 355; *Brisco* v. *Lomax* (1838), 8 Ad. & El. 198; *Pim* v. *Curell* (1840), 6 M. & W. 234, 266; *Brune* v. *Thompson* (1841), Car. & M. 34; *Petrie* v. *Nuttall* (1856), 11 Exch. 569; *Neill* v. *Devonshire* (*Duke*) (1882),

verdict is inadmissible in evidence unless the judgment, which is founded upon it, is also proved (*l*), and is also inadmissible if it is founded on evidence which would be inadmissible in the action in which such verdict is intended to be proved (*m*).

Awards.

749. An award, until set aside, is conclusive proof of the facts found therein as between parties and privies (*n*), but is inadmissible, even as evidence of reputation, as between strangers (*o*), except as proving acts of ownership (*p*). It is also inadmissible where the arbitrators have exceeded their jurisdiction (*q*), or been guilty of misconduct (*r*). An award by an arbitrator under the Lands Clauses Consolidation Act, 1845 (*s*), is conclusive proof of the amount of, but not of the right to, compensation (*t*).

Reports.

750. In certain cases a report is made admissible as evidence of the facts stated therein when it is a public document made by a public officer on an inquiry of a judicial or *quasi*-judicial nature (*a*).

8 App. Cas. 135, 147, 184; *Pim* v. *Curell* (1840), 6 M. & W. 234, *per* Lord ABINGER, at p. 266: "In cases where reputation is evidence, *i.e.*, cases involving a general right in which all the Queen's subjects are concerned, a verdict or a judgment upon the matters directly in issue between the parties, although between other parties, is also evidence; not of any specific fact existing at the time, but evidence of the most solemn kind, of an adjudication of a competent tribunal, upon the state of facts and the question of usage at that time."

(*l*) See title ESTOPPEL, p. 326, *ante*, and cases cited there in note (*b*); and *Pitton* v. *Walter* (1719), 1 Stra. 162; *Fisher* v. *Kitchingham* (1742), Willes, 367; *Fitch* v. *Smalbrook* (1661), T. Raym. 32; *Holt* v. *Miers* (1839), 9 C. & P. 191; *Gillespie* v. *Cumming* (1841), Long. & T. 181; *Jameson* v. *Leitch* (1842), Milw. 683, 688; *Needham* v. *Bremner* (1866), L. R. 1 C. P. 583. *Garland* v. *Scoones* (1798), 2 Esp. 648, and *Foster* v. *Compton* (1818), 2 Stark. 364, in which verdicts were admitted without the judgments being proved, can no longer be considered good law. A verdict of the Divorce Court may, however, be admitted in evidence as proof of cruelty and adultery, although the decree has been set aside on the ground of collusion (*Butler* v. *Butler*, [1894] P. 25, C. A.).

(*m*) *Stoate* v. *Stoate* (1861), 30 L. J. (P. M. & A.) 102; *Sopwith* v. *Sopwith* (1861), 30 L. J. (P. M. & A.) 131; *Bancroft* v. *Bancroft and Rumney* (1864), 3 Sw. & Tr. 610.

(*n*) *Doe* d. *Morris* v. *Rosser* (1802), 3 East, 15; *Thorpe* v. *Eyre* (1834), 1 Ad. & El. 926; *Commings* v. *Heard* (1869), L. R. 4 Q. B. 669; *Gueret* v. *Audouy* (1893), 62 L. J. (Q. B.) 633, 637, C. A.; but see *Newall* v. *Elliot* (1863), 32 L. J. (EX.) 120; and see title ESTOPPEL, p. 364, *ante*. An award on a reference by the court is equivalent to the verdict of a jury, see title ARBITRATION, Vol. I., p. 490.

(*o*) *R.* v. *Cotton* (1813), 3 Camp. 444; *Doe* d. *Smith and Payne* v. *Webber* (1834), 1 Ad. & El. 119; *Evans* v. *Rees* (1839), 10 Ad. & El. 151; *Wenman* (*Lady*) v. *Mackenzie* (1855), 5 E. & B. 447. In *Shelling* v. *Farmer* (1725), 1 Stra. 646, and *Doe* d. *Chawner* v. *Boulter* (1837), 6 Ad. & El. 675, awards were admitted in evidence against persons whom the court regarded as privies, although they appear to have been in fact strangers.

(*p*) *Brett* v. *Beales* (1829), Mood. & M. 416; *Brew* v. *Haren* (1874), 9 I. R. C. L. 29.

(*q*) *Hutcheson* v. *Eaton* (1884), 13 Q. B. D. 861, C. A.; *Falkingham* v. *Victorian Railways Commissioner*, [1900] A. C. 452, P. C.

(*r*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 11 (2); *Re Palmer & Co. and Hosken & Co.*, [1898] 1 Q. B. 131, C. A.

(*s*) 8 & 9 Vict. c. 18.

(*t*) *Beckett* v. *Midland Rail. Co.* (1866), L. R. 1 C. P. 241; *Re Newbold and The Metropolitan Rail. Co.* (1863), 14 C. B. (N. S.) 405; *R.* v. *Cambrian Rail. Co.* (1869), L. R. 4 Q. B. 320; *Rhodes* v. *Airedale Drainage Commissioners* (1876), 1 C. P. D. 402, C. A.; *Re East London Rail. Co., Oliver's Claim* (1890), 24 Q. B. D. 507, C. A. And see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 83.

(*a*) Thus a report by the chief gas examiner in the metropolis is virtually a

SECT. 2. Proof of Contents of Documents.

For example, reports of the Committee of the Law Society (*b*), reports of Charity Commissioners (*c*), and reports of the official receiver in bankruptcy (*d*) are admissible; but reports of Chancery visitors (*e*) and reports of inspectors appointed by the Board of Trade under the Companies Act, 1862 (*f*), are inadmissible in proof of the facts reported therein.

Depositions.

751. At common law depositions taken in a judicial proceeding are admissible in evidence in a subsequent judicial proceeding in proof of the facts stated therein (*g*), provided (1) the proceedings are between the same parties or their privies (*h*); (2) the issues involved are the same, or substantially the same, in both proceedings (*i*);

judgment, and, as it is final and a basis for future proceedings, must not be based on *ex parte* statements (*R.* v. *London County Council, Ex parte Commercial Gas Co.* (1895), 11 T. L. R. 337). For the principles governing the admissibility of public documents see p. 472, *supra*.

(*b*) Solicitors Act, 1888 (51 & 52 Vict. c. 65), s. 13. And see *Re A Solicitor* (1891), 36 Sol. Jo. 94.

(*c*) Charitable Trusts (Recovery) Act, 1891 (54 & 55 Vict. c. 17), s. 5 (1).

(*d*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 18 (9), 28 (4); Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 8 (5). And see *Re Wallace, Ex parte Campbell* (1885), 15 Q. B. D. 213, C. A.; *Re Horniblow, Ex parte Official Receiver* (1885), 53 L. T. 155; *Re Sharp, Ex parte Sharp* (1893), 10 Morr. 114.

(*e*) *Roe* v. *Nix*, [1893] P. 55. See Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 185.

(*f*) 25 & 26 Vict. c. 89, s. 56; *Re Grosvenor and West End Terminus Hotel Co.* (1897), 13 T. L. R. 309, C. A. A report of the inspector is admissible as evidence of the opinion of such inspector (*ibid.*).

(*g*) Although a deposition is admissible as secondary evidence, any statement in such deposition which ought not to have been received in evidence in the former proceeding is inadmissible (*Roe* d. *Pellatt* v. *Ferrars* (1801), 2 Bos. & P. 542, 548; *Steinkeller* v. *Newton* (1838), 9 C. & P. 313; *Tufton* v. *Whitmore* (1840), 12 Ad. & El. 370; *Small* v. *Nairne* (1849), 13 Q. B. 840). As to depositions, see generally title PRACTICE AND PROCEDURE, and as to the use of depositions in criminal cases, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 365.

(*h*) *Humphreys* v. *Pensam* (1836), 1 My. & Cr. 580, *per* Lord COTTENHAM, at p. 586: "Depositions can only be read for or against those who are parties or privies to the suit in which the deposition was taken; and they cannot be read for a party unless they can also be read against him." See also *Smith* v. *Veale* (1699), 1 Ld. Raym. 735; *Anon.* (1703), cited in *Smith* v. *Veale*, *supra*, *Coker* v. *Farewell* (1729), 2 P. Wms. 563; *Doe* d. *Foster* v. *Derby* (*Earl*) (1834), 1 Ad. & El. 783; *Gray* v. *Haig* (1852), 21 L. J. (CH.) 542. They are inadmissible against strangers (*Rushworth* v. *Pembroke* (*Countess*) (1668), Hard. 472; *Coke* v. *Fountain* (1686), 1 Vern. 413; *Peterborough* (*Earl*) v. *Norfolk* (*Duchess*) (1702), Prec. Ch. 212; affirmed *sub nom. Peterborough* (*Earl*) v. *Germaine* (1703), 3 Bro. Parl. Cas. 539; *Mackworth* v. *Penrose* (1728), 1 Dick. 50; *Niblett* v. *Daniel* (1731), Bunb. 310; *Quantock* v. *Bullen* (1820), 5 Madd. 81; *Goodenough* v. *Alway* (1826), 2 Sim. & St. 481; *Melen* v. *Andrews* (1829), Mood. & M. 336; *Atkins* v. *Humphreys* (1836), 1 Mood. & R. 523; *Hope* v. *Liddell* (No. 2) (1855), 21 Beav. 180; *Morgan* v. *Nicholl* (1866), L. R. 2 C. P. 117; *Evans* v. *Merthyr Tydfil Urban District Council*, [1899] 1 Ch. 241, C. A.; but where such stranger, although not actually on the record, was substantially a party to the former proceedings, the depositions are admissible against him (*Wright* v. *Doe* d. *Tatham* (1834), 1 Ad. & El. 3, 18, Ex. Ch.; *Doe* d. *Hulin* v. *Powell* (1852), 3 Car. & Kir. 323; and see *Byrne* v. *Frere* (1828), 2 Mol. 157; *Williams* v. *Broadhead* (1827), 1 Sim. 151).

(*i*) *Derby* (*Earl*) v. *Foster* (1835), 1 Ad. & El. 791, n. (b); *Llanover* v. *Homfray* *Phillips* v. *Llanover* (1881), 19 Ch. D. 224, C. A. In criminal cases where the party is charged in the first proceedings with one offence, and in the second proceedings with a different offence, the depositions taken in the first are admissible in the second proceeding, provided the issues are substantially the same (*R.* v. *Smith* (1817), Russ. & Ry. 339, C. C. R.; *R.* v. *Lee* (1864), 4 F. & F. 63; *R.* v. *Williams* (1871), 12 Cox, C. C. 101; *R.* v. *Buckley* (1873), 13 Cox, C. C. 293; but see *R.* v. *Ledbetter* (1850), 3 Car. & Kir. 108; *R.* v. *Dilmore* (1852), 6 Cox, C. C. 52).

(3) the party against whom the depositions are tendered had full opportunity of cross-examining the deponent when the deposition was being taken (*k*); and (4) the deponent is either dead (*l*), insane (*m*), kept out of the way by the opposite party (*n*), too ill to travel (*o*), or (in civil cases) beyond the jurisdiction (*p*).

If any one of these conditions is not fulfilled, the deposition is generally inadmissible, although it may be admissible (where the deponent is dead) even against strangers, if it relates to pedigree (*q*), or to matters of public or general interest, where reputation would be evidence (*r*). A deposition may always be used as an admission

(*k*) *A.-G.* v. *Davison* (1825), M'Cle. & Yo. 160, Ex. Ch.; *Steinkeller* v. *Newton* (1840), 9 C. & P. 313; *Scott* v. *Van Sandau* (1845), 8 Jur. 1114; *R.* v. *Day* (1852), 6 Cox, C. C. 55; *Fitzgerald* v. *Fitzgerald* (1863), 33 L. J. (P. M. & A.) 39. Actual cross-examination is not necessary if full opportunity was provided and the person against whom the deposition is being used did not choose to avail himself of such opportunity (*Howard* v. *Tremaine* (1692), 1 Salk. 278; *Cazenove* v. *Vaughan* (1813), 1 M. & S. 4; *M'Combie* v. *Anton* (1843), 6 Man. & G. 27; *Whyte* v. *Hallett* (1859), 28 L. J. (EX.) 208). As to depositions taken by a coroner at an inquest, see title CORONERS, Vol. VIII., p. 291.

(*l*) *Morely's (Lord) Case* (1666), Kel. 53, 55, H. L.; *Pyke* v. *Crouch* (1696), 1 Ld. Raym. 730; *Strutt* v. *Bovingdon* (1803), 5 Esp. 56; *Doncaster Corporation* v. *Day* (1810), 3 Taunt. 262; *Wright* v. *Doe* d. *Tatham* (1834), 1 Ad. & El. 3, Ex. Ch. The death must be proved. It is not sufficient to show that the deposition was taken fifty years before (*Benson* v. *Olive* (1731), 2 Stra. 920). In the old cases, *Nevil* v. *Johnson* (1703), 2 Vern. 447; *Barstow* v. *Palmes* (1704), Prec. Ch. 233; *London Corporation* v. *Perkins* (1734), 3 Bro. Parl. Cas. 602, although, apparently, the deaths of the deponents were not proved, the depositions were admitted; but see *Carrington* v. *Cornock* (1829), 2 Sim. 567; *Blagrave* v. *Blagrave* (1847), 16 L. J. (CH.) 346.

(*m*) *R.* v. *Eriswell (Inhabitants)* (1790), 3 Term Rep. 707, 721. In *R.* v. *Marshall* (1841), Car. & M. 147, the deposition was admitted, although the insanity was only of a temporary character, *sed quære*.

(*n*) *Morely's (Lord) Case, supra; Green* v. *Gatewick* (1672), Buller, Nisi Prius, 239; *R.* v. *Guttridge* (1840), 9 C. & P. 471.

(*o*) In civil cases this fact will usually enable the deposition to be admitted in evidence (*Lutterell* v. *Reynell* (1670), 1 Mod. Rep. 282, 284; *Bradley* v *Crackenthorp* (1752), 1 Dick. 182; *Jones* v. *Jones* (1785), 1 Cox, Eq. Cas. 184, *Jones* v. *Brewer* (1811), 4 Taunt. 46; *Andrews* v. *Palmer* (1812), 1 Ves. & B. 21; *Corbett* v. *Corbett* (1813), 1 Ves. & B. 335; but see *Harrison* v. *Blades* (1813), 3 Camp. 457; *Doe* d. *Lloyd* v. *Evans* (1827), 3 C. & P. 219). In criminal cases, however, the sickness of a deponent, although it may be a good ground for the postponement of a trial (*R.* v. *Savage* (1831), 5 C. & P. 143), is not sufficient to allow the deposition to be given in evidence, unless it is shown that he will probably never be able to attend the trial (*R.* v. *Hogg* (1833), 6 C. & P. 176; *R.* v. *Wilshaw* (1841), Car. & M. 145).

(*p*) *Fry* v. *Wood* (1737), 1 Atk. 445; *Fonsick* v. *Agar* (1806), 6 Esp. 92; *Falconer* v. *Hanson* (1808), 1 Camp. 171; *Proctor* v. *Lainson* (1836), 7 C. & P. 629; *Sills* v. *Brown* (1840), 9 C. & P. 601, 603; *Robinson* v. *Markis* (1841), 2 Mood. & R. 375; *Carruthers* v. *Graham* (1841), 10 L. J. (Q. B.) 364; *Varicas* v. *French* (1849), 2 Car. & Kir. 1008. In criminal cases, this fact will not enable the deposition to be given in evidence (*Morely's (Lord) Case, supra; R.* v. *Hagan* (1837), 8 C. & P. 167; *R.* v. *Scaife* (1851), 20 L. J. (M. C.) 229; *R.* v. *Austin* (1856), 25 L. J. (M. C.) 48, C. C. R.). On proof that diligent but ineffectual search has been made for the deponent, the deposition is probably admissible in evidence in civil cases (*Falconer* v. *Hanson, supra; Wiedemann* v. *Walpole* (1891), *Times*, 15th June), but not in criminal cases (*Morely's (Lord) Case, supra*).

(*q*) *Gee* v. *Ward* (1857), 7 E. & B. 509; see further p. 469, *ante*.

(*r*) Buller, Nisi Prius, pp. 239—242; *Terwit* v. *Gresham* (1666), 1 Cas. in Ch. 73; *Freeman* v. *Phillipps* (1816) 4 M. & S. 486; see, further, p. 467, *ante*. As to admitting a deposition as a dying declaration see *R.* v. *Jones* (1885), 49 J. P. 728.

SECT. 2. Proof of Contents of Documents.

against the deponent, whenever he is a party (*s*), or to contradict or corroborate him (*t*), or to refresh the memory of the official who took down the deposition (*a*).

Depositions made admissible by statute in certain cases.

By statute depositions have been made admissible in evidence in various proceedings, although the conditions which would have been necessary for their admissibility at common law have not been fulfilled; for example, those taken under the Indictable Offences Act, 1848 (*b*), the Bankruptcy Act, 1883 (*c*), and the Matrimonial Causes Act, 1857 (*d*); and, finally, in any cause (*e*) or matter (*f*), where it shall appear necessary for the purposes of justice, the judge may order the deposition of any person to be taken (*g*), but in the absence of any direction by the judge such deposition is not admissible in evidence without the consent of the other party unless the judge is satisfied that the deponent is dead, beyond the jurisdiction, or unable to attend from sickness or other infirmity (*h*). The party intending to use such deposition must give notice in writing to the opposite party of such intention (*i*).

All evidence taken on the hearing or trial of any cause or matter may be used in any subsequent proceedings in the same cause or matter (*j*).

(b) *In High Court.*

Judicial proceedings in High Court.

752. Judicial proceedings in the High Court may be proved by production of the original record (*k*) or by verified copies (*l*), but

(*s*) *Re Cooper, Ex parte Hall* (1882), 19 Ch. D. 580, C. A., *per* JESSEL, M.R., at p. 583: "Any statement made by a man upon oath, may be used against him as an admission." And see *Cole* v. *Hadley* (1840), 11 Ad. & El. 807.

(*t*) *Anon.* (1729), Mos. 118; and see Criminal Procedure Act, 1865 (28 & 29 Vict. c. 18), ss. 4, 5.

(*a*) *R.* v. *Mann* (1885), 49 J. P. 743.

(*b*) 11 & 12 Vict. c. 42, s. 17; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 315.

(*c*) 46 & 47 Vict. c. 52, s. 136; Bankruptcy Rules, r. 66; see also title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 318.

(*d*) 20 & 21 Vict. c. 85; see title HUSBAND AND WIFE.

(*e*) See Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 100.

(*f*) *Ibid.*

(*g*) R. S. C., Ord. 37, r. 5.

(*h*) R. S. C., Ord. 37, r. 18; and see *Nadin* v. *Bassett* (1883), 25 Ch. D. 21, C. A.; *Concha* v. *Concha* (1886), 11 App. Cas. 541. R. S. C., Ord. 37, r. 3, which says that an order to read evidence taken in another cause or matter shall not be necessary, does not alter the admissibility of the evidence in the cause in which it is sought to be read (*Printing, Telegraph and Construction Co. of the Agence Havas* v. *Drucker*, [1894] 2 Q. B. 801, C. A.).

(*i*) R. S. C., Ord. 37, r. 24.

(*j*) *Ibid.*, r. 25.

(*k*) The order of a judge or master is required before affidavits or records of the High Court can be taken from the Central Office (R. S. C. Ord. 61, r. 28). In the case of a judgment, the complete record or a copy, not merely the minutes, must be produced (*Godefroy* v. *Jay* (1827), 3 C. & P. 192). Compare *King* v. *Birch* (1842), 3 Q. B. 425, 431; *R.* v. *Smith* (1828), 8 B. & C. 341. A decree which, having been consented to by all parties, was held, in an action, to be a confirmation of a settlement relating to the same property was allowed to be proved by an affidavit verifying the bill, answer, and decree, and the identity of one of the parties with the plaintiff in the action (*White* v. *Cox* (1876), 2 Ch. D. 387, 397).

(*l*) See p. 523, *post*.

the original must be produced if issue has been joined on an allegation of *nul tiel record* (*m*).

Copies are of four kinds: examined copies, office copies, exemplifications under the Great Seal, and exemplifications under the seal of the court (*n*).

May be proved by copy.

The accuracy of examined copies must be proved by the evidence of a witness who has compared the copy with the original or with what the officer of the court read as the contents of the original (*o*), but it is not necessary for the persons examining to exchange papers and read them alternately (*p*). An examined copy will not be admitted if it contains abbreviations not in the original (*q*).

Examined copies.

Where the document in question is an ancient one, the witness proving an examined copy must have been able to read and understand the original when he compared the copy with it (*r*).

Ancient document.

Another recognised form of copy is an office copy. Office copies of all writs, records, proceedings, and documents filed in the High Court are admissible in the same way as the original (*s*); their authenticity is shown by the seal of the Central Office (*t*).

Office copies.

Office copies of certain documents of a judicial nature are also made admissible by statute (*a*).

Other recognised forms of copies are exemplifications under the Great Seal (*b*), and exemplifications under the seal of the court where the record remains (*c*). Judicial notice is taken of the seals attached to these copies (*d*).

Exemplifications.

To prove that an action was pending and was tried as alleged in an indictment for perjury, the production by the officer of the court of a copy of the writ and pleadings properly filed and the original order dismissing the action have been admitted (*e*).

(c) *In County Court.*

753. The proceedings of a county court are proved either by the registrar by the note thereof entered in his book or by a copy of such entry sealed with the court seal and purporting to be signed

Judicial proceedings in county court.

(*m*) 2 Taylor, Law of Evidence, 10th ed., s. 1535.
(*n*) See pp. 522 to 524, *ante*.
(*o*) *Rolf* v. *Dart* (1809) 2 Taunt. 52; and see p. 524, *ante*, and cases cited in next note.
(*p*) *Reid* v. *Margison* (1808), 1 Camp. 469; *Rolf* v. *Dart*, *supra*; *M'Neil* v. *Perchard* (1795) 1 Esp. 263; *Gyles* v. *Hill* (1809), 1 Camp. 471, n.; *Fyson* v. *Kemp* (1833), 6 C. & P. 71.
(*q*) *R.* v. *Christian* (1842), Car. & M. 388.
(*r*) *The Crawford and Lindsay Peerages* (1848), 2 H. L. Cas. 534.
(*s*) R. S. C., Ord. 37, r. 4; and see p. 523, *ante*.
(*t*) R. S. C., Ord. 61, r. 7.
(*a*) See the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 16 (bills of sale etc.); Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 2 (1), (2) (certificates of searches), s. 7 (7) (8) (certificates of acknowledgments by married women).
(*b*) In *Beverley Corporation* v. *Craven* (1838), 2 Mood. & R. 140, a document was admitted, although the Great Seal was missing from it, on the ground that it was ancient and produced from the proper custody. Exemplifications under the Great Seal must now be considered obsolete as a method of proving records.
(*c*) These are also obsolete.
(*d*) See pp. 495, 496, *ante*.
(*e*) *R.* v. *Scott* (1877), 2 Q. B. D. 415, C. C. R.

SECT. 2. **Proof of Contents of Documents.**

and sealed by the registrar (*f*). Such entry or copy is binding even against the evidence of the judge who proves from a private memorandum that he intended to make a different order (*g*), and cannot be varied by the judge's indorsement of the summons (*h*), nor by an informal letter from the registrar to one of the parties (*i*).

Judge's note conclusive on appeal.

On appeal to a Divisional Court, the judge's note cannot be impeached by affidavit, shorthand note, or otherwise (*k*), but the court may, it seems, use extraneous evidence to explain any ambiguity (*l*).

(d) *In Criminal Court.*

Judicial proceedings in criminal court.

754. The trial, conviction, or acquittal of any person charged with an indictable offence may be proved by certified copy of the record purporting to be under the hand of the clerk of the court or other officer (*m*) having custody of the records of the court where the conviction or acquittal took place (*n*).

Previous convictions.

Any previous conviction may further be proved by producing a record or extract thereof (*o*), together with proof of identity (*p*).

Summary proceedings.

As regards summary proceedings in particular, the register of the court (or a certified extract) is *primâ facie* evidence of the matters entered therein in a court acting for the same place as the court whose proceedings are entered in the register (*q*), while

(*f*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 28. Such entry or copy is also proof of the regularity of the proceedings (*ibid.*; and see *R.* v. *Roberts* (1878), 14 Cox, C. C. 101, C. C. R.).

(*g*) *Dens* v. *Ryley* (1851), 20 L. J. (C. P.) 264.

(*h*) *Stonor* v. *Fowle* (1887), 13 App. Cas. 20.

(*i*) *Ibid.*

(*k*) *Huddleston* v. *Furness Rail. Co.* (1899), 15 T. L. R. 238, C. A.

(*l*) *Ibid.*; and see title COUNTY COURTS, Vol. VIII., p. 608.

(*m*) Or the deputy of such clerk or officer.

(*n*) Evidence Act, 1851 (14 & 15 Vict. c. 99), s. 13; compare Criminal Procedure Act, 1865 (28 & 29 Vict. c. 18), s. 6. This evidence is admissible in all civil and criminal proceedings; see *Richardson* v. *Willis* (1873), L. R. 8 Exch. 69. At common law it was necessary to produce the record or an examined copy (*R.* v. *Smith* (1828), 8 B. & C. 341; *Hartley* v. *Hindmarsh* (1866), L. R. 1 C. P. 553). This method of proof is, of course, still available; see p. 524, *supra*.

(*o*) In the case of an indictable offence this is a certificate by the clerk or other officer; in the case of summary convictions, a copy thereof signed by a justice of the peace or by the proper officer of the court.

(*p*) Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), s. 18. This Act leaves untouched older methods of proving convictions in certain cases; these are under the Transportation Act, 1824 (5 Geo. 4, c. 84), s. 24 (sentences of transportation or banishment); see *R.* v. *Parsons* (1866), L. R. 1 C. C. R. 24; Criminal Law Act, 1827 (7 & 8 Geo. 4, c. 28), s. 11 (previous conviction for felony); Criminal Procedure Act, 1851 (14 & 15 Vict. c. 100), s. 22 (previous convictions in a trial for perjury); Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 116 (proof of previous convictions in an indictment under the Act); Coinage Offences Act, 1861 (24 & 25 Vict. c. 99), s. 37 (proof of previous convictions in an indictment under the Act).

(*q*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 22. This does not affect the necessity of proving previous convictions when required to be proved against a person charged with another offence (*ibid.*), except where the court is the same in both cases (*London School Board* v. *Harvey* (1879), 4 Q. B. D. 451; *Police Commissioner* v. *Donovan*, [1903] 1 K. B. 895).

a certificate of dismissal given by justices is evidence of such dismissal (*r*).

Quarter sessions.

The sessions book of a court of quarter sessions made up and recorded by the clerk of the peace from minutes taken by him in court is admissible in a similar court in the same county to prove the proceedings of the court (*s*).

(e) *Other Judicial Proceedings.*

Judicial proceedings in old superior courts.

755. Records and other judicial documents (*t*) of the old superior courts of law and equity are proved in the same way as records etc. of the High Court (*a*).

Bankruptcy proceedings.

Bankruptcy proceedings may be proved by production of the original document, or by a copy sealed or signed by the judge or certified by a registrar (*b*).

Adjudications in bankruptcy may be proved by the production of the adjudication under the seal of the court or by a copy of the *Gazette* containing a notice thereof (*c*).

Judgments of House of Lords.

Judgments of the House of Lords are proved by an examined copy of the minutes (*d*) or by printed copy of the Lords' journals (*e*).

(*r*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 27 (4) (indictable offences); s. 44 (assaults). Dismissal may still be proved otherwise than by such certificate (see *R.* v. *Hutchins* (1880), 5 Q. B. D. 353; reversed *sub nom.* *R.* v. *Hutchings* (1881), 6 Q. B. D. 300, C. A.).

(*s*) *R.* v. *Yeoveley* (*Inhabitants*) (1838), 8 Ad. & El. 806.

(*t*) This includes answers in Chancery (*Ewer* v. *Ambrose* (1825), 4 B. & C. 25; *Highfield* v. *Peake* (1827), Mood. & M. 109); depositions (*Duncan* v. *Scott* (1807), 1 Camp. 100); rules of court (*Selby* v. *Harris* (1698), 1 Ld. Raym. 745). In some cases ancient judicial proceedings have been admitted without being strictly proved; see *Beverley Corporation* v. *Craven* (1838), 2 Mood. & R. 140, cited note (*b*), p. 549, *ante*; *Byam* v. *Booth* (1816), 2 Price, 231, 234, n.; *Bayley* v. *Wylie* (1807), 6 Esp. 85.

(*a*) See p. 548, *ante*. In the case of other old courts, such as the old Court of Admiralty, the Ecclesiastical Courts, and the Court of Stannaries, judicial documents may, it seems, be proved by exemplifications or by examined copies, but not now by office copies. See *R.* v. *Hains* (1695), Comb. 337. Many of these documents are placed under the custody of the Master of the Rolls by the Public Record Office Act, 1838 (1 & 2 Vict. c. 94). For proof of documents in that custody, see ss. 12 and 13 of the Act and p. 524, *ante*. Where the record is lost a certified copy of the entry in the judgment book will be admitted (*Re Tollemache, Ex parte Anderson* (1885), 14 Q. B. D. 606, C. A.).

(*b*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 134. This Act also contains provisions for proving the appointment of a trustee (by certificate of the Board of Trade, s. 138), facts stated in notices (by a copy of the *London Gazette* containing such notices, s. 132 (1); this is conclusive in certain cases, s. 132 (2)), and proceedings of meetings (by minutes signed by chairman, s. 133 (1)). The validity of a composition or scheme is proved by certificate of the official receiver (see Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 3 (13)). As to the admissibility of orders and certificates by the Board of Trade, see Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 140. The provision in s. 17 of that Act, that the answers of the debtor read over and signed by him may thereafter be used in evidence against him, is not limited to proceedings in bankruptcy (*Re A Solicitor* (1890), 25 Q. B. D. 17, C. A.). See also title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 110.

(*c*) *R.* v. *Thomas* (1870), 11 Cox, C. C. 535; Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 132 (1), (2).

(*d*) *Jones* v. *Randall* (1774), 1 Cowp. 17.

(*e*) See p. 527, *ante*.

SECT. 2. Proof of Contents of Documents.

Orders of justices forming a highway district are proved by certified copy (*f*).

Judgments of inferior courts.

Judgments in inferior courts (*g*) are proved by the production of the minute book containing an entry of the judgment (*h*), or by the notes or parol evidence of the officer of the court where no such entry exists (*i*).

Awards.

An award is proved by the production and proof of execution of the award (which must be signed by all the arbitrators (*k*) in the presence of each other (*l*)), the submission itself (*m*), and, where the award is made by an umpire, the appointment of the umpire (*n*).

But where the award is made in a reference under an order of court, production of the award and the order is *primâ facie* evidence of the validity of the award (*o*).

Awards under statute by public officer.

In the case of an award made under statute by a public officer, the validity of the award is presumed (*p*), unless it be proved that subsequent usage has not been in accordance with the award (*q*), or that the award was made without jurisdiction. In the latter case, even though the statute enacts that the award is to be conclusive evidence that all the directions of the Act in relation to the matter set forth which ought to have been obeyed have been obeyed, yet it

(*f*) Highway Act, 1864 (27 & 28 Vict. c. 101), s. 12. See title HIGHWAYS, STREETS AND BRIDGES.

(*g*) Such as a sheriff's court (*Arundell* v. *White* (1811), 14 East, 216); a court of summary jurisdiction (*London School Board* v. *Harvey* (1879), 4 Q. B. D. 451); a court baron (*Dyson* v. *Wood* (1824), 3 B. & C. 449); the mayor's court (*Fisher* v. *Lane* (1772), 2 Wm. Bl. 834); a manor court (*Dawson* v. *Gregory* (1845), 7 Q. B. 756).

(*h*) See cases cited in last note.

(*i*) See *Dyson* v. *Wood*, *supra*; *Manning* v. *Eastern Counties Rail. Co.* (1843), 12 M. & W. 237. On an appeal from a registrar or master the court will only recognise the note of its officer, and will not hear other evidence as to what took place before him (*Sykes* v. *Sykes*, [1897] P. 306, C. A.). An order of a master in lunacy made under s. 116 of the Lunacy Act, 1890 (53 & 54 Vict. c. 5), reciting that a person was of unsound mind, though not so found by inquisition, is admissible as *primâ facie* evidence that the person was prevented from appearing in a suit by reason of accident or misfortune, or not having received due notice (*Harvey* v. *R.*, [1901] A. C. 601, P. C.).

(*k*) If the submission empowers less than the full number to make the award, execution by all is unnecessary, provided that all were given the opportunity of executing (*White* v. *Sharp* (1844), 12 M. & W. 712; *Wright* v. *Graham* (1848), 3 Exch. 131; *Re Beck and Jackson* (1857), 1 C. B. (N. S.) 695).

(*l*) *Stalworth* v. *Inns* (1844), 13 M. & W. 466; *Wright* v. *Graham*, *supra*; *Eads* v. *Williams* (1854), 4 De G. M. & G. 674, 688, 689; *Lord* v. *Lord* (1855), 5 E. & B. 404; *Berney* v. *Read* (1845), 7 Q. B. 79, where the submission had been made a rule of court, but the principle above stated was held to apply; compare *Re Beck and Jackson*, *supra*. Evidence may be given by an arbitrator on points of fact in explanation of his award (*Re Dare Valley Rail. Co.* (1868), L. R. 6 Eq. 429); see title ARBITRATION, Vol. I., p. 477.

(*m*) This must be shown to have been executed by all parties (*Ferrer* v. *Oven* (1827), 7 B. & C. 427), including the party relying on it (*Brazier* v. *Jones* (1828), 8 B. & C. 124); see also *Antram* v. *Chace* (1812), 15 East, 209.

(*n*) *Still* v. *Halford* (1814), 4 Camp. 17. As to enlargement of time, which must also be proved, see *Davis* v. *Vass* (1812), 15 East, 97.

(*o*) *Gisborne* v. *Hart* (1839), 5 M. & W. 50; see *Dresser* v. *Stansfield* (1845), 14 M. & W. 822, *per* PARKE, B., at p. 828.

(*p*) *Doe* d. *Roberts* v. *Mostyn* (1852), 12 C. B. 268; *Williams* v. *Eyton* (1859), 4 H. & N. 357, Ex. Ch.; compare *Doe* d. *Nanney* v. *Gore* (1837), 2 M. & W. 320.

(*q*) *R.* v. *Haslingfield* (*Inhabitants*) (1814), 2 M. & S. 558; compare *Manning* v. *Eastern Counties Rail. Co.*, *supra*.

will not be conclusive as to matters which the public officer had no jurisdiction to determine (*r*).

(x.) *Probate and Letters of Administration.*

Probate and letters of administration.

756. Probates and letters of administration, and copies thereof respectively, purporting to be sealed with a seal of the Court of Probate (*s*), are evidence in all parts of the United Kingdom without further proof (*t*). In cases where this provision is inapplicable, probate and letters of administration may be proved by the Probate Act-book of the Prerogative Court containing an entry that the will has been proved or letters of administration granted (*a*), or by an examined or certified copy of such book (*b*), or by minutes and proof of the will and sealing of probate indorsed on the will by the surrogate and registrar of the ecclesiastical court (*c*).

Colonial probates.

Probates and letters of administration (whether the grant be general or limited (*d*)) granted by the courts of certain British possessions or by British courts in a foreign country may be made admissible in England (*e*).

What is proved by probate.

757. The production of probate or letters of administration, or their equivalent (*f*), is, if the testator be in fact dead (*g*), the sole (*h*) and conclusive (*i*) proof of the title of the personal representative, but not of the identity of the person obtaining it (*k*). It makes no difference that the will proved was obtained by fraud (*l*) or forged (*m*). Probate is, moreover, until annulled, conclusive proof

(*r*) *Jacomb* v. *Turner*, [1892] 1 Q. B. 47.

(*s*) Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 69. This includes the seals of district registries.

(*t*) *Ibid.*, s. 22. As to using the probate as evidence in an action relating to real estate and notice of the intention so to do, see p. 512, *ante*.

(*a*) *Cox* v. *Allingham* (1822), Jac. 514. There is no necessity to account for the non-production of the probate itself (*ibid.*). See also *Elden* v. *Keddell* (1807), 8 East, 187; *Davis* v. *Williams* (1811), 13 East, 232.

(*b*) Evidence Act, 1851 (14 & 15 Vict. c. 99), s. 14. In *Dorrett* v. *Meux* (1854), 15 C. B. 142, an unstamped copy of the Act-book was admitted under this section to prove that a certain person was named executor in the will.

(*c*) *Doe* d. *Bassett* v. *Mew* (1837), 7 Ad. & El. 240; compare *Gorton* v. *Dyson* (1819), 1 Brod. & Bing. 219.

(*d*) *In the Goods of Smith* (1903), 20 T. L. R. 119.

(*e*) Colonial Probates Act, 1892 (55 Vict. c. 6), ss. 2, 3; see title DEPENDENCIES AND COLONIES, Vol. X., p. 559.

(*f*) See *supra*.

(*g*) *Allen* v. *Dundas* (1789), 3 Term Rep. 125.

(*h*) *Pinney* v. *Pinney* (1828), 8 B. & C. 335; *Pinney* v. *Hunt* (1877), 6 Ch. D. 98; compare *Cox* v. *Allingham* (1822), Jac. 514; *Re Ivory, Hankin* v. *Turner* (1878), 10 Ch. D. 372, C. A.; and see p. 518, note (*q*), *ante*.

(*i*) *Allen* v. *Dundas*, *supra*; compare *Marriot* v. *Marriot*, (1725), 1 Stra. 666.

(*k*) *Ex parte Jolliffe* (1845), 8 Beav. 168.

(*l*) *Meluish* v. *Milton* (1876), 3 Ch. D. 27, C. A.

(*m*) *Allen* v. *Dundas*, *supra*. *Semble*, the Court of Probate alone can revoke probate, although another court may, if necessary, decide that a will is a forgery (*Priestman* v. *Thomas* (1884), 9 P. D. 210, *per* COTTON, L.J., at p. 214); *Meluish* v. *Milton*, *supra*, *per* JAMES, L.J., at p. 33: "No other court" (than the Court of Probate) "can listen to the allegation that the will was obtained by fraud." Compare *Allen* v. *M'Pherson* (1847), 1 H. L. Cas. 191.

SECT. 2. Proof of Contents of Documents.

that the will is the testator's will (*n*) and valid by the law of his domicil (*o*), but neither probate nor letters of administration are conclusive as to what the domicil of the deceased was (*p*), or as to who is entitled by the *lex domicilii* (*q*); the probate is also conclusive that two papers proved as will and codicil are indeed such (*r*), while letters of administration are conclusive that the grantee was one of the deceased's next of kin if the grant was made on that ground. But where a codicil is executed in duplicate and probate is granted of both writings, evidence is admissible to show that they were one and not two instruments (*a*).

Probate is also conclusive as to the wording of the will (*b*), and the Probate Court alone can rectify any error in the probate (*c*).

SUB-SECT. 5.—*Proof of Particular Private Documents.*

(i.) *Bankers' Books.*

Bank in general not bound to produce its books.

758. A bank (*d*) cannot in general, without an order of the court (*e*), be compelled to produce its books in any case to which it is not a party, but may instead allow examined copies of entries in such books to be made (*f*). Such copies are in every case, and as against the whole world, *primâ facie* evidence of the matters recorded if it be shown that the book from which the entry was copied is one of the ordinary books of the bank and in its custody, and that the entry was made in due course of business.

Inspection of bankers' books.

On the application of any party to the proceedings, the court (*g*)

(*n*) If its validity depends on domicil (see, as to this, title CONFLICT OF LAWS, Vol. VI., p. 182; *Whicker* v. *Hume* (1858), 7 H. L. Cas. 124), probate is *primâ facie* evidence of domicil (*Eames* v. *Hacon* (1881), 18 Ch. D. 347, 352, C. A.).

(*o*) *Concha* v. *Concha* (1886), 11 App. Cas. 541; compare *Whicker* v. *Hume*, *supra*; and see, further, title CONFLICT OF LAWS, Vol. VI., pp. 185 *et al.*

(*p*) *Whicker* v. *Hume*, *supra*.

(*q*) *Baillie* v. *Butterfield* (1787), 1 Cox, Eq. Cas. 392, where the question was whether two legacies were cumulative or not.

(*r*) *Re Ivory*, *Hawkin* v. *Turner* (1878), 10 Ch. D. 372, C. A.; compare *Barrs* v. *Jackson* (1845), 1 Ph. 582.

(*a*) *Hubbard* v. *Alexander* (1876), 3 Ch. D. 738; compare *Whyte* v. *Whyte* (1873), L. R. 17 Eq. 50.

(*b*) *Re Bywater*, *Bywater* v. *Clarke* (1881), 18 Ch. D. 17, 22, C. A.

(*c*) *Ibid.*; and see, further, title WILLS. When a certified copy of a French will is deposited in the probate registry as well as an English translation which was admitted to probate but is incorrect, the court construing the will may look at the French copy if none of the parties insist on an application to the Court of Probate to correct the translation (*Re Cliff's Trusts*, [1892] 2 Ch. 229, cited in title CONFLICT OF LAWS, Vol. VI., p. 230, note (*d*), where the question of translations of wills in a foreign language is referred to).

(*d*) For the meaning of bank, bankers etc., see Bankers' Books Evidence Act, 1879 (42 & 43 Vict. c. 11), s. 9; and title BANKERS AND BANKING, Vol. I., p. 568.

(*e*) See title BANKERS AND BANKING, Vol. I., pp. 644—647. Special cause must be shown before such an order can be made (Bankers' Books Evidence Act, 1879 (42 & 43 Vict. c. 11), s. 6). For a case in which an order was refused, see *Parnell* v. *Wood*, [1892] p. 137.

(*f*) A banker who does not avail himself of this advantage is left with the old liability to a *subpœna duces tecum* (*Emmott* v. *Star Newspaper Co.* (1892), 62 L. J. (Q. B.) 77). For the law prior to the Act, see *Cooper* v. *Marsden* (1793), 1 Esp. 1.

(*g*) This includes a magistrate (*R.* v. *Kinghorn*, [1908] 2 K. B. 949).

may allow such party to inspect and copy any entries in the books of any bank in England, Scotland, or Ireland unless the person whose account it is sought to inspect states on affidavit that the entries therein are irrelevant (*h*). The order may, however, be made although such person has made an affidavit of documents disclosing his pass-books (*i*).

(ii.) *Books of Companies and Corporations.*

Company registers.

759. The register of members of a company directed to be kept by the Companies (Consolidation) Act, 1908 (*k*), is *primâ facie* evidence of any matters directed or authorised by the Act to be inserted therein (*l*).

Minute books.

Similarly, minute books of proceedings at general meetings, or of directors or managers, are, if purporting to be duly signed, evidence of such proceedings (*m*), and *primâ facie* evidence that the meeting was held and its proceedings valid (*n*).

Company in liquidation.

Where a company is being wound up, all books and papers of the company and of the liquidators are *primâ facie* evidence of the facts therein stated as between contributories (*o*), but not as against strangers (*p*).

Other bodies.

Minutes of the proceedings of certain other bodies have been made by statute evidence of the facts therein properly recorded (*q*).

(*h*) The order must be served on the bank three clear days before it is to be obeyed, unless the court otherwise directs. No notice is necessary either to the bank or to any other person before the application is made (Bankers' Books Evidence Act, 1879 (42 & 43 Vict. c. 11), s. 7). In *Arnott* v. *Hayes* (1887), 36 Ch. D. 731, C. A., it is said that the jurisdiction extends to civil cases, and that evidence in support of the application is not essential, although the court may require to be satisfied that the application is *bonâ fide*, and that inspection is material. As to whether the order can be made in the case of third parties, see title BANKERS AND BANKING, Vol. I., p. 646.

(*i*) *Perry* v. *Phosphor Bronze Co.* (1894), 71 L. T. 854.

(*k*) 8 Edw. 7, c. 69, s. 25 ; and see title COMPANIES, Vol. V., p. 148.

(*l*) *Ibid.*, s. 33 ; and see title COMPANIES, Vol. V., pp. 151, 152.

(*m*) *Ibid.*, s. 71 (2).

(*n*) *Ibid.*, s. 71 (3). The chairman of a general meeting has *primâ facie* authority to decide all incidental questions which necessarily require decision at the time, and his decision governs the entry of the minute in the books ; his decision so entered as to the result of a poll is valid until displaced (*Re Indian Zoedone Co.* (1884), 26 Ch. D. 70, C. A.).

(*o*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 220. This has been held to include an allotment book stating the date of allotment, although there was no record of a board or committee meeting on that date (*Re Great Northern Salt and Chemical Works, Ex parte Kennedy* (1890), 44 Ch. D. 472, 483) ; and an entry in the company's books that a person is a contributory is, until displaced, evidence that he is so (*Arnott's Case* (1887), 36 Ch. D. 702, 712, C. A.). For the law under earlier Acts, see *Re Moseley Green Coal and Coke Co., Ltd., Fox's Case* (1863), 3 De G. J.& Sm. 465.

(*p*) *Re Pyle Works* (No. 2), [1891] 1 Ch. 173, *per* STIRLING, J., at p. 184.

(*q*) Public Heath Act, 1875 (38 & 39 Vict. c. 55), Sched. I. (1), r. 10, r. 8 (2) (minutes of meetings of local boards or committees), Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 22 (5) (minutes of meetings of town councils) ; Education Act, 1902 (2 Edw. 7, c. 42), Sched. I., A (4) (minutes of proceedings of education committee) ; Sched. I., B (8), (9) (minutes of proceedings of body of managers appointed under that Act).

SECT. 2.

Proof of Contents of Documents.

(iii.) *Letters.*

(a) *Posting and Delivery.*

Posting, how proved.

760. The posting of a letter may be proved by the person who posted it, or by showing facts from which posting may be presumed. Thus, evidence of posting may be given by proving that a letter was delivered to a clerk who in the ordinary course of business would have posted it (*r*), or that it was put into a box which is cleared every day by the postman (*s*).

Postmark.

The postmark on an envelope is *primâ facie* evidence as to the time and place of posting (*t*).

Delivery, how proved.

The fact that a letter has been posted is evidence, but not conclusive evidence (*u*), of its delivery (*v*). In contracts entered into wholly or partly by correspondence the acceptance of an offer made by letter is complete as soon as a properly addressed letter containing the acceptance is posted (*a*). On similar grounds an equitable assignment (*b*) or a breach of contract (*c*) may become effective on the posting of a letter in terms which sufficiently evidence the intention of the sender.

Posting evidence of service.

In many cases provision is made by statute (*d*) that the

(*r*) *Trotter* v. *Maclean* (1879), 13 Ch. D. 574; compare *Pritt* v. *Fairclough* (1812), 3 Camp. 305. In *Hetherington* v. *Kemp* (1815), 4 Camp. 193, it was held insufficient to show that the letter was written by a merchant in his office and put on a table for the purpose of being taken to the post office, and that by the course of business at the office all letters put on that table were carried to the post office by the porter.

(*s*) *Skilbeck* v. *Garbett* (1845), 7 Q. B. 846, *per* Lord DENMAN, C.J., at p. 849: "If a public servant belonging to the post office takes charge of the letter in the exercise of his public duty, it is the same as if it were carried to the office." As to letters handed to a postman, see note (*e*), p. 557, *post*.

(*t*) *Stocken* v. *Collin* (1841), 7 M. & W. 515; *Re London and Northern Bank, Ex parte Jones*, [1900] 1 Ch. 220. This applies in the case of special marks used by a district post office, to show that a letter was posted there and not at the General Post Office. In *Abbey* v. *Lill* (1829), 5 Bing. 299, a question was raised as to the necessity of calling the person who made the post mark to prove it; it appears that this must be done in case of dispute, although it is said elsewhere that the evidence of persons who are in the habit of receiving letters from the post office in question will suffice (*Woodcock* v. *Houldsworth* (1846), 16 M. & W. 124).

(*u*) *Reidpath's Case* (1870), L. R. 11 Eq. 86.

(*v*) Compare *R.* v. *Johnson* (*Hon. R.*) (1805), 7 East, 65.

(*a*) See title CONTRACT, Vol. VII., pp. 352 *et seq.*

(*b*) *Alexander* v. *Steinhardt, Walker & Co.*, [1903] 2 K. B. 208.

(*c*) *Holland* v. *Bennett*, [1902] 1 K. B. 867, C.A. (letter posted abroad), following *Cherry* v. *Thompson* (1872), L. R. 7 Q. B. 573, *Matthews* v. *Alexander* (1873), 7 I. R. C. L. 575, and *Hamilton* v. *Barr* (1886), 18 L. R. Ir. 297, C. A.; compare *Mutzenbecher* v. *La Aseguradora Española*, [1906] 1 K. B. 254, C. A. (letter posted in London by agent sent from abroad). See also as to payments which may be effected by posting *Thairlwall* v. *GreatNorthern Rail. Co.*, [1910] 2 K. B. 509, following *Norman* v. *Ricketts* (1886), 3 T. L. R. 182, C. A.

(*d*) Provisions of this description are contained in the following statutes:—Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), s. 45; Army Act, 1881 (44 & 45 Vict. c. 58), s. 163; Children Act, 1908 (8 Edw. 7, c. 67), s. 87; Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 116, Sched. I., Table A, art. 110; Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 136; Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 67; Copyhold Act, 1894 (57 & 58 Vict. c. 46), s. 57; Corrupt and Illegal Practices Prevention Act, 1883 (46 & 47 Vict. c. 51), s. 62; County Rates Act, 1844 (7 & 8 Vict. c. 33), s. 6;

posting of a notice is sufficient evidence of service of the notice (*e*).

Press copy evidence of posting.

The fact that a letter has been copied into a letter-book is, as against the person keeping the book, evidence that the letter was posted (*f*).

Date.

The date which a letter bears is *primâ facie* evidence of the date on which it was written (*g*).

(b) *Without Prejudice.*

Letters written without prejudice.

761. Letters written during a dispute or negotiation between the parties, and expressed or otherwise proved to have been written "without prejudice," cannot in general be admitted in evidence without the consent of both parties (*h*).

Only protected where there is a dispute.

But this rule is strictly confined to cases where there is a dispute or negotiation, and terms are offered for the settlement thereof (*i*); and, where this is not the case, a writer cannot, apart from some special relation existing between the sender and recipient, by marking a letter "without prejudice," or "private," or "private and confidential," impose on the recipient any condition as to the

Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 48; Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43), s. 69; Electric Lighting (Clauses) Act, 1899 (62 & 63 Vict. c. 19), Sched., s. 62; Elementary Education Act, 1870 (33 & 34 Vict. c. 75), s. 81; Endowed Schools Act, 1869 (32 & 33 Vict. c. 56), s. 57; Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), s. 7; Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 148; Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 31; Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 94; Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 90; Licensing Consolidation Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24); Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 327; Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), s. 40; Parliamentary Voters Registration Act, 1843 (6 & 7 Vict. c. 18), s. 100; Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 81; Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), s. 72; Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 267; Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), s. 35; Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 16; Telegraphs Act, 1878 (41 & 42 Vict. c. 76), s. 12; Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), s. 65; Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 2; and several Acts, of less general application, which are mentioned in the list given in the note in 1 Taylor on Evidence, ed. 1906, s. 180.

(*e*) It must be shown that the letter was prepaid (*Walthamstow Urban District Council* v. *Henwood*, [1897] 1 Ch. 41). But note that although a letter handed to a country postman, who is allowed by the General Post Office to receive it, is considered as posted, this is not so where it is handed to a town postman, who is forbidden to receive it (*Re London and Northern Bank, Ex parte Jones*, [1900] 1 Ch. 220). As to duties of post office officials, see title POST OFFICE.

(*f*) *Sturge* v. *Buchanan* (1839), 10 Ad. & El. 598.

(*g*) *Goodtitle* d. *Baker* v. *Milburn* (1837), 2 M. & W. 853; compare *Malpas* v. *Clements* (1850), 19 L. J. (Q. B.) 435. A doubt as to this was expressed in *Butler* v. *Mountgarret* (*Viscount*) (1859), 7 H. L. Cas. 633, 646.

(*h*) *Whiffen* v. *Hartwright* (1848), 11 Beav. 111; *Hoghton* v. *Hoghton* (1852), 15 Beav. 278, where ROMILLY, M.R., gives as the reason for the rule (at p. 321): "For, if parties were to be afterwards prejudiced by their efforts to compromise, it would be impossible to attempt an amicable arrangement of difficulties"; see also *Cory* v. *Bretton* (1830), 4 C. & P. 462; *Re River Steamer Co., Mitchell's Claim* (1871), 6 Ch. App. 822, *per* MELLISH, L.J., at p. 831, cited note (*q*), p. 558, *post*; and cases cited, *post*, under this head.

(*i*) *Grace* v. *Baynton* (1877), 21 Sol. Jo. 631; *Kitcat* v. *Sharp* (1882), 48 L. T. 64; *Re Daintrey, Ex parte Holt*, [1893] 2 Q. B. 116.

SECT. 2. **Proof of Contents of Documents.**

mode in which it may be used (*k*). So a letter "without prejudice" containing threats of what the writer will do in the event of a request not being complied with is not protected (*l*).

Exceptions to rule.

Similarly, the rule has no application to a document which in its nature may prejudice the person to whom it is addressed (*m*). This is the case where, for example, a letter addressed to a creditor is of itself an act of bankruptcy (*n*).

When admissible.

Where the rule applies these letters are admissible to show that an attempt has been made to compromise the suit (*o*), and for no other purpose; they are not admissible as admissions (*p*), or to take a debt out of the Statute of Limitations (*q*), or for the purpose of determining whether there is good cause for depriving a successful litigant of costs (*r*), or in order to prove malice (*s*).

Privilege extends to whole correspondence.

Where the privilege exists, it covers not only the particular letter itself, but also all subsequent parts of the same correspondence on both sides, notwithstanding that they are not expressed to be "without prejudice" (*t*). Moreover, where a letter offering terms, but not stated to be "without prejudice," is followed by another saying that the communications between the parties are to be "without prejudice," the former letter is protected (*a*).

The fact that such letters have been written (but not their contents) may, however, be considered where a question of *laches* is raised, or in order to show that negotiations have taken place (*b*),

(*k*) *Grace* v. *Baynton* (1877), 21 Sol. Jo. 631; *Kitcat* v. *Sharp* (1882), 48 L. T. 64. The statement in the text is only a rule of evidence, and the use of letters in evidence must be carefully distinguished from the publication of them in any other manner. The unauthorised publication of a letter usually amounts to conversion; see titles TRESPASS; TROVER AND CONVERSION.

(*l*) See cases cited in last note; *Kurtz & Co.* v. *Spence & Sons* (1887), 58 L. T. 438.

(*m*) *Re Daintrey, Ex parte Holt*, [1893] 2 Q. B. 116.

(*n*) *Ibid.*

(*o*) *Jones* v. *Foxall* (1852), 15 Beav. 388.

(*p*) *Ibid.*

(*q*) *Cory* v. *Bretton* (1830), 4 C. & P. 462; *Re River Steamer Co., Mitchell's Claim* (1871), 6 Ch. App. 822, where MELLISH, L.J., says, at p. 831: "I am strongly of opinion . . . that a letter which is stated to be 'without prejudice' cannot be relied upon to take a case out of the Statute of Limitations, for it cannot do so unless it be relied upon as a new contract. Now, if a man says his letter is 'without prejudice,' that is tantamount to saying 'I make you an offer which you may accept or not as you like, but, if you do not accept it, the having made it is to have no effect at all.' It appears to me . . . that when a man says in his letter it is to be 'without prejudice' he cannot be held to have entered into any contract by it if the offer contained in it is not accepted." The point was not expressly decided in this case, but the question can scarcely be considered an open one; see also title LIMITATION OF ACTIONS.

(*r*) *Walker* v. *Wilsher* (1889), 23 Q. B. D. 335, C. A. The *dicta* to the contrary in *Woodward* v. *Eastern Counties and London and Blackwall Rail. Co.* (1855), 1 Jur. 899, cannot, it is submitted, be supported.

(*s*) *Watt* v. *Watt*, [1905] A. C. 115.

(*t*) *Paddock* v. *Forrester* (1841), 3 Scott (N. R.), 715, 734; *Re Harris, Ex parte Harris* (1875), 44 L. J. (BCY.) 33; *Peacock* v. *Harper* (1877), 26 W. R. 109; compare *Walker* v. *Wilsher*, *supra*; *Oliver* v. *Nautilus Steam Shipping Co.*, [1903] 2 K. B. 639, C. A.

(*a*) *Peacock* v. *Harper*, *supra*; compare *Oliver* v. *Nautilus Steam Shipping Co.*, *supra*.

(*b*) *Walker* v. *Wilsher*, *supra*, at p. 338; and see *Jones* v. *Foxall* (1852), 15 Beav. 388, and *Waldridge* v. *Kennison* (1794), 1 Esp. 143.

and the contents of the letters are admissible where the offer they contain has been accepted (*c*).

The privilege can be waived, but the better opinion appears to be that the consent of both writer and recipient must be given before the letter can be read (*d*).

How the privilege may be waived.

The court may look at a document written "without prejudice" for the purpose of deciding the question of its admissibility (*e*).

(iv.) *Telegrams.*

Telegrams.

762. The form handed in to the post office by the sender (and not the form delivered by the post office) is the original of a telegram (*f*), and either this must be produced by an official from the post office, or proof of its destruction given before a copy can be admitted (*g*). Where a telegram is sent by means of a code the onus is upon the sender, if he relies on the telegram having one of two possible meanings, to prove that it could not reasonably be misunderstood (*h*).

Date.

Presumptions as to the date and hour of sending a telegram are, it is conceived, the same as in the case of letters (*i*).

(v.) *Deeds.*

Deeds.

763. The subject of deeds is fully dealt with elsewhere (*k*).

(vi.) *Wills.*

Probate.

764. Probate is evidence of the effect of a will of personal estate, but the original will may be looked at for the purpose of construing the will (*l*). Other cases in which the will itself is admissible, as well as the principles on which parol evidence is admissible in relation to wills, are dealt with elsewhere (*m*).

Wills thirty years old produced from proper custody prove themselves (*n*).

Descriptions in wills admissible to prove pedigree.

Descriptions in a will, or even in the draft of a will (*o*), relating to the family of the testator are admissible in pedigree cases as

(*c*) *Holdsworth* v. *Dimsdale* (1871), 19 W. R. 798; *Re River Steamer Co., Mitchell's Claim* (1871), 6 Ch. App. 822; *Re Leite, Leite* v. *Ferreira* (1881), 72 L. T. Jo. 97; compare *Walker* v. *Wilsher* (1889), 23 Q. B. D. 335, C. A.

(*d*) *Walker* v. *Wilsher, supra*, where the contrary opinion expressed in *Williams* v. *Thomas* (1862), 2 Drew. & Sm. 29, is disapproved.

(*e*) *Re Daintrey, Ex parte Holt*, [1893] 2 Q. B. 116.

(*f*) See *Henkel* v. *Pape* (1870), L. R. 6 Exch. 7; *R.* v. *Regan* (1887), 16 Cox, C. C. 203. A signature to an acceptance of a contract on such a form may suffice to satisfy the Statute of Frauds (*Godwin* v. *Francis* (1870), L. R. 5 C. P. 295); see also title TELEGRAPHS AND TELEPHONES.

(*g*) *R.* v. *Regan, supra.*

(*h*) *Falck* v. *Williams*, [1900] A. C. 176, P. C.

(*i*) See p. 556, *ante.*

(*k*) See title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 355 *et seq.*

(*l*) *Re Harrison, Turner* v. *Hellard* (1885), 30 Ch. D. 390, C. A., and see p. 512, *ante*, and titles EXECUTORS AND ADMINISTRATORS; WILLS.

(*m*) See titles EXECUTORS AND ADMINISTRATORS; WILLS. Parol evidence is admissible to prove that words have been inserted in a will by inadvertence and did not represent the intention of the testatrix (*Brisco* v. *Baillie Hamilton*, [1902] P. 234). As to declarations by testators as to their wills, see p. 471, *ante.*

(*n*) See p. 512, *ante.*

(*o*) *Re Lambert's Trusts* (1886), 56 L. T. 15.

SECT. 2. Proof of Contents of Documents.

statements by deceased persons (*p*); but statements intended to be operative as part of a will which for want of due execution of the document in which they are contained are not so operative will not be allowed to be effective in some other way (*q*).

(vii.) *Family Papers.*

Family papers admissible to prove pedigree.

765. Family papers produced from proper custody (*r*) are in general admissible in cases of pedigree (*s*). Under this rule entries in family Bibles (*t*) or other books (*a*) are admitted to prove facts concerned with pedigree. In the case of family Bibles, which are the ordinary register in families (*b*), and other writings which are public in the family (*c*), no evidence is required that the writer was related to the family (*d*), but in all other cases the declaration is only admissible if made by a member of the family.

What papers admitted.

Other examples of family papers admissible in pedigree cases are family correspondence (*e*), wills (*f*), deeds (*g*) executed by a member of the family (*h*), pedigrees (*i*), or genealogical accounts of the

(*p*) See p. 469, *ante*.

(*q*) *E.g.*, as cancelling a debt due to the would-be testator (*Re Hyslop, Hyslop* v. *Chamberlain*, [1894] 3 Ch. 522).

(*r*) See pp. 505, 512, *ante*.

(*s*) See p. 469, *ante*.

(*t*) *Berkeley Peerage Case* (1811), 4 Camp. 401, H. L.; *Payne* v. *Bennett* (1904), 20 T. L. R. 203.

(*a*) Bibles do not stand on any special footing (see *Berkeley Peerage Case, supra*, at p. 418 (opinion of the judges): "Such a writing in a Bible or any other book or on any other piece of paper would be admissible in evidence as a declaration of the father in matter of a pedigree"). See, for further instances, *Slane Peerage* (1835), 5 Cl. & Fin. 23, 41, H. L. (missal); *Herbert* v. *Tuckal* (1663), T. Raym. 84 (almanack); compare *Monkton* v. *A.-G.* (1831), 2 Russ. & M. 147, 162; *The Sussex Peerage* (1844), 11 Cl. & Fin. 85, 114, H. L. (prayer book); compare *The Tracy Peerage* (1843), 10 Cl. & Fin. 154, H. L.; *Hood* v. *Beauchamp* (1836), 8 Sim. 26 (religious book).

(*b*) *Berkeley Peerage Case, supra, per* Lord ELLENBOROUGH, at p. 421.

(*c*) The family Bible, the public wearing of a ring, the public exposure of an inscription upon a tombstone, and the public hanging up of the family pedigree in the mansion are all relied upon because, in all those cases, the publicity supplies the want of connection between the pedigree, the tombstone, the ring, or the Bible, with particular individuals, members of the family (*Monkton* v. *A.-G.* (1831), 2 Russ. & M. 147, *per* Lord BROUGHAM, L.C., at p. 163).

(*d*) *Berkeley Peerage Case, supra; Monkton* v. *A.-G., supra; Hubbard* v. *Lees and Purden* (1866), L. R. 1 Exch. 255. The document must be produced from the proper custody before this rule can apply (*Hubbard* v. *Lees and Purden, supra*). For what is proper custody, see pp. 505, 512, *ante*. In *Hood* v. *Beauchamp, supra*, a religious book containing entries of births etc. of members of the family was admitted, and one entry was admitted without proof of authorship by a member of the family, the authorship of the others having been proved.

(*e*) *Kidney* v. *Cockburn* (1831) 2 Russ. & M. 167; compare *Butler* v. *Mountgarret* (*Viscount*) (1859), 7 H. L. Cas. 633. In *The Shrewsbury Peerage* (1858), 7 H. L. Cas. 1, letters addressed to a lady who had married into a certain family were admitted to prove the character in which she was addressed by members of that family.

(*f*) See *Vulliamy* v. *Huskisson* (1838), 3 Y. & C. (EX.) 80, 82; *Hungate* v. *Gascoyne* (1846), 2 Ph. 25.

(*g*) *Neal* d. *Athol* (*Duke*) v. *Wilding* (1741) 2 Stra. 1151.

(*h*) *Slaney* v. *Wade* (1836) 1 My. & Cr. 338; *Fort* v. *Clarke* (1826), 1 Russ. 601, 604.

(*i*) *Monkton* v. *A.-G., supra*.

family (*k*), and, generally, any writing by a member of the family (*l*); while an old will, by which the testator purports to leave all his property to collaterals or friends, is admissible to prove that he died without children (*m*).

Papers drawn up for the purpose of preventing disputes.

It is no objection to the admissibility of family papers that they were drawn up or entries were made in them for the purpose of preventing disputes in the family (*n*).

(viii.) *Account Books.*

Account books admissible against interest.

766. Account books of a deceased person are admissible as declarations by such person (*o*) against interest if the entries have been made by such person (*p*), or by someone acting on his instructions (*q*), or have been in any way adopted by him (*r*). But where the entry was made by an agent, evidence must be produced of his employment as such (*s*).

Admissions.

Account books are also receivable as admissions against the party keeping them or causing them to be kept (*a*), and in special circumstances may be admitted even in favour of such party (*b*).

Where the court directs an account, it may direct that the books of account in which the accounts in question have been kept shall be taken as *primâ facie* evidence of the truth of the matters therein contained (*c*).

Accounts thirty years old prove themselves (*d*).

(*k*) *Robson* v. *A.-G.* (1843), 10 Cl. & Fin. 471, H. L.

(*l*) *Berkeley Peerage Case* (1811), 4 Camp. 401, H. L. As to the question whether actual proof of execution by a member of the family is necessary in the case of other instruments than deeds, see *The Tracy Peerage* (1843), 10 Cl. & Fin. 154, H. L.; *The Fitzwalter Peerage* (1843), 10 Cl. & Fin. 193, H. L.

(*m*) *Hungate* v. *Gascoyne* (1846), 2 Ph. 25; *Robson* v. *A.-G.*, *supra*; *The Tracy Peerage*, *supra*, at p. 172.

(*n*) *Berkeley Peerage Case*, *supra*; *Monkton* v. *A.-G.* (1831), 2 Russ. & M. 147, 164. The weight, not the admissibility, of the evidence is affected (*ibid.*).

(*o*) For declarations by deceased persons in general, see p. 463, *ante*.

(*p*) *Doe* d. *Sturt* v. *Mobbs* (1841), Car. & M. 1; *Doe* d. *Bodenham* v. *Colcombe* (1841), Car. & M. 155; *Doe* d. *Ashburnham* (*Earl*) v. *Michael* (1851), 17 Q. B. 276.

(*q*) *Exeter Corporation* v. *Warren* (1844), 5 Q. B. 773; *Bradley* v. *James* (1853), 13 C. B. 822. In this case the actual writer need not be dead to make the entry admissible (*Doe* d. *Graham* v. *Hawkins* (1841), 2 Q. B. 212).

(*r*) *E.g.*, by producing them as his accounts at an audit (*Doe* d. *Graham* v. *Hawkins*, *supra*), or by signing them (*Doe* d. *Lichfield* (*Earl*) v. *Stacey* (1833), 6 C. & P. 139). As to estoppel against an agent accounting to his principal, see title ESTOPPEL, p. 338, *ante*.

(*s*) *De Rutzen* (*Baron*) v. *Farr* (1835), 4 Ad. & El. 53.

(*a*) *Symonds* v. *Gas Light and Coke Co.* (1848), 11 Beav. 283.

(*b*) *Ibid.*; *Lodge* v. *Prichard* (1853), 3 De G. M. & G. 906, C. A. It is conceived that this is confined to cases where the court directs an account to be taken. This is now governed by R. S. C., Ord. 33, r. 3 (see next note).

(*c*) R. S. C., Ord. 33, r. 3; *Ewart* v. *Williams* (1857), 7 De G. M. & G. 68. No special order is required in a partnership action where an account is ordered (*Gething* v. *Keighley* (1878), 9 Ch. D. 547). See, further, *Cookes* v. *Cookes* (1863), 11 W. R. 871 (accounts kept by trustee); *Newberry* v. *Benson* (1853), 23 L. J. Ch. 1003; Yearly Practice of the Supreme Court, 1911, Vol. I., p. 430; and title PRACTICE AND PROCEDURE.

(*d*) See p. 512, *ante*; *Doe* d. *Ashburnham* (*Earl*) v. *Michael*, *supra*.

SECT. 2.

Proof of Contents of Documents.

(ix.) *Bills of Exchange, Cheques, and Promissory Notes.*

Bills of exchange etc., as evidence of payment.

767. A bill, cheque, or promissory note may be evidence of the payment of a debt (*e*) where it appears to have been received by the creditor, but, standing alone, is not evidence of the existence of a debt (*f*).

Where the cheque in question has been lost, the counterfoil is, it seems, admissible to prove the giving of the cheque (*g*).

(x.) *Receipts.*

Receipts in general only *primâ facie* evidence of payment.

768. Receipts are in general only *primâ facie* evidence of payment (*h*), and can be contradicted by proof that the money was not in fact paid (*i*), that the transaction was fraudulent (*k*), that the terms of the receipt do not accurately state the transaction (*l*), that the money was in fact paid by another person (*m*), or that the receipt was given without prejudice (*n*).

But in some cases a receipt may amount to a contract, the terms of which are embodied in it (*o*), and apart from any question of contract a receipt will be conclusive in cases where it works an estoppel (*p*).

Receipts are also admissible where they amount to a statement by a deceased person against interest (*q*).

(*e*) *Boswell* v. *Smith* (1833), 6 C. & P. 60.

(*f*) *Egg* v. *Barnett* (1800), 3 Esp. 196; but see *Aubert* v. *Walsh* (1812), 4 Taunt. 293; *Pearce* v. *Davis* (1834), 1 Mood. & R. 365; *Cary* v. *Gerrish* (1801), 4 Esp. 9, *per* Lord KENYON, C.J., at p. 10: "If the plaintiff had shown any money transactions between the testator and the defendant, from which a loan could be inferred, or any application to borrow money at the time, that, coupled with the giving the draft, might be evidence to go to a jury"; *Pfiel* v. *Vanbatenburg* (1810), 2 Camp. 439.

(*g*) *R.* v. *Wilkinson* (1867), 10 Cox, C. C. 537.

(*h*) *Skaife* v. *Jackson* (1824), 3 B. & C. 421; *Graves* v. *Key* (1832), 3 B. & Ad. 313; *Farrar* v. *Hutchinson* (1839), 9 Ad. & El. 641; *Bowes* v. *Foster* (1858), 2 H. & N. 779. They operate in general only as admissions, as to which see p. 456, *ante*.

(*i*) *Skaife* v. *Jackson*, *supra*; *Bowes* v. *Foster*, *supra*; compare *Straton* v. *Rastall* (1788), 2 Term Rep. 366; *Lampon* v. *Corke* (1822), 5 B. & Ald. 606. *Alner* v. *George* (1808), 1 Camp. 392, must be considered now as bad law.

(*k*) *Farrar* v. *Hutchinson*, *supra*; *Wallace* v. *Kelsall* (1840), 7 M. & W. 264.

(*l*) *Nathan* v. *Ogdens, Ltd.* (1905), 93 L. T. 553; and see *Lee* v. *Lancashire and Yorkshire Rail. Co.* (1871), 6 Ch. App. 527, where plaintiff gave a receipt in full discharge of all claims, but was allowed to produce parol evidence to prove an agreement that this should not preclude him from making a further claim if his injuries should prove to be serious; distinguish *Stewart* v. *Great Western Rail. Co. and Saunders* (1865), 2 De G. J. & Sm. 319, which was a case of fraud. Receipts, being as a rule informal documents, may be varied or contradicted by parol evidence; see, as to this, p. 566, *post*, and title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 444.

(*m*) *Graves* v. *Key*, *supra*.

(*n*) *Oliver* v. *Nautilus Steam Shipping Co.*, [1903] 2 K. B. 639.

(*o*) *Roberts* v. *Eastern Counties Rail. Co.* (1859), 1 F. & F. 460; *Rideal* v. *Great Western Rail. Co.* (1859), 1 F. & F. 706; and distinguish *Lee* v. *Lancashire and Yorkshire Rail. Co.*, *supra*. The only question arising in these cases is really one of construction of a contract, the documents in question being something more than mere receipts. See *Prosser* v. *Lancashire and Yorkshire Accident Insurance Co.* (1890), 6 T. L. R. 285, C. A.; *Ellen* v. *Great Northern Rail. Co.* (1901), 17 T. L. R. 453, C. A.; see, further, title CONTRACT, Vol. VII., p. 453.

(*p*) See title ESTOPPEL, p. 386, *ante*; and as to receipts in deeds, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 464.

(*q*) See p. 463, *ante*.

Receipts thirty years old prove themselves (*r*).

Bills of lading, in so far as they are receipts for the goods shipped, are governed, *mutatis mutandis*, by the same rules as receipts for money (*s*), but as against the master or other person signing them they are conclusive evidence in favour of a *bonâ fide* holder for value of the shipment of the goods (*t*). Bills of lading.

(xi.) *Works of History and Science.*

769. Historical works may be referred to wherever it is important to ascertain ancient facts of a public nature (*u*); and in general, standard authors may be referred to as showing the opinions of eminent men upon particular subjects, but not to prove facts (*a*). Historical works evidence of facts of a public nature.

But a history is not admissible to prove a particular custom (*b*) or the boundary of a county (*c*).

An engineer's reports as to a past state of facts not within living memory, accepted by engineers as accurate, have been admitted on the same principle as historical works (*d*). Engineer's reports.

(xii.) *Plans and Maps.*

770. Private, as distinct from public (*e*), maps, plans, and surveys are not in general admissible in evidence against third Private maps inadmissible except

(*r*) *Bertie* v. *Beaumont* (1816), 2 Price, 303. For this rule, see p. 512, *ante*.

(*s*) *Cox* v. *Bruce* (1886), 18 Q. B. D. 147, C. A.; *Bennett and Young* v. *Bacon (John), Ltd.* (1897), 2 Com. Cas. 102, C. A.; *Hine Brothers* v. *Free, Rodwell & Co.* (1897), 2 Com. Cas. 149; *Smith & Co.* v. *Bedouin Steam Navigation Co.*, [1896] A. C. 70; *Parsons* v. *New Zealand Shipping Co.*, [1901] 1 K. B. 548, C. A.; and see, further, titles ESTOPPEL, p. 387, *ante;* SHIPPING AND NAVIGATION.

(*t*) Bills of Lading Act, 1855 (18 & 19 Vict. c. 111), s. 3.

(*u*) *Read* v. *Lincoln (Bishop)*, [1892] A. C. 644, P. C., a ritual case, where various books on church history dealing with the subject were admitted; compare *Ridsdale* v. *Clifton* (1877), 2 P. D. 276, P. C. See also *Steyner* v. *Droitwich Corporation* (1695), Skin. 623; S. C., 1 Salk. 281, and 12 Mod. Rep. 85; and *Ivy (Lady)* v. *Neal (circa* 1683) therein cited; *St. Katherine's Hospital Case* (1671), 1 Vent. 149, 151, where a chronicle was admitted to prove a particular point in the history of Edward III.'s reign. In *Neale* v. *Fry (circa* 1683) (cited 1 Salk. p. 281) histories were referred to to show the date at which Philip assumed his titles. This case appears to be the same as that of *Ivy (Lady)* v. *Neal, supra*, and that of *Neal* v. *Jay (circa* 1683), cited 12 Mod. Rep. 86. The old authorities are collected in *Evans* v. *Getting* (1834), 6 C. & P. 586, 587, n. The principle is approved in *East London Rail. Co.* v. *River Thames Conservators* (1904), 90 L. T. 347.

(*a*) *Darby* v. *Ouseley* (1856), 1 H. & N. 1, *per* POLLOCK, C.B., at p. 8. In this case the canons of Roman Catholic councils and books by Roman Catholic ecclesiastics were not admitted to prove Roman Catholic doctrines; these, being matters of fact, were held provable only by expert witnesses.

(*b*) *Steyner* v. *Droitwich Corporation, supra*. "An history may be evidence of the general history of the realm, but not of a particular custom" (Skin., p. 623, *per cur.*). Camden's "Britannia" was the book in question in this case.

(*c*) *Evans* v. *Getting, supra*, where the previous authorities are collected.

(*d*) *East London Rail. Co.* v. *River Thames Conservators, supra*. The reports in question were those of Sir T. Brunel, made on the making of the Thames tunnel in 1824.

(*e*) For this distinction, see p. 472, *ante*.

SECT. 2. Proof of Contents of Documents.

parties (*f*), although as between parties and privies they will operate as admissions (*g*) if they come from the proper custody (*h*).

between parties and privies.

But such instruments are admissible against the whole world for the purpose of proving public or general rights where they amount to a declaration as to such rights by a deceased person of competent knowledge (*i*).

Ordnance survey.

Where a map is drawn on or annexed to a will or instrument, so as to form part thereof, it is to be looked at with the instrument (*j*).

The Ordnance Survey does not come under the head of public documents, and so it is not in general admissible as between individuals as evidence of title or otherwise (*k*).

(xiii.) *Inscriptions.*

Inscriptions.

771. In pedigree cases (*l*) inscriptions of various kinds are admissible if they have been made by or under the direction of a deceased (*m*) member of the family, or have been adopted expressly or tacitly by such member or by the family at large (*n*).

(*f*) *Earl* v. *Lewis* (1801), 4 Esp. 1; *Pollard* v. *Scott* (1791), Peake, 18; *Wakeman* v. *West* (1836), 7 C. & P. 479; compare *Doe* d. *Hughes* v. *Lakin* (1836), 7 C. & P. 481; *Assheton-Smith* v. *Owen* (1905), 75 L. J. (CH.) 181, 192; *Mercer* v. *Denne*, [1904] 2 Ch. 534, *per* FARWELL, J., at p. 545, affirmed [1905] 2 Ch. 538, C. A.; see *Hammond* v. *Bradstreet* (1854), 10 Exch. 390.

(*g*) For admissions in general, see p. 456, *ante*; *Bridgman* v. *Jennings* (1699), 1 Ld. Raym. 734, appears to have been a case of this class.

(*h*) *Craven* (*Earl*) v. *Pridmore* (1902), 18 T. L. R. 282, C. A. (estate map produced from defendants' possession). As to proper custody, see p. 512, *ante*.

(*i*) In *Hammond* v. *Bradstreet*, *supra*, COLERIDGE, J., says (at p. 396), of the map then in question (which was rejected): "They" (the authors) "do not appear to have been deputed to make the map by any persons interested in the question, nor to have any knowledge of their own on the subject, nor to have been in any way connected with the district, so as to make it probable that they had such knowledge." See also *Stuart* v. *Greenall* (1821), 9 Price, 106; *Daniel* v. *Wilkin* (1852), 7 Exch. 429; *Pipe* v. *Fulcher* (1858), 5 Jur. (N. S.) 146; *Bidder* v. *Bridges* (No. 2) (1885), 34 W. R. 514; *R.* v. *Berger*, [1894] 1 Q. B. 823; *Mercer* v. *Denne*, *supra*; *Smith* v. *Lister* (1895), 72 L. T. 20; *Vyner* v. *Wirrall Rural District Council* (1909), 73 J. P. 242; *R.* v. *Norfolk County Council* (1910), 26 T. L. R. 269. Proof of the authenticity of ancient maps may be assisted by the rule relating to documents thirty years old (for which see p. 512, *ante*). For declarations by deceased persons, see p. 463, *ante*. In *R.* v. *Milton* (*Inhabitants*) (1843), 1 Car. & Kir. 58, it was said that information given by a deceased person to a surveyor for the purpose of laying down the boundaries of a parish on a map made under an inclosure Act would be admissible as evidence of reputation.

(*j*) *Lyle* v. *Richards* (1866), L. R. 1 H. L. 222; compare *Brain* v. *Harris* (1855), 10 Exch. 908; *Nicholson* v. *Rose* (1859), 4 De G. & J. 10, C. A.

(*k*) *Bidder* v. *Bridges* (No. 2), *supra*. For a similar rule in respect of the Irish Survey, see *Swift* v. *M'Tiernan* (1848), 11 I. Eq. R. 602; *Tisdall* v. *Parnell* (1863), 14 I. C. L. R. 1. See also *Caton* v. *Hamilton* (1889), 53 J. P. 504, which, however, seems of doubtful authority.

(*l*) See p. 560, *ante*.

(*m*) See p. 469, *ante*, for the general principles governing the admissibility of statements by deceased persons.

(*n*) *Davies* v. *Lowndes* (1843), 6 Man. & G. 471, Ex. Ch., *per* DENMAN, C.J., at p. 525: "A pedigree, whether in the shape of a genealogical tree or map, or contained in a book or burial or monumental inscription, if it is recognised by a deceased member of the same family, is admissible." A ring worn publicly, stating the date of the person's death whose name is engraved on it, and an inscription upon a tombstone open to all mankind, and erected or supposed to be erected by the family, are also received in evidence (*Monkton*

This rule includes inscriptions of various kinds, such as inscriptions on rings (*o*), tombstones (*p*), mural inscriptions (*q*), inscriptions on portraits (*r*), coffin-plates.

An inscription on a tombstone has been admitted, though with hesitation, to prove the death of a *cestui que vie* (*s*).

Secondary evidence.

Inscriptions whose removal is impossible or highly inconvenient may be proved by secondary evidence (*t*).

(xiv.) *Photographs.*

Photographs.

772. Photographs properly verified on oath by a person able to speak to their accuracy (*u*) are, in general, admissible to prove the identity of persons (*x*), or the configuration of land as it existed at a particular moment (*a*), or the contents of a lost document (*b*), but a photograph of a document cannot be used for purposes of comparison with another document (*c*), and in matrimonial cases the court will not act upon identification of a person by photographs alone, except in very special circumstances (*d*).

(xv.) *Newspaper Reports.*

Newspaper reports.

773. A witness may refer to a newspaper report to refresh his memory if he read it at the time when he had a recollection of the statements therein contained and knew them to be true (*e*); but a newspaper report is not admissible as evidence of the facts therein recorded (*f*).

v. *A.-G.* (1831), 2 Russ. & M. 147, 162), and as to the principle of admissibility, see p. 560; *ante*. Foreign inscriptions are admissible if they conform to the above principles (*The Earldom of Perth* (1848), 2 H. L. Cas. 865, 876; compare *The Tracy Peerage* (1843), 10 Cl. & Fin. 154, H. L.

(*o*) *Monkton* v. *A.-G.*, *supra*, at p. 162; *Vowles* v. *Young* (1806), 13 Ves. 140, 144.

(*p*) *Haslam* v. *Cron, Olivant's Claim* (1871), 19 W. R. 968; *Monkton* v. *A.-G.*, *supra*; compare *Goodright* d. *Stevens* v. *Moss* (1777), 2 Cowp. 591; *Vowles* v. *Young*, *supra*, at p. 144; *The Tracy Peerage*, *supra*; *The Shrewsbury Peerage* (1858), 7 H. L. Cas. 1.

(*q*) *Slaney* v. *Wade* (1836), 1 My. & Cr. 338; *The Earldom of Perth*, *supra*; *The Berkeley Peerage* (1861), 8 H. L. Cas. 21.

(*r*) *The Camoys Peerage* (1839), 6 Cl. & Fin. 789, H. L.

(*s*) *Whittuck* v. *Waters* (1830), 4 C. & P. 375.

(*t*) As to the relative weight of evidence of this kind in these cases, see *The Tracy Peerage*, *supra*, at p. 191. In *The Shrewsbury Peerage*, *supra*, an old "collection of monumental inscriptions" in country churches was held inadmissible to show what had been the inscription on a partly defaced tomb. But copies made or accepted by the family, or a member thereof, are worthy of confidence (*Slaney* v. *Wade*, *supra*; *Davies* v. *Lowndes* (1843), 6 Man. & G. 471, Ex. Ch.).

(*u*) See *R.* v. *Tolson* (1864), 4 F. & F. 103; *Hindson* v. *Ashby*, [1896] 2 Ch. 1, C. A.

(*x*) *R.* v. *Tolson*, *supra*; compare *Frith* v. *Frith*, [1896] P. 74.

(*a*) *R.* v. *United Kingdom Electric Telegraph Co.* (1862), 3 F. & F. 73; *Hindson* v. *Ashby*, *supra*, at p. 21.

(*b*) *M'Cullough* v. *Munn*, [1908] 2 I. R. 194, C. A.

(*c*) *Ibid.*

(*d*) *Frith* v. *Frith*, *supra*, *per* GORELL BARNES, J.; see title HUSBAND AND WIFE.

(*e*) *Topham* v. *M'Gregor* (1844), 1 Car. & Kir. 320; *Dyer* v. *Best* (1866), 4 H. & C. 189, *per* POLLOCK, C.B., at p. 192.

(*f*) *Rossmore* (*Lord*) v. *Mowatt* (1850), 15 Jur. 238.

SECT. 3. Exclusion of Extrinsic Evidence to contradict or vary Documents.

SECT. 3.—*Exclusion of Extrinsic Evidence to contradict or vary Documents.*

SUB-SECT. 1.—*General Rule (g).*

Oral evidence in general excluded.

774. Oral evidence is, in general, inadmissible to add to, vary, modify, or contradict a written instrument (*h*), but this principle is subject to certain exceptions, apparent rather than real (*i*).

The rule excludes extrinsic evidence of every description, whether parol or contained in writings such as instructions (*k*), drafts (*l*), articles (*m*), conditions of sale (*n*), or preliminary agreements (*o*).

Extrinsic evidence cannot be received in order to prove the object with which a document was executed (*p*), or that a person appearing on the face of the document to be a principal was in fact an agent so as to discharge him from liability (*q*), or, generally, that the intention of the parties was other than that appearing on the face of the instrument (*r*).

(*g*) See titles DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 444—454; WILLS. Even where a will expressly mentions "wishes verbally expressed," parol evidence cannot be admitted to show what the wishes were (*Re Hetley, Hetley* v. *Hetley*, [1902] 2 Ch. 866).

(*h*) *Robinson* v. *Gee* (1749), 1 Ves. Sen. 251; *Davis* v. *Symonds* (1787), 1 Cox, Eq. Cas. 402; *Humble* v. *Hunter* (1848), 12 Q. B. 310; *Halhead* v. *Young* (1856), 6 E. & B. 312; *O'Rourke* v. *Railways Commissioner* (1880), 15 App. Cas. 371, P. C.; *Vezey* v. *Rashleigh*, [1904] 1 Ch. 634; *Horncastle* v. *Equitable Life Assurance Society of the United States* (1906), 22 T. L. R. 735, C. A.; and see, further, titles DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 444, where the subject of oral evidence in relation to written documents is more fully treated; AUCTION AND AUCTIONEERS, Vol. I., p. 510, as to statements made by auctioneers at time of sale; BILLS OF EXCHANGE, Vol. II., p. 482, as to oral evidence in relation to bills of exchange; and SHIPPING AND NAVIGATION, as to oral evidence in relation to bills of lading and charterparties.

(*i*) See p. 567, *post*; and title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 444. As to delivery as an escrow, see *ibid.*, p. 387.

(*k*) See *Guardhouse* v. *Blackburn* (1866), L. R. 1 P. & D. 109.

(*l*) *Mitler* v. *Travers* (1832), 8 Bing. 244; *National Bank of Australasia* v. *Falkingham & Sons*, [1902] A. C. 585, P. C. As to looking at a signed draft where two copies differ, see *Ingleby* v. *Slack* (1890), 6 T. L. R. 284.

(*m*) *Pritchard* v. *Quinchant* (1752), Amb. 147.

(*n*) *Gunnis* v. *Erhart* (1789), 1 Hy. Bl. 289; *Powell* v. *Edmunds* (1810), 12 East, 6; *Doe* d. *Norton* v. *Webster* (1840), 12 Ad. & El. 442.

(*o*) *Leggott* v. *Barrett* (1880), 15 Ch. D. 306, 309, C. A.; compare *Mercantile Bank of Sydney* v. *Taylor*, [1893] A. C. 317, 321, P. C.; *Lee* v. *Alexander* (1883), 8 App. Cas. 853.

(*p*) *Prison Commissioners* v. *Middlesex Clerk of the Peace* (1882), 9 Q. B. D. 506, C. A.; *R.* v. *Pembridge* (*Inhabitants*) (1841), Car. & M. 157; *Palmer* v. *Newell* (1855), 20 Beav. 32.

(*q*) *Humble* v. *Hunter* (1848), 12 Q. B. 310; *Wake* v. *Harrop* (1861), 6 H. & N. 768; affirmed (1862), 1 H. & C. 202, Ex. Ch., *per* BYLES, J. at p. 209; *Pontifex and Wood, Ltd.* v. *Hartley & Co.* (1893), 62 L. J. (Q. B.) 196. It is different where there was an actual agreement with the other party that the agent should not be liable. The court will then rectify on the ground of mistake (see *Wake* v. *Harrop, supra*); and evidence that a person who has signed a document as agent for another intended to sign on his own behalf is admissible if it does not contradict the terms of the document (*Young* v. *Schuler* (1883), 11 Q. B. D. 651, C. A.).

(*r*) *Cocks* v. *Nash* (1832), 9 Bing. 341, 346; *Halhead* v. *Young* (1856), 6 E. & B. 312; *Cowlishaw* v. *Hardy* (1857), 25 Beav. 169; *Mercantile Bank of Sydney* v. *Taylor*, [1893] A. C. 317, P. C.; *Turner* v. *Turner*, *Hall* v. *Turner* (1880), 14 Ch. D. 829; *Henderson* v. *Arthur*, [1907] 1 K. B. 10, C. A. This rule does not of course prejudice any rights the parties may have to rectification or rescission, as to which see titles DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 355; MISTAKE.

775. The rule as to the exclusion of extrinsic evidence does not apply in the following cases (*s*):—Where the document is informal, and was never intended by the parties to be an agreement at all (*t*), or to contain all the terms (*u*); where the parties contracted with implied reference to a local or mercantile custom not mentioned in the agreement (*w*); where there is an agreement purely collateral (*x*); where the instrument was not intended by the parties to operate as an agreement unless a certain condition was fulfilled (*a*), or unless it was signed by the other party (*b*), or by a third person (*c*); where the transaction is affected by fraud (*d*), illegality or immorality (*e*), duress or mistake (*f*); to show the true consideration (*g*), or the existence of consideration (*h*) or of consideration in addition to that stated (*i*); to show the nature of the transaction (*j*), or the true relationship of the parties (*k*).

(*s*) For a fuller treatment of these exceptions, which have been worked out in a large number of cases, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 433.

(*t*) *Harris* v. *Rickett* (1856), 4 H. & N. 1; *Rogers* v. *Hadley* (1862), 2 H. & C. 227; *Clever* v. *Kirkman* (1876), 33 L. T. 672.

(*u*) See *McCollin* v. *Gilpin* (1880), 28 W. R. 813; affirmed (1881), 29 W. R. 408, 409, C. A.; *Pontifex and Wood, Ltd.* v. *Hartley & Co.* (1893), 62 L. J. (Q. B.) 196, 200; *Lindley* v. *Lacey* (1864), 17 C. B. (N. S.) 578. Other examples are *Jeffery* v. *Walton* (1816), 1 Stark. 267; *Allan* v. *Sundius* (1862), 1 H. & C. 123, 131; *Lockett* v. *Nicklin* (1848), 2 Exch. 93. The best instance is to be found in the case of receipts, as to which see p. 562, *ante*.

(*w*) *Wigglesworth* v. *Dallison* (1779), 1 Doug. (K. B.) 201; 1 Smith, L. C., 11th ed., 544; *Allan* v. *Sundius*, *supra*; *Cockburn* v. *Alexander* (1848), 6 C. B. 791; *Lilly, Wilson & Co.* v. *Smales, Eeles & Co.*, [1892] 1 Q. B. 456. The custom must conform to the requisites of a valid custom (as to which see title CUSTOM AND USAGES, Vol. X., p. 217), and must not be repugnant to the instrument.

(*x*) *De Lassalle* v. *Guildford*, [1901] 2 K. B. 215, C. A.

(*a*) *Pym* v. *Campbell* (1856), 6 E. & B. 370; *Murray* v. *Stair* (*Earl*) (1823), 2 B. & C. 82; *Wallis* v. *Little* (1862), 11 C. B. (N. S.) 369; *Lindley* v. *Lacey*, *supra*; *Pattle* v. *Hornibrook*, [1897] 1 Ch. 25.

(*b*) *Furness* v. *Meek* (1857), 27 L. J. (EX.) 34; *M'Clean* v. *Kennard* (1874), 9 Ch. App. 336.

(*c*) *Boyd* v. *Hind* (1855), 1 H. & N. 938.

(*d*) *Foster* v. *Mackinnon* (1869), L. R. 4 C. P. 704; *Lewis* v. *Clay* (1897), 67 L. J. (Q. B.) 224; and see title MISREPRESENTATION AND FRAUD.

(*e*) *Collins* v. *Blantern* (1767), 2 Wils. 341; 1 Smith, L. C., 11th ed., 369.

(*f*) *Raffles* v. *Wichelhaus* (1864), 2 H. & C. 906.

(*g*) *R.* v. *Scammonden* (*Inhabitants*) (1789), 3 Term Rep. 474; *Townend* v. *Toker* (1866), 1 Ch. App. 446. Compare *Cochrane* v. *Moore* (1890), 25 Q. B. D. 57, C. A.

(*h*) *Re Holland*, *Gregg* v. *Holland*, [1902] 2 Ch. 360, 388, C. A.

(*i*) *Clifford* v. *Turrell* (1841), 1 Y. & C. Ch. Cas. 138; *Frith* v. *Frith*, [1906] A. C. 254, P. C.; *Re Barnstaple Second Annuitant Society* (1884), 50 L. T. 424.

(*j*) *Barton* v. *Bank of New South Wales* (1890), 15 App. Cas. 379, P. C. (conveyance on its face absolute may be shown to be a mortgage); *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196, C. A. (conveyance on its face absolute may be shown to be subject to a trust). Compare *Re Boyes*, *Boyes* v. *Carritt* (1884), 26 Ch. D. 531; *Re Marlborough* (*Duke*), *Davis* v. *Whitehead*, [1894] 2 Ch. 133; and see, further, titles TRUSTS AND TRUSTEES; WILLS. As to the right of one of several purchasers to show that they are mutually entitled to the benefit of covenants entered into by each of the purchasers of several plots on one estate, although not expressly mentioned in the conveyance, and the distinction between this right and a collateral agreement, see *Spicer* v. *Martin* (1888), 14 App. Cas. 12, and title SALE OF LAND.

(*k*) *Higgins* v. *Senior* (1841), 8 M. & W. 834 (to show that a person in fact

SECT. 4. **Admission of Extrinsic Evidence to interpret Documents.**

SECT. 4.—*Admission of Extrinsic Evidence to interpret Documents.*

Oral evidence to interpret documents or rebut presumptions admitted.

776. Parol evidence is also, in general, admissible to interpret documents (*l*), and to rebut a presumption such as that of trust or advancement (*m*). These cases do not form an exception to the general rule above stated, since the evidence is admitted not to modify the written instrument in any way, but (in the former case) to show the meaning which the parties attached to the words they have used (*n*), and (in the latter case) to support the instrument in its natural sense against the artificial construction placed upon it by equity (*o*).

Ambiguity.

An ambiguity which appears on the face of an instrument of which it is not an essential characteristic that it should accurately express on its face what is intended may be explained by parol evidence of the circumstances in which it arose (*p*), but where such an ambiguity exists in an instrument, such as a written contract or a deed, which fails in its purpose if it is capable on its face of bearing more than one meaning, parol evidence is only admissible to explain ambiguities which are latent (*q*).

contracted as agent; but this cannot be done where agency is inconsistent with the instrument; see *Humble* v. *Hunter* (1848), 12 Q. B. 310); *Macdonald* v. *Whitfield* (1883), 8 App. Cas. 733, P. C. (to prove that three successive indorsees of a bill of exchange were sureties *inter se* for the same debt); *Re Lander and Bagley's Contract*, [1892] 3 Ch. 41 (to show date of commencement of a lease); *Newell* v. *Radford* (1867), L. R. 3 C. P. 52 (to show the trades of the parties to a memorandum of sale as indicating which was seller and which was buyer); *Bank of Australasia* v. *Palmer*, [1897] A. C. 540, P. C. (to show that a document signed by one of the parties to an agreement did not form part of the agreement).

(*l*) Extrinsic evidence of every material fact which will enable the court to ascertain the nature and qualities of the subject-matter of the instrument, or, in other words, to identify the persons and things to which the instrument refers, must of necessity be received (*Bank of New Zealand* v. *Simpson*, [1900] A. C. 182, 188, P. C.); *Van Diemen's Land Co.* v. *Table Cape Marine Board*, [1906] A. C. 92, P. C. (acts of user before grant to explain what was granted); *Cameron* v. *Wiggins*, [1901] 1 K. B. 1 (initial letters N M added to invoice as description of the goods at request of the purchaser); *Inglis* v. *Buttery* (1878), 3 App. Cas. 552 (surrounding circumstances to be considered, but not the communings of the parties). See further as to this, in the case of instruments *inter vivos*, title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 448—453; and, in the case of wills, title WILLS.

(*m*) See, as to this, titles EQUITY, *ante*; TRUSTS AND TRUSTEES; WILLS.

(*n*) *Smith* v. *Wilson* (1832), 3 B. & Ad. 728; *Grant* v. *Maddox* (1846), 15 M. & W. 737. Under this rule parol evidence is admissible to give to words a secondary meaning. See *Holt & Co* v. *Collyer* (1881), 16 Ch. D. 718, where FRY, J., at p. 720, states the principle: "Where there is a popular and common word used in an instrument, that word must be construed *primâ facie* in its popular and common sense. If it is a word of a technical or legal character it must be construed according to its technical or legal meaning. . . . But before you can give evidence of the secondary meaning of a word you must satisfy the court from the instrument itself, or from the circumstances of the case, that the word ought to be construed not in its popular or primary signification, but according to its secondary intention."

(*o*) See *Chichester* (*Lord*) v. *Coventry* (1867), L. R. 2 H. L. 71; *Re Lacon, Lacon* v. *Lacon*, [1891] 2 Ch. 482, C. A.; *Pryor* v. *Petre*, [1894] 2 Ch. 11, C. A.

(*p*) *Summers* v. *Moorhouse* (1884), 13 Q. B. D. 388.

(*q*) See titles CONTRACT, Vol. VII., p. 523; DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 453. As to parol evidence to explain ambiguities in wills, see title WILLS.

Part V.—Witnesses.

SECT. 1. Competency.

SECT. 1.—*Competency.*

777. All persons are now competent to be witnesses in civil proceedings who are of sufficient understanding to give evidence and who appreciate the nature and obligation of an oath or affirmation (*r*).

Who are competent witnesses.

The following classes of persons are incompetent as witnesses: (1) Children of such tender years that they have neither sufficient intelligence to testify nor a proper appreciation of the duty of speaking the truth (*s*); (2) idiots and insane persons who at the time of being tendered as witnesses are mentally incapable of testifying (*t*); (3) deaf and dumb persons, if they are unable by writing or signs or otherwise to understand questions put to them, or to communicate their answers to others (*a*); (4) other persons

Incompetent witnesses.

(*r*) At common law there were various classes of persons who were incompetent as witnesses, *e.g.*, parties to an action or their husbands and wives, persons interested in an action, infamous persons and persons who had no religious belief (1 Starkie, Law of Evidence, 3rd ed., p. 92). Persons interested were made competent witnesses by the Evidence Act, 1843 (6 & 7 Vict. c. 85); parties to an action were made competent by the Evidence Act, 1851 (14 & 15 Vict. c. 99), s. 2, and the Evidence Amendment Act, 1853 (16 & 17 Vict. c. 83); the husbands and wives of parties by the last-named Act and by the Evidence Further Amendment Act, 1869 (32 & 33 Vict. c. 68); infamous persons by the Evidence Act, 1843 (6 & 7 Vict. c. 85); and persons who had no religious belief by the Oaths Act, 1888 (51 & 52 Vict. c. 46). A husband who has been convicted of an aggravated assault on his wife has a right to be heard as a witness on an application by her to justices for a separation order (*Jones* v. *Jones*, [1895] P. 201, overruling *Powell* v. *Powell* (1889), 14 P. D. 177). It is doubtful whether a person under a sentence of death can give evidence (*R.* v. *Webb* (1867), 11 Cox, C. C. 133, *per* LUSH, J.; see *R.* v. *Fitzgerald* (1884), *per* HARRISON, J., cited in 2 Taylor, Law of Evidence, 10th ed., p. 959, n. A deaf and dumb person may testify either in writing or by signs, see *Dickinson* v. *Blisset* (1754), 1 Dick. 268.

(*s*) The judge must examine the child to ascertain whether he is possessed of sufficient intelligence to appreciate the binding obligation of an oath; see *R.* v. *Brasier* (1779), 1 Leach, 199; *R.* v. *Pike* (1829), 3 C. & P. 598; *R.* v. *Perkins* (1840), 2 Mood. C. C. 139; *R.* v. *Holmes* (1861), 2 F. & F. 788; see also *R.* v. *Baylis* (1849), 4 Cox, C. C. 23; *R.* v. *Cox* (1898), 62 J. P. 89. It seems that a child's evidence may be received after a postponement to permit of his instruction on the nature of an oath, if his ignorance arises from neglect and not merely from extreme youth; but there is some doubt on the point; see *R.* v. *Murphy* (1795), 1 Leach, 4th ed., 430, n.; *R.* v. *Wade* (1825), 1 Mood. C. C. 86; *R.* v. *Williams* (1835), 7 C. & P. 320; *R.* v. *Nicholas* (1846), 2 Car. & Kir. 246. As to the unsworn evidence of children in criminal cases, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 408. An adult witness may be incompetent from insufficient appreciation of the moral duty of speaking the truth (*R.* v. *Wade* (1825), 1 Mood. C. C. 86). As to legal capacity of infants generally, see title INFANTS AND CHILDREN.

(*t*) A person suffering from unsoundness of mind may yet give evidence, if the judge at the trial at which he is tendered as a witness is satisfied that he is then of sufficient understanding to give rational evidence; the mere fact that such a person is then suffering from delusions does not render him incompetent (*R.* v. *Hill* (1851), 2 Den. 254, C. C. R.). Before a person who is known to be in such a state of mind can be received as a witness, there should be a preliminary inquiry as to his fitness to give evidence (*Spittle* v. *Walton* (1871), L. R. 11 Eq. 420). As to lunatics and idiots generally, see title LUNATICS AND PERSONS OF UNSOUND MIND.

(*a*) *R.* v. *Ruston* (1786), 1 Leach, 408; *Morrison* v. *Lennard* (1827), 3 C. & P. 127; *Bartholomew* v. *George* (1851), *per* Lord CAMPBELL, C.J.; Best, Law of Evidence, 10th ed., p. 133; *R.* v. *Whitehead* (1866), L. R. 1 C. C. R. 33.

SECT. 1. Competency.

who, from temporary causes, such as illness or drunkenness, are for the time incapable of understanding questions, and of giving a rational account of events.

Distinction in criminal cases.

In criminal cases the defendant, and the wife or husband of the defendant, are only competent to testify in accordance with certain limitations (*b*); in other respects the rules as to the competency and incompetency of witnesses are the same in criminal as in civil matters.

Duty of judge to determine competency.

Questions as to the competency or incompetency of a witness are decided by the judge, generally on a preliminary examination called the *voir dire*, but if the incompetency of a witness is not discovered till after he is sworn and has given evidence, his evidence may none the less be objected to and rejected (*c*).

SECT. 2.—*Privilege.*

Privilege.

778. A witness, though competent generally to give evidence, may in certain cases claim privilege as a ground for refusing to disclose matter which is relevant to the issue (*d*).

(*b*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 388.

(*c*) *Jacobs* v. *Layborn* (1843), 11 M. & W. 685; *R.* v. *Whitehead* (1866), L. R. 1 C. C. R. 33. A judge who is sitting alone on the trial of a case cannot, because of his position, be a witness during that trial; part of a judge's duty is to decide questions as to the admissibility of evidence, and if a judge left the bench and gave evidence as a witness, he could not at the same time decide a question as to the admissibility of his own evidence. A judge who is sitting with others may leave the bench and give evidence, but he should not return to the bench or take any further part in the trial as a judge (*R.* v. *Antrim County Justices*, [1901] 2 I. R. 133, 141, 164, C. A.; *R.* v. *Galway Justices* (1897), 31 I. L. T. 160; *R.* v. *Hacker* (1660), Kel. 12).

A juror may be sworn as a witness in the jury box at the trial at which he is acting as a juryman and may continue to act as a juryman after giving evidence (*Manley* v. *Shaw* (1840), Car. & M. 361; *R.* v. *Rosser* (1836), 7 C. & P. 648; *R.* v. *Heath* (1744), 18 State Tr. 1, 123; *Fitz-James* v. *Moys* (1663), 1 Sid. 133; *Bennet* v. *Hartford* (*Hundred*) (1650), Sty. 233). Peers who are sitting to try one of their number may give evidence and also share in the final decision (*R.* v. *Five Popish Lords* (1678), 7 State Tr. 1218, 1458; *R.* v. *Macclesfield* (*Earl*) (1725), 16 State Tr. 1252; see also titles COURTS, Vol. IX., p. 19; PARLIAMENT; PEERAGES AND OTHER DIGNITIES. There is no recent instance of a juror giving evidence, and the practice seems undesirable. As to jurors generally, see title JURIES.

Counsel or solicitors who are acting as advocates in the case should not also act in the same case as witnesses, but if they do tender evidence, their evidence is not inadmissible; see title BARRISTERS, Vol. II., p. 396. A litigant in person who is conducting his own case, may act as his own advocate, and also be sworn as a witness (*Cobbett* v. *Hudson* (1852), 1 E. & B. 11).

It is doubtful whether the King, foreign sovereigns, and foreign ambassadors accredited to England are competent as witnesses; they are not subject to the coercive powers which the courts exercise over witnesses, and are not punishable for perjury; see titles CONSTITUTIONAL LAW, Vol. VI., pp. 374, 427 *et seq.*; CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 244, 401, note (*a*).

(*d*) The privilege in most cases is that of the witness, and not that of a party to the suit, unless, as in the case of communications with a legal adviser, a party is also within the protection of the privilege; a party not within the protection cannot raise an objection on the ground of privilege (*R.* v. *Kinglake* (1870), 11 Cox, C. C. 499; *Thomas* v. *Newton* (1826), Mood. & M. 48, n.; *R.* v. *Adey* (1831), 1 Mood. & R. 94; *Marston* v. *Downes* (1834), 1 Ad. & El. 31; *Doe* d. *Egremont* (*Earl*) v. *Date* (1842), 3 Q. B. 609; *Doe* d. *Rowcliffe* v. *Egremont* (*Earl*) (1841), 2 Mood. & R. 386; see *Procter* v. *Smiles* (1886), 55 L. J. (Q. B.) 527, C. A.).

779. A judge of the superior courts may refuse to give evidence as to judicial proceedings that have taken place before him (*e*). Who may claim privilege: (i.) Judges.

An arbitrator may be called as a witness in a legal proceeding to enforce his award, and may be asked as to what passed before him, and as to what matters were presented to him for consideration, but may not be asked as to what passed in his own mind when exercising his discretionary power on the matters submitted to him (*f*).

The grand jury are sworn to secrecy, and grand jurors may not give evidence as to what passed before them (*g*). (ii.) Jurors.

The evidence of petty jurors as to what passed between them at the trial or while they were considering their verdict is not admissible (*h*).

780. Confidential communications, whether oral or written, passing between a client and his legal advisers, *i.e.*, solicitor or counsel, and whether made directly or indirectly through an agent of either, are, if made for the purpose of obtaining or giving legal advice, privileged from disclosure; neither the client nor the legal adviser can be compelled to disclose such communications. The communications must have been made to or by the legal adviser in his professional capacity (*i*), and while the relation of client and legal adviser subsisted (*j*), but it is immaterial whether such (iii.) Legal advisers. Confidential communications.

(*e*) *Buccleuch* (*Duke*) v. *Metropolitan Board of Works* (1872), L. R. 5 H. L. 418, 433; *R.* v. *Gazard* (1838), 8 C. & P. 595; *R.* v. *Harvey* (1858), 8 Cox, C. C. 99, *per* BYLES, J., at p. 103; see 2 Taylor, Law of Evidence, 10th ed., p. 987, n. A surveyor appointed to assist the court ought not to be called as a witness (*Broder* v. *Saillard* (1876), 24 W. R. 456).

(*f*) *Buccleuch* (*Duke*) v. *Metropolitan Board of Works, supra.* See also title ARBITRATION, Vol. I., 477.

(*g*) *R.* v. *Hughes* (1844), 1 Car. & Kir. 519; *R.* v. *Marsh* (1837), 6 Ad. & El. 236; *R.* v. *Cooke* (1838), 8 C. & P. 582; *Micklethwart's Case* (1640), Clay. 84; but see *Freeman* v. *Arkell* (1823), 1 C. & P. 135, 137. Evidence as to proceedings before a grand jury may, it seems, be given by other persons than the grand jurors (*R.* v. *Watson* (1817), 32 State Tr. 1, 107.

(*h*) *Palmer* v. *Crowle* (1738), Andr. 382; *Jackson* v. *Williamson* (1788), 2 Term Rep. 281; *Vaise* v. *Delaval* (1785), 1 Term Rep. 11; *Owen* v. *Warburton* (1805), 1 Bos. & P. (N. R.) 326; *Straker* v. *Graham* (1839), 8 L. J. (EX.) 86; *Burgess* v. *Langley* (1843), 5 Man. & G. 722; *Raphael* v. *Bank of England* (1855), 17 C. B. 161; *Nesbitt* v. *Parrett* (1902), 18 T. L. R. 510. But evidence may, it seems, be given to explain the circumstances in which a juryman came into the jury box (*Bailey* v. *Macaulay* (1849), 13 Q. B. 815), or the condition of a juryman while there (*Ex parte Morris* (1907), 72 J. P. 5).

(*i*) *Bunbury* v. *Bunbury* (1839), 2 Beav. 173; *Baugh* v. *Cradocke* (1832), 1 Mood. & R. 182 (one solicitor acting for both parties).

(*j*) *R.* v. *Downer* (1880), 14 Cox, C. C. 486, C. C. R.; *R.* v. *Farley* (1846), 2 Car. & Kir. 313; *R.* v. *Brewer* (1834), 6 C. & P. 363; *Cuts* v. *Pickering* (1672), 1 Vent. 197; and see titles BARRISTERS, Vol. II., p. 395; DISCOVERY ETC., Vol. XI., p. 72; SOLICITORS. A solicitor cannot claim privilege from disclosing the name of his client (*Bursill* v. *Tanner* (1885), 16 Q. B. D. 1, C. A.; *Re Cathcart, Ex parte Campbell* (1870), 5 Ch. App. 703); he cannot claim privilege from discovering a deed, if his client is not entitled to resist its production (*Bursill* v. *Tanner, supra*); nor can he refuse to state when he parted with it and to whom (*Banner* v. *Jackson* (1847), 1 De G. & Sm. 472); he is not precluded from giving

SECT. 2. Privilege.

communications were or were not made when litigation was pending or contemplated (*k*).

Waiver of privilege.

The privilege may be waived by the client or his successors in title (*l*), but, unless waived, holds good after the relation of legal adviser and client has ceased, and indeed for ever (*m*). But secondary evidence of such communications, if written, may be given in spite of the privilege attaching to the originals (*n*).

A barrister may, if he chooses, give evidence of what he has heard or seen in court when engaged as counsel; if he is called by his client, he cannot, it seems, refuse to give evidence, even of confidential communications (*o*).

Confidential communications other than those passing between a client and his legal advisers, or the agents of either, are not privileged from disclosure (*p*).

Even confidential communications between a client and his legal advisers are not privileged if made for the purpose of committing a fraud or crime (*q*).

SUB-SECT. 2.—*Officers of State.*

State secrets.

781. Secrets of state, state papers, confidential official documents, and communications between the Government and its officers are

evidence as to what passed at the time of the execution of a deed (*Crawcour* v. *Salter* (1881), 18 Ch. D. 30, C. A.). A client's address confidentially communicated by the client to the solicitor when the client is applying to him for advice is privileged from disclosure, unless the solicitor and client were jointly engaged in the commission of some wrongful act and the address was communicated while they were so engaged (*Re Arnott, Ex parte Chief Official Receiver* (1888), 60 L. T. 109); see *Re Cathcart, Ex parte Campbell* (1870), 5 Ch. App. 703. The privilege extends to communications between either of two co-adventurers with either of their solicitors (*Rochefoucauld* v. *Boustead* (1896), 65 L. J. (CH.) 794).

(*k*) *Minet* v. *Morgan* (1873), 8 Ch. App. 361.

(*l*) *Calcraft* v. *Guest*, [1898] 1 Q. B. 759, 761, C. A.; see *Merle* v. *More* (1826), Ry. & M. 390; *Lea* v. *Wheatley* (1678), 20 State Tr. 574, n.; *Baillie's (Captain) Case* (1779), 21 State Tr. 1359. If a privileged document is referred to in the pleading of a litigant, he may be ordered to give particulars of it (*Milbank* v. *Milbank*, [1900] 1 Ch. 376, C. A.).

(*m*) *Bullivant* v. *A.-G. for Victoria*, [1901] A. C. 196; *Pearce* v. *Foster* (1885), 15 Q. B. D. 114, C. A.; *Bullock* v. *Corry* (1878), 3 Q. B. D. 356; and compare *Getty* v. *Getty*, [1907] P. 334.

(*n*) *Calcraft* v. *Guest*, *supra*.

(*o*) See titles BARRISTERS, Vol. II., p. 396; DISCOVERY ETC., Vol. XI., p. 72.

(*p*) *Wilson* v. *Rastall* (1792), 4 Term Rep. 753, 758; *Slade* v. *Tucker* (1880), 14 Ch. D. 824. Even confidential communications passing between a person and a legal adviser are not privileged, unless the relationship of counsel or solicitor and client exists between the parties, and unless the communication is made by or to the legal adviser in his professional character (*R.* v. *Downer* (1880), 14 Cox, C. C. 486, C. C. R.; *Smith* v. *Daniell* (1874), L. R. 18 Eq. 649; *Wilson* v. *Rastall*, *supra*; *R.* v. *Farley* (1846), 2 Car. & Kir. 313; *R.* v. *Brewer* (1834), 6 C. & P. 363; *Cuts* v. *Pickering* (1672), 1 Vent. 197). As to communications made to a minister of religion, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 401, and *Normanshaw* v. *Normanshaw and Measham* (1893), 69 L. T. 468. As to the admissibility of confessions in criminal cases, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 394.

(*q*) *Bullivant* v. *A.-G. for Victoria*, [1901] A. C. 196; *R.* v. *Cox and Railton* (1884), 14 Q. B. D. 153, C. C. R.; *Re Postlethwaite, Re Rickman, Postlethwaite* v. *Rickman* (1887), 35 Ch. D. 722; *R.* v. *Brown* (1862), 9 Cox, C. C. 28, C. C. R.; *Russell* v. *Jackson* (1851), 9 Hare, 387; *R.* v. *Hayward* (1846), 2 Car. & Kir.

privileged from disclosure (*r*). Secondary evidence of such documents cannot be given (*s*).

Public officials are privileged from disclosing the source of information that has been communicated to them, and witnesses for the Crown in criminal prosecutions undertaken by the Government are privileged from disclosing the channel through which they have communicated information (*t*).

Public officials. Crown witnesses.

A witness, whether a member of either House of Parliament or not, may refuse to disclose, without permission of the House of Parliament which has jurisdiction in the matter, what has taken place in either House, or what was said, or how any person voted (*a*).

Members of Parliament.

SUB-SECT. 3.—*Husband and Wife.*

782. A husband or wife may refuse to disclose any communication made to him or her during the marriage by the other party to the marriage (*b*).

Husband and wife.

234; *R.* v. *Jones* (1846), 1 Den. 166, C. C. R.; *R.* v. *Avery* (1838), 8 C. & P. 596; *Williams* v. *Quebrada Railway, Land and Copper Co.*, [1895] 2 Ch. 751.

(*r*) *Dawkins* v. *Rokeby* (*Lord*) (1873), L. R. 8 Q. B. 255, Ex. Ch. (minutes of proceedings of a military court of inquiry); *Home* v. *Bentinck* (1820), 2 Brod. & Bing. 130, Ex. Ch. (report of such a court); *Hennessy* v. *Wright* (1888), 21 Q. B. D. 509 (dispatches, reports, and other communications passing between a Secretary of State for the Colonies and the governor of a colony); see *Chatterton* v. *Secretary of State for India in Council*, [1895] 2 Q. B. 189, 195, C. A. As to letters written by a private individual to an official, see *Blake* v. *Pilfold* (1832), 1 Mood. & R. 198, and as to reports of a prison doctor, see *Leigh* v. *Gladstone* (1909), 26 T. L. R. 139. If the head of a public department who has possession of a public document, or some responsible official acting under his authority, states that the production of the document would be injurious to the public interest, the document cannot be disclosed (*Re Hargreaves* (*Joseph*), *Ltd.*, [1900] 1 Ch. 347, C. A.; *Hughes* v. *Vargas* (1893), 9 T. L. R. 551, C. A.; *Re H.M.S. Bellerophon* (1874), 44 L. J. (ADM.) 5; see *Ford* v. *Blest* (1890), 6 T. L. R. 295; *A.-G.* v. *Nottingham Corporation* (1904), 20 T. L. R. 257, 258; *Kain* v. *Farrer* (1877), 37 L. T. 469; *Wright & Co.* v. *Mills* (1890), 62 L. T. 558; *Beatson* v. *Skene* (1860), 2 L. T. 378; *Smith* v. *East India Co.* (1841), 1 Ph. 50; *Anderson* v. *Hamilton* (1820), 2 Brod. & Bing. 156, n.; *Williams* v. *Star Newspaper Co., Ltd.* (1908), 24 T. L. R. 297, and title DISCOVERY ETC., Vol. XI., p. 64). It is a criminal offence for a person in the public service, corruptly and contrary to his official duty, to communicate a public document in his possession to any person to whom, in the public interest, the document ought not to be communicated (Official Secrets Act, 1889 (52 & 53 Vict. c. 52), s. 2).

(*s*) *Home* v. *Bentinck*, *supra*.

(*t*) *R.* v. *Hardy* (1794), 24 State Tr. 199, 753; *R.* v. *Watson* (1817), 32 State Tr. 1, 100; *R.* v. *Richardson* (1863), 3 F. & F. 693; *A.-G.* v. *Briant* (1846), 15 M. & W. 169; *Marks* v. *Beyfus* (1890), 25 Q. B. D. 494, C. A.; but a detective cannot refuse on grounds of public policy to answer a question as to where he was secreted (*Webb* v. *Catchlove* (1886), 3 T. L. R. 159). As to public officials generally, see title PUBLIC AUTHORITIES AND PUBLIC OFFICERS.

(*a*) *Plunkett* v. *Cobbett* (1804), 5 Esp. 136; *Chubb* v. *Salomons* (1852), 3 Car. & Kir. 75.

(*b*) Evidence Amendment Act, 1853 (16 & 17 Vict. c. 83), s. 3; Criminal Evidence Act 1898 (61 & 62 Vict. c. 36), s. 1 (d). The rule is not limited to communications of a strictly confidential character (*O'Connor* v. *Majoribanks* (1842), 6 Jur. 509), and applies even after the marriage tie has been severed by death or divorce (*Doker* v. *Hasler* (1824), Ry. & M. 198; *Monroe* v. *Twisleton* (1802), Peake, Add. Cas. 219). The rule still applies, even in the cases where a wife or husband may be called as witness against the other party to the marriage; see Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36), s. 4 (1), s. 1 (d). As to evidence relating to adultery, see p. 576, *post*. As to the evidence of the husband or wife in criminal proceedings, see title CRIMINAL LAW AND PROCEDURE,

SECT. 2. Privilege.

SUB-SECT. 4.—*Title Deeds.*

Title deeds of witnesses.

783. A witness, whether a party to an action or not, may refuse, and cannot be compelled, to produce his title deeds (*c*).

SUB-SECT. 5.—*Matter incriminating Witness.*

Grounds for refusing to give evidence.

784. A witness may refuse to answer a question on the ground that the answer may tend to incriminate him, that is, may tend to expose the witness, or the husband or wife of the witness (*d*), to any kind of criminal charge (*e*), or to any kind of penalty (*f*) or forfeiture (*g*).

What are sufficient grounds.

The mere statement by a witness that he believes that the answer may tend to incriminate him does not excuse him from answering, and the court must be satisfied from the circumstances of the case and the nature of the evidence which the witness is called upon to give that there is reasonable ground to apprehend danger from his being compelled to answer. If it is once made to appear that the witness is in danger, great latitude should be allowed to him in judging for himself of the effect of any particular

Vol. IX., pp. 405, 406. A third person may give evidence of a conversation he has heard between husband and wife (*R.* v. *Smithies* (1832), 5 C. & P. 332; *R.* v. *Simons* (1834), 6 C. & P. 540; *R.* v. *Bartlett* (1837), 7 C. & P. 832).

(*c*) *Egremont Burial Board* v. *Egremont Iron Ore Co.* (1880), 14 Ch. D. 158; *Minet* v. *Morgan* (1873), 8 Ch. App. 361; *Doe* d. *Loscombe* v. *Clifford* (1847), 2 Car. & Kir. 448; *R.* v. *Upper Boddington* (*Inhabitants*) (1826), 8 Dow. & Ry. (K. B.) 726; *Pickering* v. *Noyes* (1823), 1 B. & C. 262; *Harris* v. *Hill* (1822), 3 Stark. 140. The rule applies to documents which a witness holds as mortgagee or pledgee (*Chichester* v. *Donegall* (*Marquis*) (1870), 5 Ch. App. 497; *Costa Rica Republic* v. *Erlanger* (1874), L. R. 19 Eq. 33). As to production of documents before trial, see *Budden* v. *Wilkinson*, [1893] 2 Q. B. 432, C. A.; *Morris* v. *Edwards* (1890), 15 App. Cas. 309; *A.-G.* v. *Newcastle-upon-Tyne Corporation*, [1899] 2 Q. B. 478, C. A. As to production of deeds by solicitors, agents, or servants, see p. 581, *post*.

(*d*) *R.* v. *Cliviger* (*Inhabitants*) (1788), 2 Term Rep. 263; *Cartwright* v. *Green* (1802), 8 Ves. 405; *R.* v. *All Saints, Worcester* (*Inhabitants*) (1817), 6 M. & S. 194.

(*e*) *Lamb* v. *Munster* (1882), 10 Q. B. D. 110; *Fisher* v. *Ronalds* (1852) 12 C. B. 762; *R.* v. *Slaney* (1832) 5 C. &. P. 213; *R.* v. *Pegler* (1833), 5 C. & P. 521; *Maloney* v. *Bartley* (1812), 3 Camp. 210; *Paxton* v. *Douglas* (1812), 19 Ves. 225; *Claridge* v. *Hoare* (1807), 14 Ves. 59. In *Parkhurst* v. *Lowten* (1816), 1 Mer. 391, *Brownsword* v. *Edwards* (1751), 2 Ves. Sen. 243, 245, and *Finch* v. *Finch* (1752), 2 Ves. Sen. 491, 493, the rule was applied to a criminal charge in an ecclesiastical court, but the rule would probably not be so applied now except in the case of persons in orders refusing to answer. Bankruptcy proceedings are no longer of such a criminal nature as to prevent the bankrupt being called by a creditor (*Re X. Y., Ex parte Haes*, [1902] 1 K. B. 98, C. A.; see *Re a Debtor*, [1910] 2 K. B. 59, 64, C. A.).

(*f*) *R.* v. *Freind* (1696), 13 State Tr. 1, 16; *Maccallum* v. *Turton* (1828), 2 Y. & J. 183; *Dandridge* v. *Corden* (1827), 3 C. & P. 11; *Derby Corporation* v. *Derbyshire County Council*, [1897] A. C. 550.

(*g*) *Pye* v. *Butterfield* (1864), 5 B. & S. 829; *Cork* (*Bishop*) v. *Porter* (1877), 11 I. R. C. L. 94; *Uxbridge* (*Lord*) v. *Staveland* (1747), 1 Ves. Sen. 56; *Hambrook* v. *Smith* (1852), 17 Sim. 209; see Witnesses Act, 1806 (46 Geo. 3, c. 37). An objection that to answer a question would expose the witness to criminal proceedings, punishment, and penalties in a foreign country is no ground for refusing to answer the questions, unless the judge has materials before him from which he can judge whether there is a reasonable likelihood of a danger of such a prosecution etc. (*Two Sicilies* (*King*) v. *Willcox* (1851), 1 Sim. (N. S.) 301; *United States of America* v. *McRae* (1867), 3 Ch. App. 79).

question. Subject to this reservation, the court is bound to insist on the witness answering, unless it is satisfied that the answer will tend to place the witness in peril (*h*).

When refusal must be made.

An objection to answer questions or interrogatories tending to incriminate must be taken at the time by the witness or person interrogated, and the objection must be taken on oath or affirmation (*i*). But, it seems, the witness, if he chooses to answer part of an inquiry, does not waive his right to object to answer subsequent questions (*k*).

Witness cannot refuse examination.

A witness cannot refuse to be examined on the ground that the only answer he can give will tend to incriminate him; he can only object to answer after he has been sworn or has affirmed, and must then object to answer a particular question (*l*).

No one except the witness or person interrogated can avail himself of the objection (*m*).

Answer improperly obtained is inadmissible in subsequent proceeding.

If a witness objects on oath to answer a question on the ground that the answer may tend to incriminate him, and there is good ground for the objection, but the witness is improperly compelled to answer the question, the answer cannot lawfully be admitted in evidence against him in a subsequent proceeding (*n*).

When witness cannot refuse to answer.

If proceedings cannot be taken against the witness, in respect of the charge, penalty, or forfeiture on account of which he refuses to answer, by lapse of time (*o*), or by pardon of the criminal offence in question (*p*), or by waiver of the penalty or forfeiture, then the witness cannot refuse to answer the question (*q*).

Except in the cases stated above, a witness cannot refuse to answer a question on a matter material to the issue on the ground that his answer would tend to degrade him (*r*), or to

(*h*) *Re Genese, Ex parte Gilbert* (1886), 3 Morr. 223, C. A.; *Re Reynolds, Ex parte Reynolds* (1882), 20 Ch. D. 294, C. A.; *R.* v. *Boyes* (1861), 1 B. & S. 311; *Sidebottom* v. *Adkins* (1857), 5 W. R. 743; *Osborn* v. *London Dock Co.* (1855), 10 Exch. 698.

(*i*) *Webb* v. *East* (1879), 5 Ex. D. 23; *Sammons* v. *Baily* (1890), 24 Q. B. D. 727; *Spokes* v. *Grosvenor Hotel Co.*, [1897] 2 Q. B. 124, C. A.; *The Mary or Alexandra* (1868), L. R. 2 A. & E. 319; *Boyle* v. *Wiseman* (1855), 10 Exch. 647; *East* v. *Chapman* (1827), 2 C. & P. 570; *Smith* v. *Beadnell* (1807), 1 Camp. 30; *Bickford* v. *Darcy* (1866), L. R. 1 Exch. 354; but see *R.* v. *Garbett* (1847), 1 Den. 236; and title DISCOVERY ETC., Vol. XI., p. 83.

(*k*) *R.* v. *Garbett, supra;* but see *East* v. *Chapman, supra.*

(*l*) *Boyle* v. *Wiseman, supra.*

(*m*) *R.* v. *Kinglake* (1870), 11 Cox, C. C. 449; *Thomas* v. *Newton* (1826), Mood. & M. 48, n.; *R.* v. *Adey* (1831), 1 Mood. & R. 94. An interrogatory cannot be struck out on the ground that it tends to criminate (*Fisher* v. *Owen* (1878), 8 Ch. D. 645, C. A.; *Webb* v. *East* (1879), 5 Ex. D. 23; *Sammons* v. *Bailey* (1890), 24 Q. B. D. 727; *Spokes* v. *Grosvenor Hotel Co.*, [1897] 2 Q. B. 124, C. A.; *The Mary or Alexandra* (1868), L. R. 2 A. & E. 319; *Bickford* v. *Darcy, supra; National Association of Operative Plasterers* v. *Smithies*, [1906] A. C. 434). Interrogatories are not allowed in actions for forfeiture or penalties. See title DISCOVERY ETC., Vol. XI., p. 41.

(*n*) *R.* v. *Garbett, supra; R.* v. *Coot* (1873), L. R. 4 P. C. 599.

(*o*) *Roberts* v. *Allatt* (1828), Mood. & M. 192; *Williams* v. *Farrington* (1789), 2 Cox, Eq. Cas. 202; *Davis* v. *Reid* (1832), 5 Sim. 443.

(*p*) *R.* v. *Boyes, supra.*

(*q*) *R.* v. *Charlesworth* (1860), 2 F. & F. 326; *Ex parte Fernandez* (1861), 10 C. B. (N. S.) 3; *Trinity House Corporation* v. *Burge* (1828), 2 Sim. 411.

(*r*) See the note in *R.* v. *Pitcher* (1823), 1 C. & P. 85, 86; and *Millman* v. *Tucker* (1803), Peake, Add. Cas. 222, and cases cited in note, *ibid.*, p. 223.

SECT. 2. Privilege.

subject him to a civil action or pecuniary loss, or to charge him with a debt (*s*).

When bound to answer.

785. There are some cases in which, by the express provisions of a statute, a witness is bound to answer a question, although the answer may tend to incriminate him (*t*). Provisions have been made absolving from penal consequences persons who make a full discovery of what they know in inquiries instituted under certain statutes, and a person who is indemnified thereby cannot refuse to answer a question on the ground that it would tend to incriminate him (*a*).

When evidence of adultery may be adduced.

786. In proceedings instituted in consequence of adultery (*b*) no witness is liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness has already given evidence in the same proceedings in disproof of his or her alleged adultery (*c*).

In other proceedings, it seems, a witness could not refuse to answer a question on the ground that the answer might tend to show that he or she had committed adultery (*d*).

(*s*) Witnesses Act, 1806 (46 Geo. 3, c. 37); *Doe* d. *Egremont* (*Earl*) v *Date* (1842), 3 Q. B. 609. But see *Venables* v. *Schweitzer* (1873), L. R. 16 Eq. 76; *Re Desportes, Ex parte Official Receiver* (1893), 68 L. T. 233. As to refusal of defendant on criminal charge, who gives evidence on his own behalf or for a fellow prisoner, to answer questions, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 404; and *R.* v. *Rowland*, [1910] 1 K. B. 458, C. A.

(*t*) See Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 17. As to objecting to produce a book kept pursuant to statute, see *Bradshaw* v. *Murphy* (1836), 7 C. & P. 612.

(*a*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 27; Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 85; Larceny Act, 1901 (1 Edw. 7, c. 10); and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., 399, note (*q*). There are some questions which a bankrupt is compellable to answer in his examination, although they criminate him (see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 73), but which a mere witness examined in bankruptcy may refuse to answer (*Re Firth, Ex parte Schofield* (1877), 6 Ch. D. 230, C. A.; *R.* v. *Hillam* (1872), 12 Cox, C. C. 174; *R.* v. *Cherry* (1871), 12 Cox, C. C. 32; *R.* v. *Cross and Leyland* (1856), 7 Cox, C. C. 226, C. C. R.; *Re Smith* (1833), 2 Deac. & Ch. 230; *Re Heath* (1833), 2 Deac. & Ch. 214; *Re Falk* (1832), 2 Deac. & Ch. 415; *R.* v. *Sloggett* (1856), Dears. C. C. 656). See the Corrupt Practices Prevention Acts, 1854—1883; title ELECTIONS, Vol. XII., pp. 466, 514; Gaming Act, 1845 (8 & 9 Vict. c. 109), s. 9; Gaming Act, 1892 (55 & 56 Vict. c. 9); Gaming Houses Act, 1854 (17 & 18 Vict. c. 38), ss. 5, 6; and title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 400.

(*b*) *Nottingham Guardians* v. *Tomkinson* (1879), 4 C. P. D. 343; *Evans* v. *Evans*, [1904] P. 378. As to such proceedings generally, see title HUSBAND AND WIFE.

(*c*) Evidence Further Amendment Act, 1869 (32 & 33 Vict. c. 68), s. 3. See *Redfern* v. *Redfern*, [1891] P. 139, C. A.; *Hebblethwaite* v. *Hebblethwaite* (1869), L. R. 2 P. & D. 29; *Babbage* v. *Babbage* (1870), L. R. 2 P. & D. 222; *Brown* v. *Brown* (1874), L. R. 3 P. & D. 198. The witness questioned must himself claim the protection of the section, and counsel for either party cannot object to such a question (*Hebblethwaite* v. *Hebblethwaite, supra*).

(*d*) *Evans* v. *Evans*, [1904] P. 378; *R* v. *Castro* (1873), Shorthand Notes, I., 1002. The possibility of proceedings in the ecclesiastical court being brought in consequence of adultery is probably now too remote to be a ground for a refusal to answer a question relating to this subject; but see *Redfern* v. *Redfern, supra*, at p. 145.

SECT. 3.—*Attendance.*

SECT. 3. Attendance.

787. All competent witnesses who are amenable to the jurisdiction of the Supreme Court of Judicature are also in civil cases compellable to attend and give evidence (*e*).

Attendance of witnesses within the jurisdiction.

SUB-SECT. 1.—*Subpœna ad testificandum.*

(i.) *Witnesses within the Jurisdiction.*

788. The attendance of witnesses in proceedings in the High Court is enforced by the writ of *subpœna ad testificandum* (*f*). The

Subpœna ad testificandum.

(*e*) As to compellable witnesses in criminal cases, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 401. There are some persons, *e.g.*, the King, a foreign sovereign who is in England, and foreign ambassadors at the English Court, who, if competent witnesses, are not compellable; see note (*c*) p. 570, *ante*.

(*f*) This writ in civil proceedings issues out of the Central Office of the Supreme Court of Judicature; for the forms of the writ, see R. S. C., App. J; Yearly Practice of the Supreme Court, 1911, Vol. II., pp. 1916—9. To obtain a writ of *subpœna*, a *præcipe* in the form given in R. S. C., App. G, No. 21, must be delivered and filed at the Central Office (R. S. C., Ord. 37, r. 26). The Probate, Divorce and Admiralty Division may issue writs of *subpœna*; see, as to divorce, Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 49, and rr. 109 and 180 of the Rules and Regulations of 26th December, 1865, made under the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85); and the Matrimonial Causes Act, 1860 (23 & 24 Vict. c. 144); see, as to probate, Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 24; Court of Probate Act, 1858 (21 & 22 Vict. c. 95), s. 23; see, as to Admiralty, Admiralty Court Act, 1861 (24 & 25 Vict. c. 10), s. 21. Writs of *subpœna* are issued from the Crown Office, not only to witnesses in causes pending on the Crown side of the King's Bench Division of the High Court, but where the attendance of witnesses is required at the assizes or the Central Criminal Court, or in any inferior criminal court, and also in inferior tribunals which have not the means of enforcing the attendance of witnesses (Short and Mellor, Practice of the Crown Office, 2nd ed., p. 405; Crown Office Rules, 1906, App. C, Nos. 151—168). No writ of *subpœna* can be issued against a defendant in a criminal case, or his or her wife or husband, except in the cases in which a defendant, or his or her wife or husband, is a compellable witness; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 388, 402—407. As to proceedings in chambers, see R. S. C., Ord. 37, r. 28; R. S. C., Ord. 55, rr. 16, 17; as to proceedings before an official referee, see R. S. C., Ord. 36, r. 49; as to proceedings before a taxing officer, see R. S. C., Ord. 65, r. 27 (25); as to proceedings before an examiner, see R. S. C., Ord. 37, r. 20; as to proceedings before an arbitrator, see Arbitration Act, 1889 (52 & 53 Vict. c. 49), ss. 8, 18; as to the summoning for cross-examination of a witness who has made an affidavit, see R. S. C., Ord. 38, r. 28; and *Re Baker, Connell v. Baker* (1885), 29 Ch. D. 711; as to examinations of witnesses in bankruptcy, see Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 27; *Re Franks, Ex parte Gittins*, [1892] 1 Q. B. 646; Bankruptcy Rules, 1886, rr. 61—66; and title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 71, 140, 318; as to the summoning of witnesses in the winding up of a company, see Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 174. As to the summoning of witnesses before either House of Parliament, see Erskine May, Parliamentary Practice, 11th ed., pp. 402, 424; before the Judicial Committee of the Privy Council, the Judicial Committee Act, 1833 (3 & 4 Will. 4, c. 41), s. 19. As to the summoning of witnesses before a coroner's court, see Coroners Act, 1887 (50 & 51 Vict. c. 71), ss. 19, 21; and title CORONERS, Vol. VIII., pp. 264—68; as to summoning of witnesses before county courts, see County Court Act, 1888 (51 & 52 Vict. c. 43), s. 110; and title COUNTY COURTS, Vol. VIII., p. 529. As to the summoning of witnesses before the ecclesiastical courts, see Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85), s. 9; as to their evidence, see title ECCLESIASTICAL LAW, Vol. XI., p. 518; and as to taking evidence by deposition before an examiner, see r. 86 of the rules made under the Clergy

SECT. 3. **Attendance.**

production of documents in the possession of a witness is enforced by the writ of *subpœna duces tecum* (*g*).

Who can issue.

Any party to a proceeding in the High Court is entitled to a *subpœna* as of right (*h*), but a *subpœna* improperly issued may be set aside (*i*).

Validity as to time.

Any *subpœna* other than a *subpœna* issued from the Crown Office, or in an action to be tried at the assizes, remains in force until the trial of the action or matter in which it is issued (*k*).

Service.

A *subpœna* must be served personally (*l*) by delivering a copy of the writ and of the indorsement, and at the same time producing the original writ (*m*).

When *subpœna* must be served.

A *subpœna* must be served within twelve weeks after the *teste* of the writ, and within a reasonable time before the trial or proceeding at which the attendance of the witness is required (*n*).

Conduct money.

At the time of the service of the *subpœna*, or within a reasonable time before the day named for the attendance of the witness, a witness in a civil case is entitled to have tendered to him his conduct money, that is, his full expenses for going to and returning from the place of trial, and for his maintenance there during the trial. A professional witness is also entitled to have tendered to him compensation to the amount of one guinea a day for loss of time (*o*).

Discipline Act, 1892 (55 & 56 Vict. c. 32), s. 9. As to witnesses in criminal matters, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 314, 321; and before justices, title MAGISTRATES. There are a great number of special statutory provisions providing for the summoning of witnesses before special courts and bodies, and persons having *quasi*-judicial functions; see 2 Taylor, Law of Evidence, 10th ed., pp. 931, 944.

(*g*) See p. 580, *post*. A *subpœna* other than a *subpœna duces tecum* is to contain three names when necessary or required, but may contain any larger number of names (R. S. C., Ord. 37, r. 29); no more than three persons are to be included in a *subpœna duces tecum*, and a *subpœna* may be sued out for each person if it is deemed necessary or desirable (R. S. C., Ord. 37, r. 30). As to correcting errors in names and resealing a *subpœna*, see R. S. C., Ord. 37, r. 31.

(*h*) *Raymond* v. *Tapson* (1882), 22 Ch. D. 430, C. A.; *Holden* v. *Holden*, *Hill* v. *Dolt* (1857), 7 De G. M. & G. 397.

(*i*) *London and Globe Finance Corporation* v. *Kaufman* (1899), 69 L. J. (CH.) 196; *Re Mundell*, *Fenton* v. *Cumberlege* (1883), 48 L. T. 776. A *subpœna* not issued *bonâ fide* for the purpose of obtaining relevant evidence may be set aside (*R.* v. *Baines*, [1909] 1 K. B. 258).

(*k*) R. S. C., Ord. 37, r. 34A.

(*l*) It is said that an order for substituted service can be made (*Dyson* v. *Foster* (1908), 7th February, *per* JELF, J., Yearly Supreme Court Practice, 1911, Vol. I., 511).

(*m*) R. S. C., Ord. 37, r. 32; *Wadsworth* v. *Marshall* (1832), 1 Cr. & M. 87; *R.* v. *Wood* (1832), 1 Dowl. 509; *Garden* v. *Creswell* (1837), 2 M. & W. 319; *Pitcher* v. *King* (1845), 2 Dow. & L. 755; *Doe* d. *Clarke* v. *Thomson* (1841), 9 Dowl. 948.

(*n*) R. S. C., Ord. 37, r. 34; *Hammond* v. *Stewart* (1722), 1 Stra. 510; *Barber* v. *Wood* (1838), 2 Mood. & R. 172; *Maunsell* v. *Ainsworth* (1840), 8 Dowl. 869; *Jackson* v. *Seager* (1844), 2 Dow. & L. 13; see *London and Globe Finance Corporation* v. *Kaufman*, *supra*. As to an action against a person who prevents the service of a *subpœna*, see *Wigens* v. *Cook* (1859), 6 C. B. (N. S.) 784, 787. If a witness is in court at the trial, he may there and then be served with a *subpœna* (*Doe* d. *Jupp* v. *Andrews* (1778), 2 Cowp. 845), and cannot refuse to give evidence, unless he is a solicitor engaged in another matter (*Pitcher* v. *King*, *supra*).

(*o*) See *Re Working Men's Mutual Society* (1882), 21 Ch. D. 831; *Bowles* v. *Johnson* (1748), 1 Wm. Bl. 36; *Newton* v. *Harland* (1840), 1 Man. & G. 956;

SECT. 3. Attendance.

If a witness in a civil case has been regularly served with a *subpœna* and has had his expenses tendered to him within a reasonable time, and does not attend at the trial or proceeding, or attends and refuses to give evidence, he may, in the absence of reasonable excuse, be attached for contempt (*p*); or an action will lie against him at the suit of the party who sued out the *subpœna* (*q*).

Consequence of refusal to attend.

A witness who attends on a *subpœna* may, in a civil case, refuse to give evidence until he has been paid his full expenses, including, if he is a professional man, compensation for his loss of time at the above-mentioned rate (*a*).

Payment of expenses.

(ii.) *Witnesses out of the Jurisdiction.*

789. Where in a civil case the attendance of a witness who is within the United Kingdom, but is not within the jurisdiction of the court in which the action is pending, is required, a writ of *subpœna* may be issued by special leave of a judge of the High Court (*b*).

Witnesses out of the jurisdiction.

In criminal matters, when witnesses are not bound over to appear and give evidence at the trial, or are out of the jurisdiction of the particular court, if such witnesses are within the United Kingdom,

Crown Office *subpœna*.

Brocas v. *Lloyd* (1856), 23 Beav. 129. As to criminal cases, see Costs in Criminal Cases Act, 1908 (8 Edw. 7, c. 15), s. 1.

(*p*) *R.* v. *Daye*, [1908] 2 K. B. 333; *R.* v. *Russell* (*Lord John*), *R.* v. *Fox Maule* (1839), 7 Dowl. 693; *Chapman* v. *Davis* (1841), 3 Man. & G. 609; *Lamont* v. *Crook* (1840), 6 M. & W. 615; *Barrow* v. *Humphreys* (1820), 3 B. & Ald. 598; *Goff* v. *Mills* (1844), 2 Dow. & L. 23; *R.* v. *Fenn* (1835), 3 Dowl. 546. As to what is a reasonable excuse, see *Blandford* v. *De Tastet* (1813), 5 Taunt. 260; *Farrah* v. *Keat* (1838), 6 Dowl. 470; *R.* v. *Sloman* (1832), 1 Dowl. 618; *Malcolm* v. *Day* (1819), 3 Moore (C. P.), 579; *Vaughton* v. *Brine* (1840), 9 Dowl. 179; *Re Jacobs* (1835), 1 Har. & W. 123; *Whiteland* v. *Grant* (1840), 4 Jur. 1061. If a witness attends at the hearing, he cannot refuse to be examined on the ground that he has not been duly served (*Wisden* v. *Wisden* (1849), 6 Hare, 549).

(*q*) *Needham* v. *Fraser* (1845), 1 C. B. 815; *Couling* v. *Coxe* (1848), 6 C. B. 703; *Mullett* v. *Hunt* (1833), 1 Cr. & M. 752; *Lamont* v. *Crook* (1840), 6 M. & W. 615; *Masterman* v. *Judson* (1832), 8 Bing. 224; *Davis* v. *Lovell* (1839), 4 M. & W. 678; *Amey* v. *Long* (1808), 9 East, 473. If a witness promises to attend at a trial without a *subpœna*, an action will lie against him for breach of the promise (*Yeatman* v. *Dempsey* (1860), 7 C. B. (N. S.) 628). If conduct money has been paid to a witness, and his attendance becomes unnecessary, and he has incurred no expense, the conduct money may be recovered by the person who paid it (*Martin* v. *Andrews* (1856), 7 E. & B. 1). A witness who has not been paid his expenses has an action for them against the party who sues out the *subpœna* (*Collins* v. *Godefroy* (1831), 1 B. & Ad. 950; *Robins* v. *Bridge* (1837), 3 M. & W. 114; *Hale* v. *Bates* (1858), E. B. & E. 575).

(*a*) See *Re Working Men's Mutual Society* (1882), 21 Ch. D. 831; and cases cited, note (*q*), *supra*.

(*b*) Attendance of Witnesses Act, 1854 (17 & 18 Vict. c. 34), ss. 1, 2; Judicature Act, 1884 (47 & 48 Vict. c. 61), s. 16; see *Allen* v. *Hamilton* (*Duke*) (1867), L. R. 2 C. P. 630. A reasonable and sufficient sum of money to defray the expenses of coming and attending to give evidence, and of returning from giving such evidence, must be tendered to the person when the *subpœna* is served upon him (Attendance of Witnesses Act, 1854 (17 & 18 Vict. c. 34), s. 4. Disobedience to the writ is punishable in the courts of the country in which it is served (*ibid.*, s. 3). An order will not be made under the Attendance of Witnesses Act, 1854 (17 & 18 Vict. c. 34), for the attendance of witnesses before an arbitrator to whom an action and all matters in difference have been referred (*Hall* v. *Brand* (1883), 12 Q. B. D. 39, C. A.). It seems that in such a case the proper course would be to procure a Crown Office *subpœna*.

SECT. 3. Attendance.

their attendance is enforced by a Crown Office *subpœna*, which may be served anywhere in the United Kingdom (*c*).

SUB-SECT 2.—*Habeas Corpus ad testificandum.*

Attendance of prisoners.

790. Any prisoner in custody may be brought up to give evidence before a court of record by a writ of *habeas corpus ad testificandum* granted by a judge of the High Court (*d*), or by a warrant or order of a judge of the High Court (*e*).

A Secretary of State may order the attendance of any prisoner at any place, if it is proved to his satisfaction that such attendance is required in the interests of justice or for the purpose of any public inquiry (*f*).

SUB-SECT 3.—*Subpœna duces tecum.*

(i.) *In General.*

Production of material documents.

791. The production at the trial of a material document which is in the possession of any person other than the party who desires its production, and which such person is not willing to produce voluntarily, is enforced by a *subpœna duces tecum* (*g*).

Documents required must be specified.

The *subpœna* must specify the particular documents required, and if too general in language will not be enforced (*h*).

(*c*) Writ of Subpœna Act, 1805 (45 Geo. 3, c. 92), s. 3. Under this Act a reasonable and sufficient sum of money to defray the expenses of the witness coming and attending to give evidence, and of returning from giving such evidence, must be tendered to the witness when the *subpœna* is served (*ibid.*, s. 4).

(*d*) R. S. C., App. J, Form No. 2; *Graham* v. *Glover* (1855), 5 E. & B. 591; *Marsden* v. *Overbury* (1856), 18 C. B. 34. Where a person is (1) detained in a lunatic asylum (*Fennell* v. *Tait* (1834), 1 Cr. M. & R. 584), or (2) is an officer in the army or navy who cannot attend a trial without leave of his superior officers (*R.* v. *Roddam* (1777), 2 Cowp. 672), and an affidavit is made stating that such officer is willing to attend and has been served with a *subpœna*, then a writ of *habeas corpus ad testificandum* may be granted by a judge of the High Court, and the witness may be brought to give evidence.

(*e*) See *Jenks* v. *Ditton* (1897), 76 L. T. 591; Criminal Procedure Act, 1853 (16 & 17 Vict. c. 30), s. 9, amended by the Prison Act, 1898 (61 & 62 Vict. c. 41), s. 15, and Sched. If the proceedings are in the county court, the county court judge may make an order for the attendance of the witness (County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 112, and see title COUNTY COURTS, Vol. VIII., p. 530).

(*f*) Prison Act, 1898 (61 & 62 Vict. c. 41), s. 11.

(*g*) The writ is in the same form as a *subpœna ad testificandum*, with the addition of an order for the production of the document or documents specified. For forms, see R. S. C., App. J, Nos. 5, 7, 7B, 7D, 7F. The writ is served in the same way as a *subpœna ad testificandum* (see p. 578, *ante*). No more than three names are to be included in one *subpœna duces tecum*, and the party suing out the writ may sue out a *subpœna* for each person if it is deemed necessary or desirable (R. S. C., Ord. 37, r. 30). The provisions of the Attendance of Witnesses Act, 1854 (17 & 18 Vict. c. 34) (see p. 579, *ante*), are applicable to a *subpœna duces tecum* as well as to a *subpœna ad testificandum*. No affidavit or record of the High Court is to be taken out of the Central Office without the order of a judge or master, and no *subpœna* for the production of any such document is to be issued (R. S. C., Ord. 61, r. 28). A sealed packet is a document, and may be ordered to be produced by a *subpœna duces tecum* (*R.* v. *Daye*, [1908] 2 K. B. 333; and see Extradition Act, 1873 (36 & 37 Vict. c. 60), s. 5). As to a Crown Office *subpœna duces tecum*, see Crown Office Rules, 1906, App. C, No. 151.

(*h*) *Lee* v. *Angas* (1866), L. R. 2 Eq. 59; *A.-G.* v. *Wilson* (1839), 9 Sim. 526.

If the *subpœna* is in proper form and is properly served, and the witness receives his conduct money, he must attend at the place directed with the documents specified, if he has them in his possession (*i*). If he admits that he has the specified documents in his possession, he cannot insist on being first sworn (*k*), but must produce them without being sworn, unless he has an objection to produce them; if he has any such objection, he is sworn and makes the objection on oath and it is for the judge who tries the case to decide on the validity of the objection (*l*).

Duty of witness in possession of documents.

A witness who attends on a *subpœna duces tecum* may object to produce a document on the ground that it is privileged from production (*m*).

Objection to produce.

A witness cannot object to produce a document on the ground that he has a lien on it (*n*), unless, perhaps, where the party who asks for the production of the document is the person against whom the lien is claimed (*o*).

When lien can be the ground of objection.

(ii.) *Solicitors.*

792. A solicitor who has been served with a *subpœna duces tecum* in respect of a document which he holds confidentially for his client, and which his client could withhold, cannot be forced to produce it (*p*).

Production by solicitor.

(*i*) *Amey* v. *Long* (1808), 9 East, 473. If he does not so attend, he is liable to the same proceedings as a person who disobeys a *subpœna ad testificandum* (*ibid.*; and see p. 579, *ante*).

(*k*) *Lee* v. *Angas* (1866), L. R. 2 Eq. 59. It is the ordinary practice to call upon a witness who attends on such a *subpœna* to produce such documents without his being sworn.

(*l*) *Amey* v. *Long*, *supra*; *R.* v. *Greenaway* (1845), 7 Q. B. 126. If a person has possession of documents only as a servant, he cannot be compelled to produce them if his master refuses to allow him to bring them (*Austin* v. *Evans* (1841), 2 Man. & G. 430; *Crowther* v. *Appleby* (1873), L. R. 9 C. P. 23; *Re Higgs*, *Ex parte Leicester* (1892), 66 L. T. 296).

(*m*) A document is privileged from production on the same grounds as those on which a witness is privileged from giving evidence (see p. 570, *ante*).

(*n*) *Re Toleman and England*, *Ex parte Bramble* (1880), 13 Ch. D. 885; *Re South Essex Estuary and Reclamation Co.*, *Ex parte Paine and Layton* (1869), 4 Ch. App. 215; *Pratt* v. *Pratt* (1882), 51 L. J. (CH.) 838; *Locket* v. *Cary* (1864), 3 New Rep. 405; *Hope* v. *Liddell* (1855), 7 De G. M. & G. 331, where *Griffith* v. *Ricketts* (1849), 7 Hare, 299, was disapproved; *Re Cameron's Coalbrook etc. Rail. Co.* (1857), 25 Beav. 1; *Ley* v. *Barlow* (1848), 1 Exch. 800; *Thompson* v. *Mosely* (1833), 5 C. & P. 501, 502; *Hunter* v. *Leathley* (1830), 10 B. & C. 858; *Brassington* v. *Brassington* (1823), 1 Sim. & St. 455; *Furiong* v. *Howard* (1804), 2 Sch. & Lef. 115; *Re Rapid Road Transit Co.*, [1909] 1 Ch. 96, 99; see Bankruptcy Rules, 1886, r. 349.

(*o*) *Kemp* v. *King* (1842), 2 Mood. & R. 437. But in some cases a solicitor has been ordered to produce a document when the lien is claimed against the party calling for it (*Fowler* v. *Fowler* (1881), 50 L. J. (CH.) 686; see *Locket* v. *Cary*, *supra*; *Vale* v. *Oppert* (1875), 10 Ch. App. 340).

(*p*) *Hibberd* v. *Knight* (1846), 2 Exch. 11; *Volant* v. *Soyer* (1853), 13 C. B. 231; *Doe* d. *Egremont* (*Lord*) v. *Langdon* (1848), 12 Q. B. 711; *Doe* d. *Carter* v. *James* (1837), 2 Mood. & R. 47; *Ditcher* v. *Kenrick* (1824), 1 C. & P. 161; *Harris* v. *Hill* (1822), 3 Stark. 140; *Nixon* v. *Mayoh* (1831), 1 Mood. & R. 76. If the solicitor willingly produces such a document, the evidence may be received (*Hibberd* v. *Knight*, *supra*). A deed which a solicitor refuses to produce may yet, it seems, be ordered to be produced for identification (*Phelps* v. *Prew* (1854), 3 E. & B. 430). As to secondary evidence, when production is refused, see *Phelps*

SECT. 3. Attendance.

Solicitor's lien

A solicitor who has been served with a *subpœna duces tecum*, and has a lien on documents, will be ordered to produce them without prejudice to his lien (*q*).

A solicitor having a lien on documents in his possession belonging to a client, a party to an action, may not refuse to produce the documents, if they are wanted by a third party for the purpose of the action, although the documents may have come into the possession of the solicitor before the commencement of the action (*r*).

(iii.) *Production of Documents at proceedings other than Trial.*

Production of documents at any stage of proceedings.

793. An order may be made by the court or a judge directing the attendance of any person, at any stage of the proceedings in any cause or matter, for the purpose of producing any writings or other documents named in the order which the court or judge may think fit to be produced, but no person can be compelled to produce under any such order any writing or other document which he could not be compelled to produce at the hearing or trial (*s*).

v. *Prew, supra; Doe* d. *Egremont (Lord)* v. *Langdon* (1848), 12 Q. B. 711; *Ditcher* v. *Kenrick* (1824), 1 C. & P. 161; *Calcraft* v. *Guest*, [1891] 1 Q. B. 759, C. A. As to the production by a solicitor of a document belonging to a client in a criminal trial, see *R.* v. *Tuffs* (1848), 1 Den. 319; *R.* v. *Hankins* (1849), 2 Car. & Kir. 823; *R.* v. *Avery* (1838), 8 C. & P. 596; *R.* v. *Hayward* (1846), 2 Car. & Kir. 234; *R.* v. *Jones* (1846), 1 Den. 166; *R.* v. *Brown* (1862), 9 Cox, C. C. 281; *R.* v. *Downer* (1880), 14 Cox, C. C. 486, C. C. R.; see *R.* v. *Cox and Railton* (1884), 14 Q. B. D. 153, C. C. R.; and p. 574, *ante*.

(*q*) *Re Hawkes, Ackerman* v. *Lockhart*, [1898] 2 Ch. 1. As to solicitor's lien, see title SOLICITORS.

(*r*) *Re Hawkes, Ackerman* v. *Lockhart, supra*.

(*s*) R. S. C., Ord. 37, r. 7. The object of this rule is to remove the difficulties which existed in compelling production of documents at various stages of the proceedings both before and after the trial, at the hearing of motions, petitions, summonses, and examinations of witnesses and the like. The rule does not give any new right to discovery against persons not parties to the proceedings, and the court has no jurisdiction to order a person not a party to the proceedings to produce a document belonging to him, unless the parties to the proceedings are entitled to the production of the document at the time when the order is made (*Elder* v. *Carter Ex parte Slide and Spur Gold Mining Co.* (1890), 25 Q. B. D. 194, C. A.), nor to order inspection of the books of persons who are not parties to the action, or the production of such books at the office of the solicitor of one of the parties (*Straker* v. *Reynolds* (1889), 22 Q. B. D. 262; see *O'Shea* v. *Wood*, [1891] P. 286, C. A.; *Burchard* v. *Macfarlane, Ex parte Tindall*, [1891] 2 Q.B. 241, C. A.). The production which can be ordered under this rule is not a production for the purpose of private inspection, but must have some reference to a proceeding in the litigation (*Re Smith, Williams* v. *Frere*, [1891] 1 Ch. 323). An order under this rule is equivalent to a *subpœna duces tecum* and has the same effect; the person summoned must attend with the documents specified, but may, when he attends, make any legitimate objection to the production of any document (*ibid.*). The order may be made *ex parte* (*Zumbech* v. *Biggs* (1900), 48 W. R. 507). A person who disobeys an order under this rule is to be deemed guilty of contempt of court and may be attached (R. S. C., Ord. 37, r. 8; *Carew* v. *Carew*, [1891] P. 360; *Shurrock* v. *Lillie* (1888), 4 T. L. R. 355). A person required to attend under R. S. C., Ord. 37, r. 7, is entitled to the like conduct money and payment for expenses and loss of time as upon attendance at a trial in court (Ord. 37, r. 9); a judgment debtor ordered to attend under R. S. C., Ord. 42, r. 32, does not come within this rule (*Rendell* v. *Grundy*, [1895] 1 Q. B. 16, C. A.); nor does a person directed to attend for the purpose of being examined pursuant to the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 26 (*In the Goods of Wyatt*, [1898] P.

SUB-SECT. 4.—*Expenses.*

SECT. 3.
Attendance.

Conduct money must be reasonable and sufficient.

794. No person served with a *subpœna* in a civil cause is bound to attend the trial unless he is paid or tendered a reasonable sum of money for going to, staying at, and returning from the place of trial, nor is he liable to a penalty if in such circumstances he refuses to attend (*a*). The sum must be sufficient for his subsistence during his probable stay at the place of trial (*b*).

The reasonableness of the sum is a question of degree, and depends on the situation in life of the witness and the circumstances in which he may happen to be placed (*c*).

A professional witness served with a *subpœna* for the purpose of giving expert evidence only, and not evidence as to the facts of the case, is entitled to claim compensation for loss of time before giving his evidence (*d*).

Waiver of expenses.

A witness may waive payment of the expenses to which he is entitled, or of part of them, as, for example, the expenses of going to the place of trial; but in the latter case he is still entitled to demand money for his return (*e*). A witness who makes no complaint that the sum tendered is insufficient, but offers to bear his own expenses, has no answer to a motion for attachment if he refuse to attend the trial on his *subpœna* (*f*), on the ground that he

15). As to the costs of attendance of a witness at the trial, and also at a preliminary examination, see *Delaroque* v. *Oxenholme & Co.*, [1883] W. N. 227. And, generally, as to stages in proceedings, see title PRACTICE AND PROCEDURE.

(*a*) Stat. (1563) 5 Eliz. c. 9, s. 6. By this statute the witness is entitled to be paid, "according to his countenance or calling, such reasonable sums of money for his costs and charges as having regard to the distance of the places is necessary to be allowed in that behalf." The statute was made perpetual by the Statute Law Revision Act, 1863 (26 & 27 Vict. c. 125); see also *Bowles* v. *Johnson* (1763), 1 Wm. Bl. 36; *Fuller* v. *Prentice* (1788), 1 Hy. Bl. 49; *Chapman* v. *Paynton* (1741), 13 East, 16, n.; *Newton* v. *Harland* (1840), 1 Man. & G. 956; *Brocas* v. *Lloyd* (1856), 23 Beav. 129.

(*b*) *Horne* v. *Smith* (1815), 6 Taunt. 9.

(*c*) *Horne* v. *Smith, supra*; *Vice* v. *Anson* (*Countess*) (1827), 3 C. & P. 19 (witness served in London in August to attend trial in October, and at the time of service about to depart for the Continent, held entitled to expenses of coming from the Continent to the place of trial); *Dixon* v. *Lee* (1834), 1 Cr. M. & R. 645 (woman with a sick infant at the breast held entitled to expenses of coach journey as inside passenger).

(*d*) *Webb* v. *Page* (1843), 1 Car. & Kir. 23; *Clark* v. *Gill* (1856), 1 K. & J. 19; *Re Working Men's Mutual Society* (1882), 21 Ch. D. 831. An ordinary witness could never at common law claim compensation for loss of time; see *Collins* v. *Godefroy* (1831), 1 B. & Ad. 950, and remarks thereon in *Chamberlain* v. *Stoneham* (1889), 24 Q. B. D. 113. But the right may be given by statute in certain cases, *e.g.*, by the Bankruptcy Rules, 1886, r. 71 (*Chamberlain* v. *Stoneham, supra*). The two last-cited cases, however, were cases of actions to recover fees brought subsequent to the proceedings in which the evidence was given, and it would seem that in view of the scale of allowances for witnesses provided by R. S. C., 1883, a witness served with a *subpœna* in a civil case may recover from the person on whose behalf he was served, not only his bare expenses, but such remuneration as is provided by the scale (2 Taylor, Law of Evidence, 10th ed., s. 1250). As to questions arising on taxation as to allowances to witnesses, see titles PRACTICE AND PROCEDURE; SOLICITORS.

(*e*) *Newton* v. *Harland* (1840), 1 Man. & G. 956, *per* TINDAL, C.J., at p. 957.

(*f*) *Goff* v. *Mills* (1844), 13 L. J. (Q. B.) 227.

SECT. 3. Attendance.

has not been paid expenses due to him for attendance on an earlier occasion (*g*).

Witness served by both parties.

A witness served with a *subpœna* by both parties is entitled to be paid by the second party serving him all that he would be entitled to receive from him after exhausting what he has received from the other party (*h*).

A party to an action who is about to attend the trial on his own behalf cannot claim conduct money or expenses if served with a *subpœna* by the other side (*i*).

When conduct money may be recovered.

When the attendance of a witness has become unnecessary, and no expenses have been incurred by him under his *subpœna*, the conduct money paid him may be recovered back as money had and received (*k*).

Solicitor's liability for expenses.

A solicitor who causes a *subpœna* to be served is not personally liable to the witness for his expenses, in the absence of a contract express or implied (*l*). But the fact that a witness attends and gives evidence without demanding his expenses is evidence from which a promise may be inferred by the party for whom he appears to pay the expenses subsequently (*m*).

Rule in criminal cases.

795. The rule in criminal cases is different. No tender of conduct money or expenses (with the exceptions referred to below) is necessary where the *subpœna* is served in England (*n*), whether the *subpœna* be served by the Crown or by the defence, and it is immaterial that the indictment has been removed by *certiorari* and comes to the assizes as a civil record (*o*). But by the Writ of Subpœna Act, 1805 (*p*), which enacts that a *subpœna* served in any part of the United Kingdom in connection with a criminal prosecution shall be as effectual as though served in that part of the United Kingdom in which the witness is required to appear, the omission to tender a sufficient sum for his expenses justifies a witness in

(*g*) *Gaunt* v. *Johnson* (1848), 6 Hare, 551.

(*h*) *Betteley* v. *M'Leod* (1837), 3 Bing. (N. C.) 405; *Allen* v. *Yoxall* (1844), 1 Car. & Kir. 315; *Hale* v. *Bates* (1858), E. B. & E. 575 (sum paid by but repaid to one party recoverable from the other).

(*i*) *Reed* v. *Fairless* (1863), 3 F. & F. 958. If a necessary and material witness, he may be allowed his reasonable expenses on taxation as a witness; but not if he only attended to superintend the course of the trial (*Howes* v. *Barber* (1852), 18 Q. B. 588; *Dowdell* v. *Australian Royal Mail Co.* (1854), 3 E. & B. 902).

(*k*) *Martin* v. *Andrews* (1856), 7 E. & B. 1.

(*l*) *Robins* v. *Bridge* (1837), 3 M. & W. 114. The rule with regard to expert witnesses is the same (*Lee* v. *Everest* (1857), 2 H. & N. 285). *Semble*, that where a solicitor is conducting a speculative action, a contract to make himself personally liable to the witnesses might be implied; see *Miller* v. *Appleton* (1906), 50 Sol. Jo. 192, which, though only a county court decision, is, it is submitted, in accordance with the general principle.

(*m*) *Hallet* v. *Mears* (1813), 13 East, 15; *Pell* v. *Daubeny* (1850), 5 Exch. 955.

(*n*) *R.* v. *Cooke* (1824), 1 C. & P. 321; *R.* v. *Cousens* (1843), cited in Russell on Crimes and Misdemeanours, 7th ed., 2258; *Pell* v. *Daubeny*, *supra*, *per* ALDERSON, B., at p. 957. It is apprehended that genuine inability to obey the *subpœna* by reason of poverty would be held a sufficient excuse.

(*o*) *R.* v. *Cooke*, *supra*.

(*p*) 45 Geo. 3, c. 92.

refusing to attend the trial (*q*). The Attendance of Witnesses Act, 1854 (*r*), contains similar provisions with regard to a *subpœna* served in any part of the United Kingdom in connection with civil proceedings, but so far as regards the tender of expenses to witnesses, merely reproduces the common law (*a*).

SECT. 3. Attendance.

Exceptions to rule.

Witnesses summoned in connection with criminal proceedings under the Fugitive Offenders Act, 1881 (*b*), are also entitled to be tendered their expenses (*c*).

796. Similar provisions have been made in the case of witnesses summoned to county courts (*d*), courts of bankruptcy (*e*), courts of summary jurisdiction (*f*), revising barristers' courts (*g*), ecclesiastical courts (*h*), courts-martial (*i*), and before commissioners appointed to take evidence in the United Kingdom in suits pending in the United Kingdom (*k*), in colonial courts (*l*), or in foreign courts (*m*), as well as before other bodies and persons exercising judicial or semi-judicial functions (*n*).

Rules in other courts.

SUB-SECT. 5.—*Privilege from Arrest.*

797. Witnesses (as well as the parties themselves and their solicitors) are privileged from arrest on civil (*o*) but not criminal

Privilege of witness from arrest.

(*q*) Writ of Subpœna Act, 1805 (45 Geo. 3, c. 92), ss. 3, 4. As to the allowance of witnesses' costs and expenses after trial, see Costs in Criminal Cases Act, 1908 (8 Edw. 7, c. 15), and title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 445 *et seq.*

(*r*) 17 & 18 Vict. c. 34.

(*a*) *Ibid.*, s. 4.

(*b*) 44 & 45 Vict. c. 69. See, also, title EXTRADITION AND FUGITIVE OFFENDERS.

(*c*) *Ibid.*, ss., 15, 27.

(*d*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 111; *Chamberlain* v. *Stoneham* (1889), 24 Q. B. D. 113.

(*e*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 27 (2); Bankruptcy Rules, 1886, r. 71. This rule has no application to the debtor himself (*Re Batson, Ex parte Hastie* (1894), 70 L. T. 382).

(*f*) Summary Jurisdiction Acts, 1848 (11 & 12 Vict. c. 43), s. 7; 1879 (42 & 43 Vict. c. 49), s. 36; 1881 (44 & 45 Vict. c. 24), s. 4 (3). See title MAGISTRATES.

(*g*) Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), s. 36. As to revision courts, see title ELECTIONS.

(*h*) Rules made under the Clergy Discipline Act, 1892 (55 & 56 Vict. c. 32), s. 9 (Stat. R. & O., 1903, tit. Ecclesiastical Court, England, p. 106). The *subpœna* of the Ecclesiastical Courts was known as a "compulsory," but the rules as to the tender of expenses to a witness did not differ from those of the common law. The practice as to the attendance of witnesses under the Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85), is assimilated to that of the High Court. For proceedings under these Acts, see title ECCLESIASTICAL LAW, Vol. XII., pp. 515 *et seq.*

(*i*) See Army Act, 1881 (44 & 45 Vict. c. 58), s. 126; Naval Discipline Act, 1866 (29 & 30 Vict. c. 109), s. 66; and as to courts-martial, title ROYAL FORCES.

(*k*) Evidence by Commission Act, 1843 (6 & 7 Vict. c. 82), s. 7.

(*l*) Evidence by Commission Act, 1859 (22 Vict. c. 20), s. 3.

(*m*) Foreign Tribunals Evidence Act, 1856 (19 & 20 Vict. c. 113), s. 4.

(*n*) As, for example, in the case of inquiries under the Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 22 (4); before the Customs Board (Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), s. 37); before inspectors of the Local Government Board (Poor Law Board Act, 1847 (10 & 11 Vict. c. 109), ss. 21, 26, Local Government Board Act, 1871 (34 & 35 Vict. c. 70)); before inspectors of the Board of Trade (Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 729); in rating cases (Poor Rate Act, 1839 (2 & 3 Vict. c. 84)).

(*o*) *Re Freston* (1883), 11 Q. B. D. 545, C. A., where the distinction

SECT. 3. Attendance.

process (*p*), *eundo, morando et redeundo*—that is to say, while going to, attending at, and returning from the place of trial (*q*).

Application of rule.

The rule applies in all cases where a person is attending a properly constituted tribunal for the purpose of giving testimony (*r*), or where he has some relation to or interest in the proceedings, either as a party, or as solicitor, or agent, or for any other reason (*s*).

Exceptions.

But the rule has no application to a common informer going to lay a *qui tam* information, or to a person going to obtain a summons, even though he obtains it (*t*). It is immaterial that the person has been served with no *subpœna* or process by which his presence might be compelled (*a*); but he must be acting *bonâ fide* in the capacity on which he bases his claim to the privilege (*b*). The time over which

is fully discussed. As to privileges of solicitors generally, see title SOLICITORS.

(*p*) *Re Douglas* (1842), 3 Q. B. 825; *Re Freston* (1883), 11 Q. B. D. 545, C. A. (solicitor who disobeys order of the court made against him as an officer of the court is guilty of a criminal contempt, and has no privilege); *Kimpton* v. *London and North Western Rail. Co.* (1854), 9 Exch. 766. A witness may be arrested by his bail, for that is a retaking only (*Ex parte Lyne* (1822), 3 Stark. 132).

(*q*) The general principle is stated by BRETT, M.R., in *Re Freston, supra*, at p. 552; see also *Lightfoot* v. *Cameron* (1776), 2 Wm. Bl. 1113; *Meekins* v. *Smith* (1791), 1 Hy. Bl. 636; *Willingham* v. *Matthews* (1815), 6 Taunt. 358; *Magnay* v. *Burt* (1844), Dav. & Mer. 652; and, generally, the cases cited under this section.

(*r*) *Ex parte Cobbett* (1857), 7 E. & B. 955, *per* CROMPTON, J., at p. 959: "However inferior the tribunal may be, if it be a lawful tribunal, the privilege on principle exists." See, for cases of the privilege successfully claimed in proceedings before various tribunals, *Arding* v. *Flower* (1800), 8 Term Rep. 534; *Ex parte King* (1802), 7 Ves. 312; *Ex parte Byne* (1813), 1 Ves. & B. 316; *Willingham* v. *Matthews, supra; Re Sewer Krop, Ex parte Clarke* (1832), 2 Deac. & Ch. 99 (bankruptcy); *Moore* v. *Booth* (1797), 3 Ves. 350; *Phillips* v. *Pound* (1852), 7 Exch. 881; *Re Jewitt* (1864), 10 Jur. (N. S.) 814 (judge's chambers); *Sidgier* v. *Birch* (1803), 9 Ves. 69; *List's Case* (1814), 2 Ves. & B. 373; *Franklyn* v. *Colquhoun* (1816), 1 Madd. 580 (masters etc. of High Court); *Newton* v. *Askew* (1848), 6 Hare, 319 (Chancery registrar); *Spence* v. *Stuart* (1802), 3 East, 89; *Ex parte Temple* (1814), 2 Ves. & B. 391; *Randall* v. *Gurney* (1819), 3 B. & Ald. 252 (arbitration by order of the court); *Webb* v. *Taylor* (1843), 1 Dow. & L. 676 (the same under a submission agreed to be made a rule of court); *Walter* v. *Rees* (1819), 4 Moore (C. P.), 34 (under-sheriff); *Webb* v. *Taylor, supra; Mountague* v. *Harrison* (1857), 3 C. B. (N. S.) 292; *Re Freston, supra* (magistrates' courts). The privilege with regard to military and naval courts-martial is statutory (see Army Act, 1881 (44 & 45 Vict. c. 58), ss. 125 (2), 179; Naval Discipline Act, 1866 (29 & 30 Vict. c. 109), s. 66).

(*s*) *Walpole* v. *Alexander* (1782), 3 Doug. (K. B.) 45; *Meekins* v. *Smith, supra; Arding* v. *Flower, supra* (bankrupt attending, on notice, meeting to declare dividend); *Ex parte Byne, supra* (person attending without summons commissioners in a bankruptcy, and filing uncontradicted affidavit that he is a material witness); *Re Britten* (*D.*), *Ex parte Britten* (*J.*) (1840), 1 Mont. D. & De G. 278 (husband of petitioner in bankruptcy protected because of his possible liability for costs); *Phillips* v. *Pound* (1852), 7 Exch. 881 (solicitors' clerk at judge's chambers).

(*t*) *Ex parte Cobbett, supra, per* Lord CAMPBELL, C.J., at p. 956.

(*a*) *Walpole* v. *Alexander, supra* (witness coming from abroad to give evidence); *Meekins* v. *Smith, supra; Spence* v. *Stuart, supra; Rishton* v. *Nisbett* (1834), 1 Mood. & R. 347 (witness attending at request of party to arbitration proceedings). There was at one time a difference of opinion as to the necessity of a *subpœna* or other like process (see *Ex parte Byne, supra*, and cases there cited, as well as cases cited in *Magnay* v. *Burt* (1844), Dav. & Mer. 652).

(*b*) *Meekins* v. *Smith, supra; Gibbs* v. *Phillipson* (1829), 1 Russ. & M. 19.

the privilege extends is a question of fact and reasonableness in each case (*c*); a witness is not, for example, protected as from the moment at which he is served with his *subpœna* (*d*), but only when he *bonâ fide* begins his journey to the place of trial (*e*). His journey must be made without unnecessary deviations (*f*), unless such deviations are clearly connected with the object of the journey (*g*). So, also, the time during which the privilege will extend while he is actually in attendance at the place of trial will vary according to the circumstances of each case (*h*); and when he returns he is under no obligation to go home by the shortest route, or the very moment that the trial is over, provided that he acts reasonably and does not abuse the privilege for his own purposes (*i*). But the fact that he is compelled to prolong his stay for want of means to return is an immaterial consideration (*k*).

Reason for privilege.

The privilege exists in the interests of public justice (*l*), and a delay on the part of the witness in asserting the privilege for the purpose of obtaining his discharge from custody will not, therefore, necessarily prejudice him (*m*); but when the delay is very long and unexplained, the court will possibly not exercise its discretion in his favour (*n*).

(*c*) *Walpole* v. *Alexander* (1782), 3 Doug. (K. B.) 45, *per* Lord MANSFIELD, C.J., at p. 46; *Strong* v. *Dickinson* (1836), 1 M. & W. 488.

(*d*) *Gibbs* v. *Phillipson* (1829), 1 Russ. & M. 19.

(*e*) *Ibid.*; *Ricketts* v. *Gurney* (1819), 7 Price, 699; *Strong* v. *Dickinson*, *supra*; *Persse* v. *Persse* (1856), 5 H. L. Cas. 671.

(*f*) *Ricketts* v. *Gurney*, *supra*; *Strong* v. *Dickinson*, *supra*.

(*g*) *Ricketts* v. *Gurney*, *supra* (deviation on way to place of trial to collect and arrange necessary papers). Contrast *Gibbs* v. *Phillipson*, *supra*, where witness was held to have no privilege on going to his solicitors' office three days before his examination, for the purpose of looking at the interrogatories which he would have to answer.

(*h*) *Walpole* v. *Alexander*, *supra* (witness coming from abroad, and finding case postponed to following sittings, privileged from arrest while staying in London for case to be heard); *Childerston* v. *Barrett* (1809), 11 East, 439 (arrest of witness on day when case was not in list unjustifiable); *Ex parte Temple* (1814), 2 Ves. & B. 391 (privilege continues during adjournment); *Spencer* v. *Newton* (1837), 6 Ad. & El. 623 (but not where case is adjourned *sine die*, and witness stays on in the expectation that some step will be taken by the other side).

(*i*) *Willingham* v. *Matthews* (1815), 6 Taunt. 356, *per cur.* at p. 358; *Strong* v. *Dickinson*, *supra*, *per* Lord ABINGER, C.B., at p. 491; see also *Lightfoot* v. *Cameron* (1776), 2 Wm. Bl. 1113 (arrest unjustified where a party after being present at case in morning was dining in the afternoon with his solicitor and witnesses: *sed quære*); *Holiday* v. *Pitt* (1734), 2 Stra. 985, 986; *Selby* v. *Hills* (1832), 1 Dowl. 257 (arrest unjustified where witness was arrested a mile from the court, and two hours after leaving it, but on his direct road home); *Pitt* v. *Coomes* (1834), 5 B. & Ad. 1078 (the same, where witness was in his tailor's shop, which he had visited on his way home). But the privilege covers a witness while returning home after imprisonment for contempt of court committed during the trial (*R.* v. *Wigley* (1835), 7 C. & P. 4).

(*k*) *Spencer* v. *Newton*, *supra*.

(*l*) *Newton* v. *Constable* (1841), 2 Q. B. 157, *per* Lord DENMAN, C.J., at p. 166; *Magnay* v. *Burt* (1844), Dav. & Mer. 652; *Ex parte Cobbett* (1857), 7 E. & B. 955, *per* Lord CAMPBELL, C.J., at p. 956.

(*m*) *Webb* v. *Taylor* (1843), 1 Dow. & L. 676; *Andrews* v. *Martin* (1862), 12 C. B. (N. S.) 371.

(*n*) *Greenshield* v. *Pritchard* (1841), 8 M. & W. 148 (delay of a year).

SECT. 3. **Attendance.**

Application for discharge from custody.

A witness may obtain his discharge from custody by application either to the court to which he has been summoned to give evidence, or to the court from which the process of his arrest has issued (*o*), unless these are courts of inferior jurisdiction (*p*), in which case, as well as in any other, *habeas corpus* proceedings may be taken to obtain his release (*q*).

Liability of officer arresting witness.

But a witness cannot bring any action against the officer who arrests him, even though the officer knew that the privilege existed (*r*), or against those who employed him (*s*), though in the latter case a knowledge of the privilege may possibly be evidence of malice, and therefore may justify an action for damages (*t*). But the court itself could treat the arrest as a contempt, as being a deliberate interference with the course of justice (*u*).

Protection in respect of evidence given.

798. A witness is also protected from civil proceedings in respect of the evidence which he gives, and this protection extends not only to evidence given in court, but to such preliminary communications as are necessary to enable that evidence to be given (*a*).

SUB-SECT. 6.—*Penalties for Non-attendance.*

Penalties for non-attendance.

799. By failing to attend on his *subpœna* a witness exposes himself to three kinds of penalties: punishment for contempt of court, a statutory penalty of £10, and an action for damages (*b*).

Punishment for contempt of court.

With regard to the punishment for contempt of court, this may take the form of fine or attachment (*c*). But the court will not

(*o*) *Walker* v. *Webb* (1797), 3 Anst. 941; *Randall* v. *Gurney* (1819), 3 B. & Ald. 252; *Selby* v. *Hills* (1832), 8 Bing. 166; *Re Sewer Krop, Ex parte Clarke* (1832), 2 Deac. & Ch. 99; *A.-G.* v. *Skinners' Co.* (1837), Coop. Pr. Cas. 1; *Kimpton* v. *London and North Western Rail. Co.* (1854), 9 Exch. 766.

(*p*) See *Walters* v. *Rees* (1819), 4 Moore (C. P.), 34.

(*q*) *Ex parte Tillotson* (1816), 1 Stark. 470; *Towers* v. *Newton* (1841), 1 Q. B. 319; *Astbury* v. *Belbin* (1850), 3 Car. & Kir. 20. For cases arising in connection with military or naval courts-martial, see Army Act, 1881 (44 & 45 Vict. c. 58), s. 125, and Naval Discipline Act, 1866 (29 & 30 Vict. c. 109), s. 66, which provide that application for discharge shall be made to the court issuing process, or, if that court is not sitting, to a judge of the High Court.

(*r*) *Tarlton* v. *Fisher* (1781), 2 Doug. (K. B.) 671; *Magnay* v. *Burt* (1844), Dav. & Mer. 652.

(*s*) *Stokes* v. *White* (1834), 1 Cr. M. & R. 223; *Yearsley* v. *Heane* (1845), 14 M. & W. 322; *Ewart* v. *Jones* (1845), 14 M. & W. 774.

(*t*) *Whalley* v. *Pepper* (1836), 7 C. & P. 506; but in view of the later decisions, such as *Magnay* v. *Burt*, *supra*, this seems open to question (2 Taylor, Law of Evidence, 10th ed., s. 1340).

(*u*) *Magnay* v. *Burt*, *supra*.

(*a*) *Seaman* v. *Netherclift* (1876), 2 C. P. D. 53, C. A.; *Bynoe* v. *Bank of England*, [1902] 1 K. B. 467, C. A.; *Barratt* v. *Kearns*, [1905] 1 K. B. 504, C. A.; *Watson* v. *M'Ewan*, *Watson* v. *Jones*, [1905] A. C. 480.

(*b*) A large number of statutes give power to various tribunals and semi-judicial bodies to inflict small fines on persons who fail to appear before them when summoned; these will be found collected in 2 Taylor, Law of Evidence, 10th ed., Part V., Chap. I.

(*c*) Attachment rather than committal (*Re Evans*, *Evans* v. *Noton*, [1893] 1 Ch. 252, C. A.). For contempt of court and attachment in general, see title CONTEMPT OF COURT ETC., Vol. VII., pp. 280, 303. For cases illustrating the general rule with regard to witnesses, see *Batt* v. *Rookes* (1577), Cary, 87; *Dolman* v. *Pritman* (1670), 3 Rep. Ch. 36 [64]; *Vailiant* v. *Dodomede* (1743), 2 Atk. 592;

interfere unless a clear case of contempt is made out (*d*), such as an intentional defiance of authority (*e*). Thus, it may be a sufficient excuse that the witness was ill (*f*) or unable to travel (*g*); that his employers (who were not parties to the case) refused to allow him to take to court a large number of books and papers belonging to them (*h*); that he had *bonâ fide* and reasonable grounds for thinking that his attendance would not be required (*i*); or that a proper sum was not tendered to him for his expenses (*k*). But the most stringent orders of an employer not to leave business are no excuse (*l*); neither is the fact that the case was not called on (*m*), nor that he would have been in time if the case had not unexpectedly been called on (*n*), nor that his evidence was not material (*o*).

What is clear case of contempt

A motion for attachment in such case must be made at the earliest opportunity (*p*), and the affidavit in support must prove that the original writ was shown to the witness at the time of service (*q*),

Requisites for motion for attachment.

Barrow v. *Humphreys* (1820), 3 B. & Ald. 598; *Mullett* v. *Hunt* (1833), 1 Cr. & M. 752; *Goff* v. *Mills* (1844), 13 L. J. (Q. B.) 227.

(*d*) *Horne* v. *Smith* (1815), 6 Taunt. 9; *Garden* v. *Creswell* (1837), 2 M. & W. 319.

(*e*) *R.* v. *Russell* (*Lord John*), *R.* v. *Fox Maule* (1839), 7 Dowl. 693; *Chapman* v. *Davis* (1841), 1 Dowl. (N. S.) 239; *Glendinning* v. *Thomas* (1862), 6 L. T. 251 (failure to hear call); *Netherwood* v. *Wilkinson* (1855), 17 C. B. 226 (failure of wife to hand husband notice requiring his attendance on following day; but see *R.* v. *Daye*, [1908] 2 K. B. 333.

(*f*) *Re Jacobs* (1835), 1 Har. & W. 123 *Scholes* v. *Hilton* (1842), 10 M. & W. 15.

(*g*) *More* v. *Woreham* (1580), Cary, 142; compare *Humble* v. *Malbe* (1559), Cary, 58 (witness impressed as a soldier).

(*h*) *Crowther* v. *Appleby* (1873), L. R. 9 C. P. 23. In ordinary circumstances a witness must bring the documents specified in the *subpœna duces tecum*, even though not bound to produce them (*R.* v. *Carey* (1845), 2 New Sess. Cas. 105).

(*i*) *R.* v. *Sloman* (1832), 1 Dowl. 618; compare *Farrah* v. *Keat* (1838), 6 Dowl. 470 (case called on whilst witness absent with attorney's consent); and see *Blandford* v. *De Tastet* (1814), 5 Taunt. 260 (witness subpœnaed without notice as to when case would come on, and leaving on third day of his attendance on urgent business); *Vaughton* v. *Brine* (1841), 9 Dowl. 179 (defendant's attorney subpœnaed for a particular day, and case postponed at defendant's request).

(*k*) As to conduct money and expenses; see p. 583, *ante*.

(*l*) *Goff* v. *Mills*, *supra* (even though there is no possibility of communicating with the employer after the *subpœna* is served). This case is not inconsistent with *Crowther* v. *Appleby*, *supra*, which concerned a *subpœna duces tecum*; see also *Jackson* v. *Seager* (1844), 2 Dow. & L. 13.

(*m*) *Barrow* v. *Humphreys*, *supra*.

(*n*) *R.* v. *Fenn* (1834), 3 Dowl. 546.

(*o*) See *Chapman* v. *Davis*, *supra*; unless, it would seem, the judge's notes make it clear that in fact the witness's evidence would have been wholly immaterial (*Dicas* v. *Lawson* (1835), 1 Cr. M. & R. 934). The earlier cases, however (*Taylor* v. *Williams* (1831), 2 B. & Ad. 845; *Tinley* v. *Porter* (1837), 5 Dowl. 744), seem inconsistent with the law as stated in the text; perhaps the fact that the evidence would have been immaterial only affects the question as to whether the contempt was intentional (2 Taylor, Law of Evidence, 10th ed., s. 1267).

(*p*) *R.* v. *Stretch* (1835), 3 Ad. & El. 503.

(*q*) *Thorpe* v. *Gisbourne* (1825), 11 Moore (C. P.), 55; *Barnes* v. *Williams* (1832), 1 Dowl. 615; *Jacob* v. *Hungate* (1834), 1 Mood. & R. 445; *Garden* v. *Creswell*, *supra*; *Pitcher* v. *King* (1845), 2 Dow. & L. 755; *Marshall* v. *York*, *Newcastle and Berwick Rail. Co.* (1851), 11 C. B. 398.

SECT. 3. Attendance.

and that his proper expenses were tendered to him (*r*); but it is not necessary that he should actually have been called on his *subpœna* (*s*).

A witness summoned to give evidence in an inferior court can only be attached for failure to attend where the *subpœna* issued from the Crown Office (*a*).

Statutory penalty.

800. With regard to the statutory penalty, a witness becomes liable, in the event of non-attendance (*b*), to forfeit £10 and pay such further recompense to the person at whose instance the *subpœna* was served as the judge shall award (*c*); but this recompense must be assessed by the court out of which process issues, and not by the judge or jury at *nisi prius* (*d*).

Action for damages.

A more effectual remedy is by an action for damages against the witness, in which proof of actual damage caused by the witness's non-attendance must be given (*e*), and though it must be alleged that the defendant was a material witness in the case (*f*), and that he could and might have appeared (*g*), yet an averment that the plaintiff had a good cause of action (*h*), or that the absence of the defendant was the sole cause of the loss of the suit (*i*), is unnecessary. The action will lie even though the plaintiff himself withdrew the record at the trial, if he did so because of the absence of the defendant as a witness (*k*).

SECT. 4.—*Oath and Affirmation.*

Evidence must be given on oath or affirmation.

801. Subject to the exceptions referred to below, no evidence is receivable in any kind of legal proceedings except such as is given

(*r*) As to conduct money and expenses, see p. 583, *ante*.

(*s*) *Dixon* v. *Lee* (1834), 3 Dowl. 259; *R.* v. *Fenn* (1834), 3 Dowl. 546; *Lamont* v. *Crook* (1840), 6 M. & W. 615; *Goff* v. *Mills* (1844), 13 L. J. (Q. B.) 227. These cases are inconsistent with the earlier case of *Malcolm* v. *Ray* (1819), 3 Moore (C. P.), 222; compare *R.* v. *Stretch* (1835), 3 Ad. & El. 503.

(*a*) *R.* v. *Ring* (1800), 8 Term Rep. 585; *R.* v. *Room* (1834), 3 Nev. & M. (K. B.) 725 (quarter sessions); *R.* v. *Brownell* (1834), 1 Ad. & El. 598; *R.* v. *Greenaway* (1845), 7 Q. B. 126 (justices); *R.* v. *Vickery* (1848), 12 Q. B. 478; compare *R.* v. *Clement* (1821), 4 B. & Ald. 218.

(*b*) Stat. (1563) 5 Eliz. c. 9. The statute was made perpetual by the Statute Law Revision Act, 1863 (26 & 27 Vict. c. 125). As to county courts, see title COUNTY COURTS, Vol. VIII., p. 530.

(*c*) Stat. (1563) 5 Eliz. c. 9, s. 62.

(*d*) *Pearson* v. *Iles* (1781), 2 Doug. (K. B.) 556. This procedure has accordingly fallen into disuse.

(*e*) *Couling* v. *Coxe* (1848), 6 Dow. & L. 399.

(*f*) *Masterman* v. *Judson* (1832), 8 Bing. 224. Materiality on a single issue is sufficient (*Couling* v *Coxe*, *supra*), for the plaintiff may have lost his costs of that issue.

(*g*) *Maunsell* v. *Ainsworth* (1840), 8 Dowl. 869. It is not necessary to aver that the original *subpœna* was shown to the witness (*Mullett* v. *Hunt* (1833), 1 Cr. & M. 752), or that he was called on his *subpœna* at the trial, if he was not in fact present (*Lamont* v. *Crook* (1840), 6 M. & W. 615). An action will also lie where the witness had contracted to appear, though not served with a *subpœna* (*Yeatman* v. *Dempsey* (1860), 7 C. B. (N. S.) 628).

(*h*) *Masterman* v. *Judson*, *supra*.

(*i*) *Davis* v. *Lovell* (1839), 6 M. & W. 678.

(*k*) *Mullett* v. *Hunt*, *supra*; and see *Needham* v. *Fraser* (1845), 14 L. J. (C. P.) 256.

upon oath or affirmation (*l*). At common law the form of the oath is immaterial, provided that it is binding on the witness's conscience (*m*), whether he be of Christian religion or not (*n*).

Form of oath.

802. By the Oaths Act, 1909 (*o*), any oath may be administered and taken in the form and manner following:—The person taking the oath shall hold the New Testament, or in the case of a Jew, the Old Testament, in his uplifted hand, and shall say or repeat after the officer administering the oath the words "I swear by Almighty God that . . . ," followed by the words of the oath prescribed by law, and the officer must, unless the witness objects or is physically incapable of so taking it, administer the oath in that form and manner without question, provided that to a witness who is neither a Christian nor a Jew the oath is to be administered in any manner which was lawful prior to the passing of the Act (*o*).

The fact that a witness has been sworn in a manner contrary to the custom of his religion is no ground for a new trial; the witness, if he has sworn falsely, may be convicted of perjury (*p*).

Solemn declaration in lieu of oath.

803. A witness may object to be sworn on the ground that he has no religious belief, or that the taking of an oath is contrary to his religious belief, and may then be permitted to make a solemn declaration in lieu of an oath, which shall have the same force and effect in law as though the oath had been taken in the ordinary form (*q*). It is for the court to decide by questioning the witness whether he is entitled to take advantage of this provision (*r*), but where the witness has taken the oath without objection the fact

(*l*) See *R.* v. *Brazier* (1779), 1 Leach, 199; *A.-G.* v. *Bradlaugh* (1885), 14 Q. B. D. 667, C. A.

(*m*) *Omychund* v. *Barker* (1744), 1 Atk. 21; *Atcheson* v. *Everitt* (1776), 1 Cowp. 382; *Edmonds* v. *Rowe* (1824), Ry. & M. 77; *Maden* v. *Catanach* (1861), 7 H. & N. 360; *A.-G.* v. *Bradlaugh, supra;* see also 1 & 2 Vict. c. 105, s. 1. There is no prescribed form of oath, but the usual form for Christians is as follows: "The evidence which you shall give between the parties [*or* between our Sovereign Lord the King and the prisoner at the bar (felonies), *or* between our Sovereign Lord the King and the defendant (misdemeanours)] shall be the truth, the whole truth, and nothing but the truth, so help you God," the witness holding the Gospels, or the whole of the New Testament, in his naked hand. For variations of this method of swearing, which have been held good, see *Colt* v. *Dutton* (1657), 2 Sid. 6, cited Willes, 553; *R.* v. *Love* (1651), 5 State Tr. 43, 113. As to persons empowered to administer oaths, see Evidence Act, 1851 (14 & 15 Vict. c. 99), s. 16); Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. II., r. 26; R. S. C., Ord. 37, r. 19; Ord. 55, rr. 16, 17; Ord. 61, r. 5; Ord. 65, r. 27; 2 Taylor, Law of Evidence, 10th ed., s. 1386.

(*n*) *Omychund* v. *Barker, supra*, the witness saying "I do swear by Almighty God etc."; see *R.* v. *Morgan* (1764), 1 Leach, 54 (Mohammedan); *R.* v. *Gilham* (1795), 1 Esp. 285 (converted Jew); *R.* v. *Entrehman* (1842), Car. & M. 248 (Chinaman).

(*o*) 9 Edw. 7, c. 39.

(*p*) *Sells* v. *Hoare* (1822), 3 Brod. & Bing. 232.

(*q*) Oaths Act, 1888 (51 & 52 Vict. c. 46), s. 1. Prior to the Oaths Act, 1888, it was a rule of the common law that persons of no religious belief were incompetent as witnesses, being incapable of acknowledging the origination of an oath. See *Maden* v. *Catanach, supra; A.-G.* v. *Bradlaugh, supra; Nash* v. *Ali Khan* (1892), 8 T. L. R. 444, C. A.

(*r*) *R.* v. *Moore* (1892), 61 L. J. (M. C.) 80, C. C. R.

SECT. 4. Oath and Affirmation.

that he had at the time no religious belief is not to affect its validity in any way (*a*).

Oath in Scottish manner.

A witness may, at his own desire, be sworn in the Scottish manner with uplifted hand, instead of in the ordinary form (*b*).

Affirmation of Quakers and Moravians.

A special form of affirmation has long been permitted to members of the religious bodies of Quakers and Moravians (*c*), and even to persons who have ceased to belong to these bodies, but retain their views as to the unlawfulness of oaths (*d*).

Statutory declarations.

With regard to certain oaths required to be taken out of court and such voluntary declarations as may be required in confirmation of written instruments, proofs of debts, or other matters, all persons may, by the Statutory Declarations Act, 1835 (*e*), make a solemn declaration in place of an oath (*f*).

When judge or juror must be sworn.

804. A juryman (*g*) or a judge (at any rate if he is not the sole judge trying the case (*h*)), must be sworn before he can give evidence of any matter which is within his knowledge; and the rule is said to extend to the Sovereign himself (*i*).

Barristers.

805. A barrister is permitted to make a statement from the bar without being sworn on any matter within his knowledge in

(*a*) Oaths Act, 1888 (51 & 52 Vict. c. 46), s. 3.

(*b*) *Ibid.*, s. 5; and see *Rabey* v. *Birch* (1908), 72 J. P. 106. This Act obviates the necessity of a corporal oath which is an oath ratified by corporally touching a sacred object. The form of Scottish oath is as follows: "I swear by Almighty God as I shall answer to God at the great Day of Judgment that etc." (see circular of the Home Secretary, May 31st, 1893). For earlier cases of Scottish oaths, see *R.* v. *Mildrone* (1786), 1 Leach, 412; *R.* v. *Walker* (1788), 1 Leach, 498; *Mee* v. *Reid* (1790), Peake, 33 [23].

(*c*) Quakers and Moravians Act, 1833 (3 & 4 Will. 4, c. 49). The form is: "I, A. B., being one of the people called Quakers (*or* one of the persuasion of the people called Quakers, *or* of the United Brethren called Moravians), do solemnly, sincerely and truly declare and affirm that etc." (s. 1).

(*d*) Quakers and Moravians Act, 1838 (1 & 2 Vict. c. 77); this Act was passed in consequence of the decision in *R.* v. *Doran* (1838), 2 Mood. C. C. 37. The form is: "I, A. B., having been one of the people called Quakers, and entertaining conscientious objections to the taking of an oath, do solemnly etc."

(*e*) 5 & 6 Will. 4, c. 62.

(*f*) *Ibid.*, ss. 4, 18, 20. The form is: "I, A. B. of . . . do solemnly and sincerely affirm etc.," and the form in lieu of jurat is "affirmed at . . . this . . . day of . . . before me. . . ."

(*g*) *R.* v. *Rosser* (1836), 7 C. & P. 648; *Manley* v. *Shaw* (1840), Car. & M. 361.

(*h*) *R.* v. *Anderson* (1680), 7 State Tr. 811; *Hurpurshad* v. *Sheo Dyal* (1876), L. R. 3 Ind. App. 259.

(*i*) See *Abignye* v. *Clifton* (1611), Hob. 213, where a certificate of the Sovereign was received in place of an affidavit; it may be doubted whether this would be followed at the present day. There is no process known to the law by which the Sovereign could be summoned as a witness if he did not choose to come. For a case concerning the evidence not on oath of the Lord Lieutenant of Ireland, in Ireland, see *Birch* v. *Somerville* (1852), 2 I. C. L. R. 243. Though a peer when sitting in the House of Lords on the trial of a fellow peer for felony gives his verdict upon his honour, not upon oath, yet in an ordinary court he stands on the same footing as any other of the King's subjects (*Meers* (*Sir T.*) v. *Stourton* (*Lord*) (1711), 1 P. Wms. 146); see also title CONSTITUTIONAL LAW, Vol. VI., p. 373.

connection with the case, as, for example, when a question of his authority to enter into a compromise has arisen (*k*).

SECT. 5.—*Ordering out of Court.*

Power to order witnesses out of court.

806. At any time during the course of a trial, and on the application of either party (*l*), the judge may order witnesses in the case to leave the court (*m*). The power of doing so is discretionary in the judge, and is not a matter of right so far as the parties are concerned (*n*); and an application, for example, to order a witness out of court during the reading of an affidavit, which he has already seen, will not be granted (*o*).

At discretion of judge.

Parties excluded in exceptional circumstances.

There is some little doubt as to whether this power extends to the exclusion of parties in the case themselves (*p*), but the better opinion would seem to be that, though parties may now give evidence on their own behalf, a judge, while he may have the power, would only be justified in excluding them in exceptional circumstances (*a*). In criminal trials, however, a prosecutor is entitled to remain in court only in his capacity as prosecutor, and if he is a witness also he may be ordered to retire (*b*).

Legal adviser allowed to remain.

Expert witnesses.

A solicitor in the case, though a witness, is usually permitted to remain if his presence is necessary for the purpose of instructing counsel or the like (*c*); and it is the usual practice for witnesses who are called to give expert evidence, and not to speak to facts only, to be allowed to remain even though other witnesses are excluded (*d*).

Refusal to leave is contempt.

Refusal to leave the court when ordered is a contempt of court and punishable accordingly (*e*), but the witness is not thereby rendered incompetent, though the judge may direct the jury that the weight

(*k*) See title BARRISTERS, Vol. II., p. 396.

(*l*) *Southey* v. *Nash* (1837), 7 C. & P. 632.

(*m*) So also an examiner (*Re Western of Canada Oil, Lands and Works Co.* (1877), 6 Ch. D. 109); see p. 617, *post.*

(*n*) *R.* v. *Murphy* (1837), 8 C. & P. 297, 307; *Selfe* v. *Isaacson* (1858), 1 F. & F. 194. *Southey* v. *Nash*, *supra*, can no longer be regarded as correctly stating the law on this point.

(*o*) *Penniman* v. *Hill*, *Hill* v. *Penniman* (1876), 24 W. R. 245. As to exclusion by an arbitrator, see *Re Haigh's Estate*, *Haigh* v. *Haigh* (1862), 31 L. J. (CH.) 420.

(*p*) *Charnock* v. *Dewings* (1853), 3 Car. & Kir. 378; *Outram* v. *Outram*, [1877] W. N. 75.

(*a*) See 2 Taylor, Law of Evidence, 10th ed., s. 1400, where it is also pointed out that under R. S. C., Ord. 37, r. 11, a commissioner or special examiner must permit parties to be present through the examination, even though they are themselves witnesses; see also *Selfe* v. *Isaacson*, *supra*. As to examination by a commissioner or a special examiner, see p. 609, *post.*

(*b*) *R.* v. *Newman* (1852), Car. & Kir. 252.

(*c*) *Pomeroy* v. *Baddeley* (1826), Ry. & M. 430; *Everett* v. *Lowdham* (1831), 5 C. & P. 91; *Re Aughtie, Ex parte Dugard* (1835), 4 Deac. & Ch. 524 (petitioner in bankruptcy, who was also assignee, allowed to remain as being in position of solicitor in the cause, and his presence likely to be necessary for proper conduct of case).

(*d*) Roscoe, Criminal Evidence, 13th ed., 114; 2 Taylor, Law of Evidence, 10th ed., s. 1400.

(*e*) *Chandler* v. *Horne* (1842), 2 Mood. & R. 423; *Cobbett* v. *Hudson* (1852), 1 E. & B. 11.

SECT. 5. Ordering out of Court.

to be attached to his evidence is diminished (*f*). The rule formerly was that it was in the discretion of the judge whether his evidence was admitted or not (*g*), while in revenue cases in the Exchequer it was wholly rejected (*h*); but though there are no recent decisions on the latter point, it is probable that at the present time the practice in revenue cases would be assimilated to that in ordinary trials (*i*).

Hearing *in camerâ*.

Whenever it is reasonably clear that justice cannot be done unless a case is heard in private, the court, by reason of its inherent jurisdiction, has power to order that it be heard *in camerâ* (*k*).

SECT. 6.—*Examination in Chief, Cross-examination, and Re-examination.*

SUB-SECT. 1.—*Leading Questions.*

Examination.

807. A witness is examined in chief by or on behalf of the party for whom he is called to give evidence (*l*).

Leading questions.

Leading questions, that is to say, questions which by their form suggest the answer which it is desired that the witness shall give (*m*), are not permissible in an examination in chief (*n*). A question couched in an alternative form is not necessarily a leading question (*o*), and the rule has always been relaxed where evidence is being given of facts about which no dispute can possibly arise, or which are merely formal and in the nature of an introduction to the rest of the evidence which the witness proposes to give; such, for example, as his name, address, and calling (*p*). So, too, a witness's mind may be directed to a particular topic on which it is desired to examine him by a preliminary leading question (*q*), the limit of this indulgence

(*f*) *Cook* v. *Nethercote* (1835), 6 C. & P. 741; *Chandler* v. *Horne* (1842), 2 Mood. & R. 423.

(*g*) *Parker* v. *M'William* (1830), 6 Bing. 683; *Beamon* v. *Ellice* (1831), 4 C. & P. 585; *Thomas* v. *David* (1836), 7 C. & P. 350. In *R.* v. *Colley and Sweet* (1829), Mood. & M. 329, it was said to "depend on circumstances."

(*h*) *A.-G.* v. *Bulpit* (1821), 9 Price, 4; *Parker* v. *M'William, supra; Thomas* v. *David, supra.*

(*i*) See 2 Taylor, Law of Evidence, 10th ed., s. 1401.

(*k*) *D.* v. *D., D.* v. *D. and G.*, [1903] P. 144; *Mellor* v. *Thompson* (1885), 31 Ch. D. 55, C. A.; *Malan* v. *Young* (1889), 6 T. L. R. 38; Yearly Practice of the Supreme Court, 1911, Vol. I., p. 462; see title PRACTICE AND PROCEDURE.

(*l*) See p. 600, *post*, as to impeaching credit of witness, and occasions when it is permitted to a party to cross-examine his own witness.

(*m*) *Nicholls* v. *Dowding and Kemp* (1815), 1 Stark. 81.

(*n*) *Ibid.; Lincoln* v. *Wright* (1859), 28 L. J. (CH.) 705, C. A.; *Gregory* v. *Marychurch* (1850), 19 L. J. (CH.) 289.

(*o*) *Rowe* v. *Brenton* (1828), 3 Man. & Ry. (K. B.) 133, 212.

(*p*) *Nicholls* v. *Dowding and Kemp, supra.*

(*q*) *Courteen* v. *Towse* (1807), 1 Camp. 43; *Acerro* v. *Petroni* (1815), 1 Stark. 100; *Edmonds* v. *Walter* (1820), 3 Stark. 7. So, also, a witness's attention may be directed to an individual in court for the purpose of identifying him (*R.* v. *Watson* (1817), 2 Stark. 116, 128; *R.* v. *Berenger* (1814), 3 M. & S. 67, cited 2 Stark. 129, n. A witness called to explain ancient records may be asked to state the result of his examination of them, and may then be cross-examined on them in detail (*Rowe* v. *Brenton, supra*). As to proving a custom, see *Curtis* v. *Peek* (1864), 13 W. R. 230.

being a matter of discretion for the judge (*r*). But even if the question is one which contravenes the rules of evidence the witness is bound to answer, unless objection is taken to its admissibility (*s*).

A witness may, in general, give evidence only on matters of fact, and not on matters of his opinion or belief (*t*).

SUB-SECT. 2.—*Refreshing Memory.*

Reference to papers.

808. A witness is permitted to refresh his memory (*a*) in the course of his evidence by reference to documents or memoranda. By doing so he does not make them evidence (*b*); and it is, indeed, immaterial that they would not in fact be admissible in evidence if tendered as such (*c*).

What papers may be referred to.

But the document or memorandum must have been made by the witness contemporaneously with the facts about which he is testifying, or shortly afterwards, while the facts were still fresh in his memory (*d*), or, if not made by him personally, must have been made in his presence or assented to or checked by him (*e*).

(*r*) See *Bastin* v. *Carew* (1824), Ry. & M. 127.

(*s*) *Ex parte Fernandez* (1861), 10 C. B. (N. S.) 3.

(*t*) See p. 479, *ante*, and p. 607, *post*, as to evidence of opinion and expert evidence.

(*a*) But from early times he has never been permitted to give the whole of his evidence from writing (*Anon.* (1755), Amb. 252).

(*b*) *Kensington* v. *Inglis* (1807), 8 East, 273, 289; *Alcock* v. *Royal Exchange Assurance Co.* (1849), 13 Q. B. 292; *Payne* v. *Ibbotson* (1858), 27 L. J. (EX.) 341. A deposition taken before justices must be put in evidence if it is sought to contradict a witness for the prosecution by reference to it at the trial on behalf of the prisoner (*R.* v. *Ford* (1851), 5 Cox, C. C. 184, C. C. R.); *secus*, if it is used to refresh the memory of a witness on behalf of the prosecution (*R.* v. *Williams* (1853), 6 Cox, C. C. 343).

(*c*) *E.g.*, an unstamped receipt (*Jacob* v. *Lindsay* (1801), 1 East, 460; *Catt* v. *Howard* (1820), 3 Stark. 3; *Maugham* v. *Hubbard* (1828), 8 B. & C. 14; compare *Bolton* (*Lord*) v. *Tomlin* (1836), 5 Ad. & El. 856 (lease not complying with Statute of Frauds)).

(*d*) See *Kingston's* (*Duchess*) *Case* (1776), 20 State Tr. 537; 2 Smith, L. C., 11th ed., 731; *Kensington* v. *Inglis*, *supra*; *Jones* v. *Stroud* (1825), 2 C. & P. 196; *Hill* v. *Barry* (1842), 7 Jur. 10; and compare *Whitfield* v. *Aland* (1849), 2 Car. & Kir. 1015. Where a witness has taken notes of a conversation it is not necessary that they should be a *verbatim* report, provided they substantially reproduce what was said (*R.* v. *O'Connell* (1844), Armstrong & Trevor, 163).

(*e*) *Hiscox* v. *Batchellor* (1867), 15 L. T. 543; *Rambert* v. *Cohen* (1802), 4 Esp. 213 (receipt which witness saw given when money was paid); *Burrough* v. *Martin* (1809), 2 Camp. 112 (log book examined by witness from time to time shortly after events therein recorded); see also *Anderson* v. *Whalley* (1852), 3 Car. & Kir. 54; *Burton* v. *Plummer* (1834), 2 Ad. & El. 341 (entries copied daily from waste-book to ledger and checked by witness); *Bolton* (*Lord*) v. *Tomlin*, *supra* (document assented to in witness's presence); *Smith* v. *Morgan* (1839), 2 Mood. & R. 257 (deposition signed by witness after examination by commissioner of bankruptcy), following *Vaughan* v. *Martin* (1796), 1 Esp. 440; see also *Wood* v. *Cooper* (1845), 1 Car. & Kir. 645); *Dyer* v. *Best* (1866), 4 H. & C. 189 (witness who had read in newspaper shortly afterwards report of proceedings at which he had been present allowed to refer to newspaper to refresh his memory as to date of proceedings); *R.* v. *Mullins* (1848),

SECT. 6. Examination in Chief, Cross-examination, and Re-examination.

Documents made with a view to subsequently giving testimony therefrom cannot be referred to (*f*).

Documents may be read over to a witness who has become blind to refresh his memory (*g*).

It is apprehended that copies of documents may not be used to refresh the memory unless the original be lost or destroyed, or cannot for some sufficient reason be produced (*h*), and it is in every case necessary that the witness should be able to swear positively to the accuracy of the copy (*i*).

What copies may be referred to.

It is not, however, necessary that the witness should have any independent recollection of the facts to which he testifies and of which he seeks to refresh his memory, apart from the document to which he refers (*k*).

Documents must be produced at trial.

809. The document from which memory is refreshed must be produced at the trial in every case in which the witness has no independent recollection of the facts (*l*), and it is customary (though not necessary) to produce it in all cases, in order that the witness may be cross-examined upon it, if thought desirable, by the other party (*m*), who may not, however, look at those parts of the document which have not been used by the witness for the purpose

3 Cox, C. C. 526 (reports dictated by witness and afterwards read over and signed by him); *R.* v. *Langton* (1876), 2 Q. B. D. 296, C. C. R. (time-sheet used every week by witness in paying wages); *R.* v. *Dexter, Laidler* v. *Coates* (1899), 19 Cox, C. C. 361 (transcript of shorthand notes made by clerk and afterwards read over to witness). A witness may not refresh his memory by referring to proceedings in another court (*Halliday* v. *Holgate* (1867), 17 L. T. 18). In *Lawes* v. *Reed* (1835), 2 Lew. C. C. 152, a witness was allowed to refresh his memory from notes made by counsel on his brief; *sed quære.*

(*f*) *Anon.* (1753), cited by Lord KENYON, C.J., in *Doe* d. *Church* v. *Perkins* (1790), 3 Term Rep. 749, 752; *Jones* v. *Stroud* (1825), 2 C. & P. 196; *Steinkeller* v. *Newton* (1838), 9 C. & P. 313; *Re Sanders, Ex parte Wagstaff, Sayer* v. *Wagstaff* (1844), 13 L. J. (CH.) 161.

(*g*) *Catt* v. *Howard* (1820), 3 Stark. 3.

(*h*) See *Burton* v. *Plummer* (1834), 2 Ad. & El. 341; compare *Jones* v. *Stroud, supra* (copy made six months after original not permitted to be used, though original illegible). See also *Horne* v. *MacKenzie* (1839), 6 Cl. & Fin. 628, H. L. (report of surveyor compiled from original notes); *Topham* v. *M'Gregor* (1844), 1 Car. & Kir. 320 (extract from newspaper, original MS. being lost). *Tanner* v. *Taylor* (1756), cited by BULLER, J., in *Doe* d. *Church* v. *Perkins, supra*, at p. 754 (and see 1 Lew. C. C. 101), can scarcely stand in face of the later decisions.

(*i*) See *Talbot de Malahide (Lord)* v. *Cusack* (1864), 17 I. C. L. R. 213; and compare *Doe* d. *Church* v. *Perkins, supra*; *R.* v. *St. Martin's, Leicester (Inhabitants)* (1834), 2 Ad. & El. 210, 215; *Beech* v. *Jones* (1848), 5 C. B. 696; *Alcock* v. *Royal Exchange Assurance Co.* (1849), 13 Q. B. 292.

(*k*) *Haig* v. *Newton* (1817), 6 South Carolina Reports, 423; *R.* v. *St. Martin's, Leicester (Inhabitants), supra*; *Topham* v. *M'Gregor, supra.* In *Dupuy* v. *Trueman* (1843), 2 Y. & C. Ch. Cas. 341, and *Cator* v. *Croydon Canal Co.* (1841), 4 Y. & C. (EX.) 405, affirmed (1843), 13 L. J. (CH.) 89, the witness was not permitted to state his belief that certain transactions (of which he had no other knowledge) took place, by reason of the presence of entries in account books, but it seems doubtful whether in any case he could have spoken to the transactions of his own knowledge.

(*l*) *Howard* v. *Canfield* (1836), 5 Dowl. 417; *Beech* v. *Jones, supra.*

(*m*) *Kensington* v. *Inglis* (1807), 8 East, 273; *Sinclair* v. *Stevenson* (1824), 1 C. & P. 582; *Loyd* v. *Freshfield* (1826), 2 C. & P. 325; *Burton* v. *Plummer*

of assisting his memory (*n*). If, in fact, the other party go further, and cross-examine on other parts of the document, he makes it evidence in the case (*o*), but otherwise he does not (*p*). But he may not see the document at all, where the witness is in fact unable to refresh his memory even with its assistance, or where it is used only for the purpose of enabling a witness to identify handwriting (*q*), except for purposes of subsequent recognition or re-examination as to the handwriting (*r*), and therefore, if he does more, he makes it his own evidence (*s*).

SUB-SECT. 3.—*Cross-examination.*

When cross-examination takes place.

810. The cross-examination of a witness (unless postponed by leave of the judge) follows immediately upon the examination in chief (*t*), and evidence in chief is of little or no value until sifted by the process of cross-examination (*a*). A witness, once sworn (*b*) in a proceeding in the High Court, is liable to be cross-examined, even though he has not given evidence or been asked any questions in chief (*c*), unless he has been called by mistake and not examined in consequence of the mistake being discovered (*d*).

Where, however, a witness is with the consent of the parties (*e*) called and examined by the judge, and not by either of the parties, he cannot be cross-examined save at the judge's discretion (*f*); and

(1834), 2 Ad. & El. 341; *Dupuy* v. *Trueman* (1843), 2 Y. & C. Ch. Cas. 341.

(*n*) *Burgess* v. *Bennett* (1872), 20 W. R. 720.

(*o*) *Gregory* v. *Tavernor* (1833), 6 C. & P. 280; *Stevens* v. *Foster* (1833), 6 C. & P. 289; *Calvert* v. *Flower* (1836), 7 C. & P. 386.

(*p*) *R.* v. *Ramsden* (1827), 2 C. & P. 603; *Payne* v. *Ibbotson* (1858), 27 L. J. (EX.) 341.

(*q*) *Sinclair* v. *Stevenson* (1824), 1 C. & P. 582; *Russell* v. *Rider* (1834), 6 C. & P. 416.

(*r*) *Holland* v. *Reeves* (1835), 7 C. & P. 36; *R.* v. *Duncombe* (1838), 8 C. & P. 369; *Peck* v. *Peck* (1870), 21 L. T. 670.

(*s*) *Palmer* v. *Maclear* (1858), 1 Sw. & Tr. 149.

(*t*) *Beatagh* v. *Beatagh* (1824), Hog. 98. As to cross-examination of a witness by the party calling him, see p. 600, *post*.

(*a*) See *Allen* v. *Allen*, [1894] P. 248, 253, C. A.

(*b*) *Davis* v. *Dale* (1830), 4 C. & P. 335; *Summers* v. *Moseley* (1834), 3 L. J. (EX.) 128 (witness only called to produce document on *subpœna duces tecum*); *Perry* v. *Gibson* (1834), 1 Ad. & El. 48; *Griffith* v. *Lunell*, *Griffith* v. *Ricketts* (1849), 19 L. J. (CH.) 399. So, too, in the High Court, a witness who has made an affidavit which has been filed as evidence may be cross-examined, though it be subsequently withdrawn (*Re Quartz Hill etc. Co.*, *Ex parte Young* (1882), 21 Ch. D. 642, C. A., following *Clarke* v. *Law* (1855), 2 K. & J. 28); but not so in the Court of Bankruptcy (*Re Ottaway*, *Ex parte Child* (1882), 20 Ch. D. 126, C. A.).

(*c*) *Phillips* v. *Middlesex Sheriff* (1795), 1 Esp. 355; *Reed* v. *James* (1815), 1 Stark. 132; *R.* v. *Brook* (1819), 2 Stark. 472; *Wood* v. *Mackinson* (1840), 2 Mood. & R. 273; *Newton* v. *Belcher* (1848), 18 L. J. (Q. B.) 53.

(*d*) *Clifford* v. *Hunter* (1827), 3 C. & P. 16 (wrong witness called owing to a mistake in name); *Rush* v. *Smith* (1834), 3 L. J. (EX.) 355; *Wood* v. *Mackinson*, *supra* (witness called by counsel's mistake).

(*e*) Neither a judge nor an arbitrator has any right to call a witness in a civil action without the consent of the parties (*Re Enoch and Zaretsky*, *Bock & Co.'s Arbitration*, [1910] 1 K. B. 327, C. A.).

(*f*) *Coulson* v. *Disborough*, [1894] 2 Q. B. 316, C. A. As to the cross-examination of witnesses called to give evidence as to a company in liquidation, see *Re Greys Brewery Co.* (1883), 25 Ch. D. 400.

SECT. 6. Examination in Chief, Cross-examination, and Re-examination.

it seems that a witness cannot be cross-examined where the judge has stopped the examination in chief after a single immaterial question has been put and answered (*g*).

A defendant may cross-examine his co-defendant (*h*), or any of his co-defendant's witnesses (*i*), if his co-defendant's interest is hostile to his own (*j*).

Relaxation of rules.

811. The more rigid rules governing the examination in chief are relaxed in the case of cross-examination, and leading questions may freely be asked, and must be answered (*k*), though it is not permissible to put the actual words into the witness's mouth for him to repeat (*l*), or to mislead him by false assumptions or actual misstatements (*m*). Provided the questions are relevant to the matters in issue (*n*), they need not be confined to the subject-matter of the evidence already given by the witness in chief (*o*); and it seems that where one party has examined a witness in chief, who is afterwards called by the other party as his own witness, he is, nevertheless, liable to be cross-examined by the party who first called him (*p*).

Not only questions which are relevant to the actual issues in the case, but any question tending to impeach the credit or veracity of the witness may be asked in cross-examination, for this is a material consideration in weighing the value to be placed upon his evidence (*q*). During the progress of the cross-examination the judge may always disallow questions which appear to him to be vexatious, and not relevant to any matter proper to be inquired into in the case before him (*r*), and in certain classes of cases

(*g*) *Creevy* v. *Carr* (1835), 7 C. & P. 64, *sed quære;* although the judge in refusing leave to cross-examine is reported to have said that he stopped the witness's evidence, yet the report itself seems to show that counsel closed his case voluntarily after asking the one question.

(*h*) *Allen* v. *Allen*, [1894] P. 248.

(*i*) *Lord* v. *Colvin* (1855), 3 Drew. 222; *R.* v. *Hadwen*, [1902] 1 K. B. 882, C. C. R.

(*j*) *Dunhill* v. *Dunhill* (1894), 29 L. J. N. C. 368.

(*k*) *Parkin* v. *Moon* (1836), 7 C. & P. 408.

(*l*) *R.* v. *Hardy* (1794), 24 State Tr. 199, *per* BULLER, J., at p. 755.

(*m*) See Starkie on Evidence, 4th ed., 197, citing *Hill* v. *Coombe* (1818); *Handley* v. *Ward* (1818).

(*n*) *Haigh* v. *Belcher* (1836), 7 C. & P. 389; *Tennant* v. *Hamilton* (1839), 7 Cl. & Fin. 122, H. L.; *Lever & Co.* v. *Goodwin Brothers*, [1887] W. N. 107; but counsel may undertake to show by subsequent evidence that questions apparently irrelevant are not so in fact (*Haigh* v. *Belcher, supra*).

(*o*) *Morgan* v. *Brydyes* (1818), 2 Stark. 314; *Berwick Corporation* v. *Murray* (1850), 19 L. J. (CH.) 281. This is the better opinion, and represents existing practice, but there are decisions the other way; see *Ely* (*Dean and Chapter*) v. *Stewart* (1740), 2 Atk. 44; *Re Woodfine, Thompson* v. *Woodfine* (1878), 47 L. J. (CH.) 832. In this case the judge directed defendant, who was counter-claiming, to recall plaintiff as his own witness, and not to cross-examine him on the matters raised by the counter-claim).

(*p*) *Lord* v. *Colvin, supra;* see, *contra*, however, in *Dickinson* v. *Shee* (1801), 4 Esp. 67.

(*q*) As to impeaching credit of witness, see p. 600, *post*.

(*r*) See R. S. C., Ord. 36, r. 38. The R. S. C. only apply to High Court proceedings, but this rule is probably no more than declaratory of the discretion which the court has always and of necessity possessed (compare *Re Mundell, Fenton* v. *Cumberlege* (1883), 48 L. T. 776), and the principle which it lays down would doubtless be adopted by every kind of tribunal in this country.

cross-examination is limited in accordance with definite rules of practice (*s*).

SUB-SECT. 4.—*Re-examination.*

Re-examination.

812. On the conclusion of the cross-examination, a witness may be re-examined on behalf of the party for whom he has given evidence in chief for the purpose of explaining any part of his evidence given during cross-examination which is capable of being construed unfavourably to his own side (*t*); but no questions may be asked in re-examination which introduce wholly new matters (*u*). Where, however, questions asked in cross-examination let in evidence which would not have been admissible in chief, the witness may be re-examined upon it (*a*).

SUB-SECT. 5.—*Further Evidence.*

Powers of judge and jury.

813. The judge may (but in a civil case not without the consent of the parties (*b*)) call any witness whose evidence he thinks likely to elucidate the truth (*c*), or may recall any witness who has already given evidence to ask him further questions (*d*); and questions may be put by the jury to a witness (*e*). The parties themselves can only recall a witness at the discretion of the judge (*f*).

Fresh evidence.

Leave will be given to a party, even after his own case is closed, to call fresh evidence when he has been taken by surprise in the course of his opponent's conduct of his own case (*g*).

(*s*) *E.g.*, in cross-examination upon an account, notice of the items to which cross-examination will be directed must be given (*Bates* v. *Eley* (1876), 1 Ch. D. 473), and must specify the points and not only the items (*Arthur* v. *Dudgeon* (1872), L. R. 15 Eq. 102), and in the winding up of a company contributories are limited in their cross-examination of a person claiming to be a creditor to matters referred to in the affidavit in support of his claim (*Re Brampton and Longtown Rail. Co.* (1871), L. R. 11 Eq. 428).

(*t*) See *The Queen's Case* (1820), 2 Brod. & Bing. 284, 297, H. L.; *Dicas* v. *Brougham* (*Lord*) (1833), 6 C. & P. 249; *R.* v. *St. George* (1840), 9 C. & P. 483, 488; *Dunn* v. *Aslett* (1838), 2 Mood. & R. 122.

(*u*) *The Queen's Case, supra* (witness cross-examined as to whether he had not stated that he was to be one of the witnesses to the prosecution can only be asked what induced him to make the statement); *Dicas* v. *Brougham* (*Lord*), *supra* (witness admitting in cross-examination a conversation with defendant may be re-examined as to whole of conversation; *secus*, if he denies that he had any such conversation at all); *Prince* v. *Samo* (1838), 7 Ad. & El. 627 (if cross-examined as to a particular statement only, witness may not be re-examined on other statements in some conversation unconnected with the one spoken to).

(*a*) *Blewett* v. *Tregonning* (1835), 5 Nev. & M. (K. B.) 308.

(*b*) See p. 597, note (*e*), *ante*. In a criminal case if neither the prosecutor nor the prisoner puts in the depositions the judge may direct the attention of the jury to them as qualifying the other evidence (*R.* v. *Garner* (1890), 54 J. P. 424).

(*c*) *The Queen's Case, supra*; *R.* v. *Cliburn* (1898), 62 J. P. 232; *Bevan* v. *M'Mahon* (1859), 28 L. J. (P. & M.) 40; *Budd* v. *Davison* (1881), 29 W. R. 192; *Coulson* v. *Disborough*, [1894] 2 Q. B. 316, C. A.

(*d*) *R.* v. *Remnant* (1807), Russ. & Ry. 136; *R.* v. *Watson* (1834), 6 C. & P. 653; *Middleton* v. *Barned* (1849), 4 Exch. 241.

(*e*) *R.* v. *Lillyman*, [1896] 2 Q. B. 167, 177, C. C. R.

(*f*) *Cattlin* v. *Barker* (1847), 5 C. B. 201; *Adams* v. *Bankart* (1835), 1 Cr. M. & R. 681.

(*g*) *Bigsby* v. *Dickinson* (1876), 4 Ch. D. 24, C. A. The plaintiff will not

SECT. 7.
Impeaching Credit of Witness.

SECT. 7.—*Impeaching Credit of Witness.*

SUB-SECT. 1.—*Of Party's own Witness.*

Impeaching credit.

814. In certain circumstances a party is permitted to cross-examine or contradict a witness whom he has himself called.

Of party's own witness.

A party producing a witness is not allowed (*h*) to impeach his credit by general evidence of bad character (*i*), but if in the opinion of the judge the witness prove adverse, the party calling him may contradict him by other evidence, or by leave of the judge prove that the witness has, at other times, made a statement inconsistent with his present testimony. Before giving proof of this the circumstances of the alleged statement (sufficient to designate the particular occasion) must be mentioned to the witness, and he must then be asked whether or not he made the statement (*k*).

Hostile witness.

By an "adverse" witness is meant one who is hostile to the party calling him (*l*), and who, by his manner of giving evidence, shows that he is not desirous of telling the court the truth (*m*). Whether he shows himself so hostile as to justify his cross-examination by the party calling him is a matter for the discretion of the judge (*n*), and this is so even where a party calls a witness who must of necessity be adverse to him, as, for example, his opponent in the case (*o*).

The better opinion is that where a party contradicts his own

usually be allowed to call defendant as a witness after the case of the latter is closed, unless there has been a representation that defendant would be called to support his own case (*Barker* v. *Furlong*, [1891] 2 Ch. 172). As to calling further evidence, see also title PRACTICE AND PROCEDURE.

(*h*) Criminal Procedure Act, 1865 (28 & 29 Vict. c. 18), s. 3; replacing the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 22, which was finally repealed by the Statute Law Revision Act, 1892 (55 & 56 Vict. c. 19).

(*i*) This was the existing law (*Ewer* v. *Ambrose* (1825), 3 B. & C. 746).

(*k*) Criminal Procedure Act, 1865 (28 & 29 Vict. c. 18), s. 3. S. 1 of the Act applies the rule to civil as well as to criminal cases. The doubt in the earlier decisions had been as to the right to prove prior inconsistent statements; the right to contradict on relevant facts was not disputed (see *Ewer* v. *Ambrose*, *supra*; *Wright* v. *Beckett* (1834), 1 Mood. & R. 414; *Dunn* v. *Aslett* (1838), 2 Mood. & R. 122; *Holdsworth* v. *Dartmouth Corporation* (1838), 2 Mood. & R. 153; *Winter* v. *Butt* (1841), 2 Mood. & R. 357; *Melhuish* v. *Collier* (1850), 15 Q. B. 878).

(*l*) *Greenough* v. *Eccles* (1859), 5 C. B. (N. S.) 786. It has been said that where a party calls two equally credible witnesses who contradict each other it is not open to him to discredit one and accredit the other (*Sumner* v. *John Brown & Co.* (1909), 25 T. L. R. 745).

(*m*) *Coles* v. *Coles and Brown* (1866), L. R. 1 P. & D. 70. See also *Parkin* v. *Moon* (1836), 7 C. & P. 408; *R.* v. *Ball* (1839), 8 C. & P. 745; *R.* v. *Murphy* (1837), 8 C. & P. 297; *Dear* v. *Knight* (1859), 1 F. & F. 433.

(*n*) *Ohlsen* v. *Terrero* (1874), 10 Ch. App. 127; *Rice* v. *Howard* (1886), 16 Q. B. D. 681; *Price* v. *Manning* (1889), 42 Ch. D. 372, C. A., disapproving a *dictum* of BEST, C.J., to the contrary, in *Clarke* v. *Saffery* (1824), Ry. & M. 126.

(*o*) *Price* v. *Manning*, *supra*. Where a witness gave evidence contradicting his proof he was treated as hostile (*Amstell* v. *Alexander* (1867), 16 L. T. 830; contrast *Reed* v. *King* (1879), 30 L. T. 299; and see *Pound* v. *Wilson* (1865), 4 F. & F. 301; *Jackson* v. *Thomason* (1862), 31 L. J. (Q. B.) 11, differently reported 1 B. & S. 745).

witness on one part of his evidence he does not thereby throw over all the witness's evidence, though its value may be impaired in the eyes of the jury (*p*).

SECT. 7. Impeaching Credit of Witness.

SUB-SECT. 2.—*Of Opponent's Witness.*

815. In the course of cross-examination a witness may be asked any question tending to impeach his character or credit, but unless such questions not only affect the credit of the witness, but are also relevant to the matters actually in issue in the case, the witness's answers are conclusive, and cannot be contradicted by other evidence (*q*), save in the cases referred to below. It is often a matter of some difficulty to decide whether a question relating to a witness's character is at the same time relevant to the issue before the court. Thus, on a charge of rape the prosecutrix may be contradicted if she denies previous connection with the prisoner, for that may be material on the question of consent in the case under investigation (*r*); but her answer is conclusive if she denies connection with other men, for in that case the question only goes to her character and credit (*s*). There are, also, certain limits which must be determined by the discretion of the judge to the questions which may be asked even affecting a witness's credit; thus, a question as to a witness's religious belief has been held not to be admissible to impeach credit, though tendered with that object (*t*).

Impeaching credit of opponent's witness.

Questions must be relevant to issue.

A witness who has not been examined in chief cannot be cross-examined to credit at all, since the object of such cross-examination is to impair the value which might otherwise attach to evidence already given (*a*).

Witness must have been examined.

816. In three cases, a witness's answers are not conclusive, but may be contradicted.

When answers may be contradicted.

First, a witness, provided he is not himself charged with an offence to which the proceedings relate (*b*), may be questioned as to whether he has been convicted of any felony or misdemeanour (*c*), and if he denies or does not admit the fact, the conviction may be proved,

Denial or non-admission of conviction.

(*p*) See *Bradley* v. *Ricardo* (1831), 8 Bing. 57, disapproving the contrary view expressed in *Alexander* v. *Gibson* (1811), 2 Camp. 555; *contra*, *Faulkner* v. *Brine* (1858), 1 F. & F. 254, where, however, *Bradley* v. *Ricardo*, *supra*, was not cited.

(*q*) *Harris* v. *Tippett* (1811), 2 Camp. 637; *R.* v. *Yewin* (1811), 2 Camp. 638, n.; *R.* v. *Watson* (1817), 2 Stark. 116, 149; *Spenceley* v. *Willott* (1806), 7 East, 108; *Tennant* v. *Hamilton* (1839), 7 Cl. & Fin. 122, H. L.; *A.-G.* v. *Hitchcock* (1847), 1 Exch. 91; *Farmer* v. *Trower* (1853), 22 L. J. (EX.) 22; *Goddard* v. *Parr* (1855), 24 L. J. (CH.) 783; *Tolman* v. *Johnstone* (1860), 2 F. & F. 66; *Baker* v. *Baker* (1863), 32 L. J. (P. M. & A.) 145; *Re Haggenmacher's Patents*, [1898] 2 Ch. 280.

(*r*) *R.* v. *Martin* (1834), 6 C. & P. 562; *R.* v. *Holmes* (1871), L. R. 1 C. C. R. 334.

(*s*) *R.* v. *Hodgson* (1812), Russ. & Ry. 211; *R.* v. *Holmes*, *supra*.

(*t*) *Darby* v. *Ouseley* (1856), 1 H. & N. 1; and see *R.* v. *Bernard* (1858), 1 F. & F. 240; *Seaman* v. *Netherclift* (1876), 2 C. P. D. 53, C. A.

(*a*) *Bracegirdle* v. *Bailey* (1859), 1 F. & F. 536.

(*b*) *Charnock* v. *Merchant*, [1900] 1 Q. B. 474.

(*c*) Criminal Procedure Act, 1865 (28 & 29 Vict. c. 18), s. 6; replacing Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 25.

SECT. 7. **Impeaching Credit of Witness.**

and a certificate signed by the proper officer of the court where the conviction took place is sufficient evidence of the conviction, provided evidence of identity is also given (*d*).

By previous verbal statement.

Secondly, a witness may be asked in cross-examination whether he has made at any previous time a statement inconsistent with his present evidence, and if he denies or does not admit it, or refuses to answer, proof of such prior statement may be given; but the circumstances of the alleged statement sufficient to designate the particular occasion must first be given. A witness may also be cross-examined as to previous statements made by him in writing, without the statements being shown to him (*e*); but if it is intended to contradict him by such writing, his attention must first be called to those parts of the writing which are to be used for that purpose, and the judge may at any time require production of the writing for his own inspection (*f*). It seems that if the writing be lost or be not in the possession of the party cross-examined, he may interpose evidence out of turn, either to prove it in the latter case, or to give secondary evidence of it in the former (*g*).

Any previous written statement.

Denial of implication of partiality.

Thirdly, evidence may be given to contradict a witness who denies the truth of questions tending to show that he is not impartial, or that for some reason or other he has a bias in favour of, or against, one of the parties to the action, as, for example, that he has been bribed (*h*).

Evidence of general veracity.

It is also permissible, with a view to impeaching a witness's credit, to bring forward evidence of a general reputation for untruthfulness, though not of particular facts from which the inference of untruthfulness might be drawn (*i*); and in any event such evidence must be given by persons well acquainted with the witness, and not by a stranger who has merely made inquiries as to the witness's reputation among his neighbours (*k*).

(*d*) Criminal Procedure Act, 1865 (28 & 29 Vict. c. 18), s. 6; *R.* v. *Parsons* (1866), L. R. 1 C. C. R. 24; *Ward* v. *Sinfield* (1880), 49 L. J. (Q. B.) 696; *R.* v. *Baker*, [1895] 1 Q. B. 797, 800, C. C. R.; compare *Police Commissioner* v. *Donovan*, [1903] 1 K. B. 895.

(*e*) He cannot demand to see it first (*North Australian Territory Co.* v. *Goldsborough, Mort & Co.*, [1893] 2 Ch. 381, C. A.).

(*f*) Criminal Procedure Act, 1865 (28 & 29 Vict. c. 18), s. 5; replacing Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 23; and see *Farrow* v. *Blomfield* (1859), 1 F. & F. 653.

(*g*) *Calvert* v. *Flower* (1836), 7 C. & P. 386; *A.-G.* v. *Bond* (1839), 9 C. & P. 189; *Davies* v. *Davies* (1840), 9 C. & P. 252; *R.* v. *Shellard* (1840), 9 C. & P. 277.

(*h*) *A.-G.* v. *Hitchcock* (1847), 1 Exch. 91; see also *The Queen's Case* (1820), 2 Brod. & Bing. 284, 311 (witness suborned); *R.* v. *Shaw* (1888), 16 Cox, C. C. 503 (witness at enmity with other party). An extreme case is *Thomas* v. *David* (1836), 7 C. & P. 350, where a witness was the mistress of the party for whom she gave evidence.

(*i*) *R.* v. *Brown and Hedley* (1867), L. R. 1 C. C. R. 70; *Stebbings* v. *London and North Western Rail. Co.* (1899), 63 J. P. 138; compare *R.* v. *Riley* (1887), 18 Q. B. D. 481. The character of a witness who is called to impeach that of another may itself be impeached, but the process may not be carried further (*R.* v. *Five Popish Lords* (1685), 7 State Tr. 1218, 1459; *R.* v. *Murphy* (1753), 19 State Tr. 694, 724; *R.* v. *Whelan* (1881), 14 Cox, C. C. 595; and see 2 Taylor, Law of Evidence, 10th ed., s. 1473).

(*k*) *Manson* v. *Heartsink* (1803), 4 Esp. 103.

SUB-SECT. 3.—*Re-establishing Credit of Witness.* SECT. 7.

Impeaching Credit of Witness.

817. General evidence of good character and reputation is admissible subsequent to the cross-examination of the witness where his character for truthfulness has been impugned (*l*), but here also evidence will not be admitted from which merely an inference might be drawn that the witness has been a witness of truth (*m*); and evidence of good character does not become admissible if the cross-examination goes no further than to show that the witnesses contradict one another (*n*).

Re-establishing credit.

SECT. 8.—*Corroboration.*

818. In certain cases the court will not act upon the evidence of a single witness, but requires corroboration (*o*). This is so in trials for treason (*p*) and perjury (*q*); to a certain extent, where the evidence is that of an accomplice in crime (*r*); where evidence not upon oath is given by a child of tender years (*s*); and in bastardy proceedings (*t*).

When corroboration required.

In actions for breach of promise of marriage there must be material corroboration of the plaintiff's evidence (*a*).

Breach of promise.

In proceedings for the removal of paupers in respect of a settlement acquired by three years' residence, no order for removal may be made upon the evidence of the person to be removed without such corroboration as the court shall think sufficient (*b*).

Removal of paupers.

In cases in ecclesiastical courts it seems that it is still the practice to require corroboration of the evidence of a single witness, at any rate where charges of immorality are made (*c*).

Ecclesiastical offences.

In cases under the Motor Car Act, 1903, a person may not be convicted on the opinion of a single witness as to the rate of speed (*d*).

Excessive speed of motor car.

(*l*) *Craig* d. *Annesley* v. *Anglesea* (*Earl*) (1743), 17 State Tr. 1139, 1348; *Doe* d. *Walker* v. *Stephenson* (1801), 3 Esp. 284; *Durham* (*Bishop*) v. *Beaumont* (1808), 1 Camp. 207; *R.* v. *Clarke* (1817), 2 Stark. 241.

(*m*) *R.* v. *Parker* (1783), 3 Doug. (K. B.) 242.

(*n*) *Durham* (*Bishop*) v. *Beaumont*, *supra*.

(*o*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 388.

(*p*) *Ibid.*, p. 456.

(*q*) *Ibid.*, p. 494. The evidence of a witness who swears that he has already perjured himself carries no weight (*Ex parte Lord* (1750), 2 Ves. Sen. 26).

(*r*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 408.

(*s*) See note (*s*), p. 569, *ante*.

(*t*) See title BASTARDY, Vol. II., p. 448.

(*a*) Evidence Further Amendment Act, 1869 (32 & 33 Vict. c. 68), s. 2; *Bessela* v. *Stern* (1877), 2 C. P. D. 265, C. A.; *Hickey* v. *Campion* (1872), 20 W. R. 752. The mere refusal to answer letters asserting a promise to marry is not, in the absence of other circumstances, sufficient corrobration (*Wiedemann* v. *Walpole*, [1891] 2 Q. B. 534, C. A.; *Spooner* v. *Godfrey* (1908), *Times*, 16th October, C. A.); nor the giving of a ring (*Spooner* v. *Godfrey*, *supra*; compare *May* v. *Kelly* (1897), 31 I. L. T. Jo. 67).

(*b*) Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 34; *R.* v. *Abergavenny Union* (1880), 6 Q. B. D. 31. See also title POOR LAW.

(*c*) See *Norwich* (*Bishop*) v. *Berney* (1866), 36 L. J. (ECCL.) 8; *Moore* v. *Oxford* (*Bishop*), [1904] A. C. 283, P. C. (a case under the Clergy Discipline Act, 1892 (55 & 56 Vict. 32), s. 2. As to such charges, generally, see title ECCLESIASTICAL LAW, Vol. XI., p. 523.

(*d*) 3 Edw. 7, c. 36, s. 9. But a single policeman may give evidence as to

SECT. 8. **Corroboration.**

Claims against deceased.

Claims against the estate of a deceased person usually require to be corroborated by other evidence than that of the plaintiff himself, but the rule is one of practice rather than of law (*e*). Where there is substantial corroboration of the evidence of an interested party, it confirms the credit not only of the statements which are expressly supported, but of all statements made by him (*f*); but where two persons make a joint claim, the evidence of each is not a sufficient corroboration of the evidence of the other (*g*).

Weight of evidence to be considered.

In all other cases the question is one of the weight to be attached to the evidence actually tendered; and circumstances may cause the court to place but little reliance on evidence which is not only admissible, but might otherwise be sufficient for purposes of proof. Thus, the evidence of an attesting witness to a will who impeaches the sanity of the testator (*h*), of a witness who has signed a receipt but alleges that the money was never paid (*i*), of a witness whose testimony is inconsistent with his previous conduct (*k*), will be regarded with suspicion unless corroboration is forthcoming; and where the burden of proof lies on one party, he will not be held to have discharged it unless the evidence which he produces is of a sufficiently trustworthy character to discharge the burden (*l*).

SECT. 9.—*Attesting Witnesses, when required to be called.*

When attesting witness must be called.

819. It is unnecessary (*m*) to prove by the attesting witness any instrument which, though attested, does not depend upon attestation for its validity (*n*). In the case of instruments which are required

the time marked on his stop-watch, for that is evidence of fact, not of opinion (*Plancq* v. *Marks* (1906), 94 L. T. 577; compare *Gorham* v. *Brice* (1902), 18 T. L. R. 424).

(*e*) *Re Hodgson, Beckett* v. *Ramsdale* (1885), 31 Ch. D. 177, C. A.; *Rawlinson* v. *Scholes* (1898), 79 L. T. 350, dissenting from *Re Finch, Finch* v. *Finch* (1883), 23 Ch. D. 267, C. A.; compare *Re Garnett, Gandy* v. *Macaulay* (1885), 31 Ch. D. 1, C. A., and *Minister of Stamps* v. *Townend*, [1909] A. C. 633, P. C. The earlier cases rather state the rule as one of law (*Grant* v. *Grant* (1865), 34 Beav. 623; *Down* v. *Ellis* (1865), 35 Beav. 578; *Rogers* v. *Powell* (1869), 38 L. J. (CH.) 648; *Hill* v. *Wilson* (1873), 8 Ch. App. 888; *Re Whittaker, Whittaker* v. *Whittaker* (1882), 21 Ch. D. 657). As to administration of such estates, see title EXECUTORS AND ADMINISTRATORS.

(*f*) *Minister of Stamps* v. *Townend, supra*, at p. 638.

(*g*) *Vavasseur* v. *Vavasseur* (1909), 25 T. L. R. 250; the head-note in this case states the rule as one of law, though the judgment itself does not go so far, and is certainly not inconsistent with the principle as stated in the text.

(*h*) *Howard* v. *Braithwaite* (1812), 1 Ves. & B. 202.

(*i*) *Re Farrow's Estate* (1856), 22 Beav. 400; compare *Gill* v. *Gill*, [1907] S. C. 532.

(*k*) *Re Barr's Trusts* (1858), 4 K. & J. 212; *Rowley* v. *Rowley* (1854), 23 L. J. (CH.) 275.

(*l*) See *Forrest* v. *Forrest* (1865), 5 New Rep. 299, where the plaintiff sought to prove his case by uncorroborated evidence of an oral admission by the defendant (*Re Warwick, Ex parte Jackson* (1839), Mont. & Ch. 263, 271), where the reliance to be placed on evidence of prior intention is discussed. As to evidence of adultery in matrimonial suits, see title HUSBAND AND WIFE.

(*m*) See Criminal Procedure Act, 1865 (28 & 29 Vict. c. 18), s. 8. By s. 1 of the Act its provisions with regard to evidence are applied to all courts.

(*n*) *Ibid.*, s. 7. But all the parties must be before the court, or the stricter rule applies (*Re Reay's Estate* (1855), 3 W. R. 312; *Re Mair's Estate* (1873), 42 L. J. (CH.) 882; *Re Rice* (*a Person of Unsound Mind*) (1886), 32 Ch. D. 35, C. A.; *Worthington* v. *Moore* (1891), 64 L. T. 338).

SECT. 9. Attesting Witnesses, when required to be called.

by law to be attested, the attesting witness must be called (*o*), save in certain cases applicable to all classes of such instruments alike (*p*) and also in the particular case of shipping documents, which may be proved by any person who can give evidence as to the requisite facts without calling the attesting witness or witnesses, even though attestation is necessary to give validity to the document (*q*).

When strict proof required.

The party against whom the instrument is tendered may always demand strict proof of it (*r*), and may not himself be called as a witness by his opponent for the purpose of obtaining an admission of its due execution (*s*).

When secondary evidence admissible.

Secondary evidence of attestation is only admissible where the attesting witness cannot be called at the trial (*t*); but it is immaterial that the instrument itself is destroyed or even cancelled (*a*); and even an attesting witness who has become blind must be called (*b*).

Contradiction of attesting witness.

An attesting witness who denies attestation or execution may be contradicted by other evidence (*c*); and when it appears that the

(*o*) It is not necessary to call more than one of several attesting witnesses (*Holdfast* d. *Anstey* v. *Dowsing* (1746), 2 Stra. 1253; *Forster* v. *Forster* (1864), 33 L. J. (P. M. & A.) 113); save in the case of wills of realty, where, in general, it appears to be necessary to call both witnesses (*Ogle* v. *Cook* (1748), 1 Ves. Sen. 177; *Grayson* v. *Atkinson* (1752), 2 Ves. Sen. 454, 460; *Bootle* v. *Blundell* (1815), 19 Ves. 494; *M'Gregor* v. *Topham* (1850), 3 H. L. Cas. 132, 155); but this exception can scarcely be regarded as a rigid rule of law, and where circumstances render it necessary it will be relaxed; see *Lowe* v. *Jolliffe* (1762), 1 Wm. Bl. 365; *Belbin* v. *Skeats* (1858), 27 L. J. (P. & M.) 56; *Andrew* v. *Motley* (1862), 12 C. B. (N. S.) 526; *Tatham* v. *Wright* (1831), 2 Russ. & M. 1).

(*p*) See p. 606, *post*.

(*q*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 694.

(*r*) *Abbot* v. *Plumbe* (1779), 1 Doug. (K. B.) 216; *Breton* v. *Cope* (1791), Peake, 43 [31]; *Johnson* v. *Mason* (1794), 1 Esp. 89; *Call* v. *Dunning* (1803), 4 East, 53; *R.* v. *Harringworth* (*Inhabitants*) (1815), 4 M. & S. 350, 353; *Gillies* v. *Smither* (1819), 2 Stark. 528; *Mounsey* v. *Burnham* (1841), 1 Hare, 15.

(*s*) *Whyman* v. *Garth* (1853), 8 Exch. 803. See *infra*, as to when an admission dispenses with the necessity of proof.

(*t*) *E.g.*, if the witness is dead (*Anon.* (1701), 12 Mod. Rep. 607; *Adam* v. *Kerr* (1798), 1 Bos. & P. 360; *Nelson* v. *Whittall* (1817), 1 B. & Ald. 19; *R.* v. *St. Giles, Camberwell* (*Inhabitants*) (1853), 1 E. & B. 642; *Baxendale* v. *de Valmer* (1887), 57 L. T. 556; *Byles* v. *Cox* (1896), 74 L. T. 222; *In the Goods of Peverett* (1902), 87 L. T. 143); or is a lunatic (*Currie* v. *Child* (1812), 3 Camp. 283); or is abroad (*Prince* v. *Blackburn* (1802), 2 East, 250), or cannot be found (*Cunliffe* v. *Sefton* (1802), 2 East, 183; *Wardell* v. *Fermor* (1809), 2 Camp. 282; *Crosby* v. *Percy* (1808), 1 Taunt. 364; *Parker* v. *Hoskins* (1810), 2 Taunt. 223; *Burt* v. *Walker* (1821), 4 B. & Ald. 697; *Kay* v. *Brookman* (1828), 3 C. & P. 555; *Morgan* v. *Morgan* (1832), 9 Bing. 359; *Willman* v. *Worrall* (1838), 8 C. & P. 380; *Falmouth* (*Earl*) v. *Roberts* (1842), 9 M. & W. 469; *Spooner* v. *Payne* (1847), 4 C. B. 328; *Austin* v. *Rumsey* (1849), 2 Car. & Kir. 736); *quære* as to absence through illness (*Jones* v. *Brewer* (1811), 4 Taunt. 46; *Harrison* v. *Blades* (1813), 3 Camp. 457).

(*a*) *Breton* v. *Cope* (1791), Peake, 43 [31]; *Gillies* v. *Smither*, *supra*; unless the names or handwriting of the attesting witnesses are unknown (*Keeling* v. *Ball* (1796), Peake, Add. Cas. 88; *R.* v. *St. Giles, Camberwell* (*Inhabitants*), *supra*; *R.* v. *Fordingbridge* (*Inhabitants*) (1858), 27 L. J. (M. C.) 290.

(*b*) *Crank* v. *Firth* (1839), 2 Mood. & R. 262, *per* Lord ABINGER, C. B., at p. 263: "The witness might on recollection give material evidence relating to the transaction"; *Rees* v. *Williams* (1847), 1 De G. & Sm. 314. But see, *contra*, *Wood* v. *Drury* (1699), 1 Ld. Raym. 734; *Pedler* v. *Paige* (1833), 1 Mood. & R. 258, both of which cases were, however, cited in *Crank* v. *Firth*, *supra*.

(*c*) See *Fitzgerald* v. *Elsee* (1811), 2 Camp. 635; *Lemon* v. *Dean* (1810), 2 Camp.

SECT. 9. **Attesting Witnesses, when required to be called.**

name of the attesting witness is that of a fictitious person (*d*), or has been inserted without the knowledge of the parties to the instrument (*e*), the instrument may be proved in the ordinary way.

Exception to general rule.

But general exceptions to the rule requiring the evidence of the attesting witness exist where the instrument is more than thirty years old (*f*), where the other party to the suit refuses to produce the instrument after notice to do so (*g*), where, although he produces it (*h*), he claims a subsisting (*i*) interest under it in the subject-matter of the suit (*k*), when the attestation was required merely by reason of the rule of some court, and the court has subsequently acted upon the instrument so attested (*l*); or when the instrument is tendered either against a public officer whose duty it was to procure its execution and who has treated it as duly executed (*m*), or against a party who is estopped from denying its validity (*n*).

Instruments enrolled.

It is said also that instruments which have been enrolled under some statute may be proved merely by proof of enrolment; but it is doubtful how far this is permissible, save as against the party on whose acknowledgment they have been enrolled (*o*).

636, n.; *Talbot* v. *Hodson* (1816), 7 Taunt. 251, overruling *Phipps* v. *Parker*, (1808), 1 Camp. 412; *Coles* v. *Coles and Brown* (1866), L. R. 1 P. & D. 70; *Bowman* v. *Hodgson* (1867), L. R. 1 P. & D. 362; *Dayman* v. *Dayman* (1894), 71 L. T. 699; *Pilkington* v. *Gray*, [1899] A. C. 401, P. C.

(*d*) *Fasset* v. *Brown* (1790), Peake, 33 [23].

(*e*) *M'Craw* v. *Gentry* (1812), 3 Camp. 232.

(*f*) See p. 512, *ante*.

(*g*) *Cooke* v. *Tanswell* (1818), 8 Taunt. 450; *Poole* v. *Warren* (1838), 8 Ad. & El. 582. As to the admission of secondary evidence of documents in general, see p. 518, *ante*.

(*h*) But refuses to relinquish possession of it (*Vacher* v. *Cocks* (1830), 1 B. & Ad. 145; *Carr* v. *Burdiss* (1835), 4 L. J. (EX.) 60, 63). The older rule was that the production of an instrument after notice by the adverse party superseded in all cases the necessity of calling attesting witnesses (*R.* v. *Middlezoy* (*Inhabitants*) (1787), 2 Term Rep. 41; *Bowles* v. *Langworthy* (1793), 5 Term Rep. 366, overruled by *Gordon* v. *Secretan* (1807), 8 East, 548).

(*i*) *Collins* v. *Bayntun* (1841), 1 Q. B. 117; *Fuller* v. *Patrick* (1849), 13 Jur. 561. It seems that his interest in the suit must be the same as that claimed by his opponent (*Knight* v. *Martin* (1818), Gow, 26).

(*k*) The validity of an instrument is necessarily admitted where an interest is claimed under it (*Pearce* v. *Hooper* (1810), 3 Taunt. 60; see also *Orr* v. *Morice* (1821), 3 Brod. & Bing. 139; *Doe* d. *Tyndale* v. *Hemming* (1826), 9 Dow. & Ry. (K. B.) 15; *Doe* d. *Wilkins* (*Marquis*) v. *Cleveland* (1829), 9 B. & C. 864; *Bradshaw* v. *Bennett* (1831), 1 Mood. & R. 143; *Carr* v. *Burdiss* (1835), 4 L. J. (EX.) 60; *Doe* d. *Rowlandson* v. *Wainwright* (1836), 5 Ad. & El. 520; *Bell* v. *Chaytor* (*Sir Wm.*) (1843), 1 Car. & Kir. 162.

(*l*) Thereby recognising its validity; see *Bailey* v. *Bidwell* (1844), 13 M. & W. 73; *Streeter* v. *Bartlett* (1848), 5 C. B. 562 (debt sued for admitted in a schedule filed in the bankruptcy court); it was held that the schedule being tendered as evidence of an acknowledgment the attesting witness must be called.

(*m*) *Bailey* v. *Bidwell*, *supra*; *Plumer* v. *Brisco* (1847), 11 Q. B. 46.

(*n*) See title ESTOPPEL, pp. 375, 393, *ante*; *Bringloe* v. *Goodson* (1839), 5 Bing. (N. C.) 738; *Fishmongers' Co.* v. *Dimsdale* (1852), 12 C. B. 557 (incorporation of old instrument in new, new only need be proved); *Laing* v. *Kaine* (1800), 2 Bos. & P. 85; *Randall* v. *Lynch* (1810), 2 Camp. 352, 357; *Freeman* v. *Steggall* (1849), 14 Q. B. 202 An admission in a former suit does not estop a party from denying execution of an instrument tendered in evidence against him (*Call* v. *Dunning* (1803), 4 East, 53; *Whyman* v. *Garth* (1853), 8 Exch. 803).

(*o*) See *Thurle* v. *Madison* (1655), Sty. 462; *Smartle* v. *Williams* (1694), 3 Lev. 387; *Holcroft* (*Lady*) v. *Smith* (1702), Freem. (CH.) 259; *Doe* d. *Freemaire* v. *Lloyd* (1839), 5 Bing. (N. C.) 741; (1840), 10 L. J. (C. P.) 128; Buller, Nisi

SECT. 10.—*Evidence of Opinion and Belief.*

SECT. 10. Evidence of Opinion and Belief.

820. As a general rule a witness may not give evidence of opinion or belief, but only of facts (*p*). In certain circumstances, however the rule is relaxed. A witness unable to swear positively to a matter about which his recollection may be at fault is permitted to state that to the best of his belief such and such is the truth (*q*), and when evidence of reputation is admissible (*r*) this is, in a sense, evidence of the belief or opinion of a body of persons (*s*).

Evidence of opinion and belief.

Faulty recollection.

A witness may state his belief or opinion when it is sought to identify persons (*t*) or things (*a*), and to prove that words or expressions of which evidence has been given were understood by him as referring to some particular individual (*b*), but, in general, he may not be asked what meaning he attached to words used unless it appear either from his own or other evidence that there was reason to think that they were used in other than their ordinary sense (*c*).

Identification.

Evidence of opinion or belief is also admitted for the purpose of proving handwriting where direct evidence of one who was present when the document was written is not available (*d*), but an opinion based on mere inference is insufficient (*e*).

Proof of handwriting.

Prius, 255. See also Phipson, Law of Evidence, 4th ed., p. 484. A doubt also exists as to the necessity of calling attesting witnesses of instruments sealed by a corporation; *semble*, that they must be called if the instrument is one which depends on attestation for its validity (*Doe* d. *Bank of England* v. *Chambers* (1836), 4 Ad. & El. 410. See, however, 2 Taylor, Law of Evidence, 10th ed., s. 1852; Phipson, Law of Evidence, 4th ed., p. 479; *Moises* v. *Thornton* (1799), 8 Term Rep. 303).

(*p*) See *Bonfield* v. *Smith* (1843), 2 Mood. & R. 519; and p. 479, *ante*.

(*q*) See *Carmalt* v. *Post* (1839), 8 Watts, 406, 411 (Pennsylvania Supreme Court).

(*r*) See p. 479, *ante*.

(*s*) As to when evidence of reputation is admissible, see p. 479, *ante*.

(*t*) See p. 447, *ante;* and *R.* v. *Tolson* (1864), 4 F. & F. 103. Identity may be proved by comparison with portraits and the belief of the witness as to the likeness (*Hindson* v. *Ashby*, [1896] 2 Ch. 1, 21, C. A.).

(*a*) See p. 447, *ante*.

(*b*) *Bourke* v. *Warren* (1826), 2 C. & P. 307; *Broome* v. *Gosden* (1845), 1 C. B. 728.

(*c*) *Daines* v. *Hartley* (1848), 3 Exch. 200; *Brunswick* (*Duke*) v. *Harmer* (1850), 3 Car. & Kir. 10; *Barnett* v. *Allen* (1858), 3 H. & N. 376; *Simmons* v. *Mitchell* (1880), 6 App. Cas. 156, P. C.; *Gallagher* v. *Murton* (1888), 4 T. L. R. 304.

(*d*) See p. 482, *ante;* and *Sayer* v. *Glossop* (1848), 2 Exch. 409; *Wright* v. *Cobb* (1885), 1 T. L. R. 555; *Carey* v. *Pitt* (1797), Peake, Add. Cas. 130; *Batchelor* v. *Honeywood* (*Sir J.*) (1799), 2 Esp. 714; *Greaves* v. *Hunter* (1826), 2 C. & P. 477; *Drew* v. *Prior* (1843), 5 Man. & G. 264; *Chant* v. *Brown* (1852), 9 Hare, 790; *Smith* v. *Sainsbury* (1832), 5 C. & P. 196; *Doe* d. *Mudd* v. *Suckermore* (1836), 5 Ad. & El. 703. It is sufficient if the witness has acted on letters received from the person whose handwriting is in dispute (*Harrington* v. *Fry* (1824), 1 C. & P. 289; *Tharpe* v. *Gisburne* (1825), 2 C. & P. 21; *R.* v. *Slaney* (1832), 5 C. & P. 213; *Murietta* v. *Wolfhagen* (1849), 2 Car. & Kir. 744; *Ovenston* v. *Wilson* (1845), 2 Car. & Kir. 1). A signature may be proved by a witness who has only seen the surname written on some other occasion (*Lewis* v. *Sapio* (1827), Mood. & M. 39), disapproving *Powell* v. *Ford* (1817), 2 Stark. 164; *Willman* v. *Worrall* (1838), 8 C. & P. 380; compare *Eagleton and Coventry* v. *Kingston* (1803), 8 Ves. 438, 476; *R.* v. *Crouch* (1850), 4 Cox, C. C. 163 (constable and prisoner). The rules as to proof of handwriting are the same in criminal as in civil cases (*R.* v. *Hensey* (1758), 1 Burr. 643).

(*e*) *Da Costa* v. *Pym* (1797), Peake, Add. Cas. 144; *R.* v. *Murphy* (1837), 8 C. & P. 297, 310.

SECT. 10. Evidence of Opinion and Belief.

The handwriting in ancient documents may be proved in the same way (*f*), or by comparison with other documents the authenticity of which is not disputed (*g*), or even (where by reason of lapse of time no witness with an acquaintance of the handwriting can be found, and no strict proof can be given of the genuineness of other documents with which comparison might be made) by a witness who, in the course of his business, has acquired a knowledge of the character of the handwriting, and the person whose handwriting is in dispute, from his acquaintance with a number of documents purporting to have been written or signed by that person (*h*); but it is otherwise when the knowledge is acquired not in the course of business, but from a study of such other documents for the purpose of giving evidence (*i*).

Comparison of disputed writing.

Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine may be made by a witness (*k*); and such writing, and the evidence of witnesses thereon, may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute (*l*). It is immaterial that the writing with which the comparison is made is not and cannot be made evidence in the case (*m*); but proof of genuineness must be given, if at all, at the trial itself, and cannot be ordered during preliminary proceedings (*n*).

Where the opinion or belief of a witness is, or becomes, relevant to the issue before the court as evidencing his good faith or the state of his mind, he may give evidence thereof (*o*); but he may not testify as to his own sanity (*p*), nor indeed (unless an expert) as to his opinion on the sanity of another (*q*).

(*f*) *Morewood* v. *Wood* (1791), cited 14 East, 328; *Taylor* v. *Cook* (1820), 8 Price, 650; *Doe* d. *Mudd* v. *Suckermore* (1836), 5 Ad. & El. 703; *The Fitzwalter Peerage* (1843), 10 Cl. & Fin. 193, H. L. As to proof of documents more than thirty years old, see p. 512, *ante*; *Fenwick* v. *Reed* (1821), Madd. & G. 7; *The Camoys Peerage* (1839), 6 Cl. & Fin. 789, H. L.; *Doe* d. *Jenkins* v. *Davies* (1847), 10 Q. B. 314.

(*g*) As to proof by comparison with other handwriting, see *infra*.

(*h*) See p. 482, *ante*; and *The Fitzwalter Peerage*, *supra*; *Doe* d. *Jenkins* v. *Davies*, *supra*.

(*i*) *The Fitzwalter Peerage*, *supra*, overruling by implication earlier decisions on this subject; see 2 Taylor, Law of Evidence, 10th ed., s. 1876.

(*k*) Criminal Procedure Act, 1865 (28 & 29 Vict. c. 18).

(*l*) *Ibid.*, s. 8. This applies in all courts, civil and criminal (*ibid.*, s. 1).

(*m*) *Birch* v. *Ridgway* (1858), 1 F. & F. 270; *Cresswell* v. *Jackson* (1860), 2 F. & F. 24. The comparison may be made by the jury (*Cobbett* v. *Kilminster* (1865), 4 F. & F. 490; *Scard* v. *Jackson* (1875), 24 W. R. 159); and may be made with a document written in court for this purpose (*Cobbett* v. *Kilminster*, *supra*).

(*n*) *Wilson* v. *Thornbury* (1874), L. R. 17 Eq. 517.

(*o*) *Mansell* v. *Clements* (1874), L. R. 9 C. P. 139, where a witness was allowed to state, in answer to a question by the judge, that he should not have taken a house but for the house agent's card to view; *R.* v. *King*, [1897] 1 Q. B. 214, C. C. R. (opinion of witness as to meaning of an alleged false pretence made to him); compare *Hardwick* v. *Coleman* (1859), 1 F. & F. 531; *R.* v. *Dale* (1836), 7 C. & P. 352; *Wilson* v. *Wilson* (1872), L. R. 2 P. & D. 435. But the opinion of a witness as to the motives of another is inadmissible (*Townsend* v. *Moore*, [1905] P. 66, C. A.).

(*p*) *Bootle* v. *Blundell* (1815), 19 Ves. 494; *Knight* v. *Young* (1813), 2 Ves. & B. 184.

(*q*) *Greenslade* v. *Dare* (1855), 20 Beav. 284; *Wright* v. *Tatham* (1838), 5 Cl. & Fin. 670, H. L.

And in certain other cases a witness is allowed to state his opinion, where it is scarcely possible to do more than draw inferences of fact from appearances or surrounding circumstances, as, for example, as to a person's age (*r*), or the affection existing between one person and another (*s*).

Part VI.—Evidence out of Court.

SECT. 1.—*How Obtained.*

Evidence out of court.

821. Evidence may be taken out of court for use at a trial, by the examination out of court of witnesses who, because they are resident beyond the jurisdiction or for other reasons, are unable to attend the trial; by affidavit (*t*); and by interrogatories (*a*).

Methods.

822. The examination of witnesses in any cause or matter may be ordered to be taken under a commission, or before an examiner, or by means of a mandamus to an Indian or colonial court, or by letters of request addressed to a foreign, or Indian, or colonial court (*b*).

SECT. 2.—*Examination of Witnesses.*

SUB-SECT. 1.—*Commission.*

Commission.

823. An order may be obtained in the High Court for the examination on commission of a witness or witnesses who is or are out of the jurisdiction of the English courts (*c*).

(*r*) See p. 482, *ante*.

(*s*) *Trelawney* v. *Colman* (1817), 2 Stark. 191.

(*t*) See pp. 620 *et seq.*, *post*.

(*a*) See, generally, title DISCOVERY ETC., Vol. XI., pp. 92—113.

(*b*) R. S. C., Ord. 37, rr. 1, 5, 6A. The procedure is not applicable to an arbitration, except where reference to arbitration is compulsory (Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 100; *Re Shaw and Ronaldson*, [1892] 1 Q. B. 91; *Re Mysore West Gold Mining Co.* (1889), 42 Ch. D. 535). As to mandamus, see East India Company Act, 1772 (13 Geo. 3, c. 63); East India Company Act, 1784 (24 Geo. 3, c. 25), ss. 78, 79; East India Company Act, 1786 (26 Geo. 3, c. 57), s. 28; Evidence on Commission Act, 1831 (1 Will. 4, c. 22). As to taking evidence abroad in criminal cases, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 387.

(*c*) R. S. C., Ord. 37, r. 1, App. K, Forms 35c, 36, 37. For the form of writ, see App. J, Form 13. Commissions were originally issued to examine witnesses on written interrogatories. According to the form given in App. K, Form 37 (known as the "Long Order"), two commissioners are appointed, one for each party, but this form is rarely used, and the more common practice is to appoint one commissioner. An official referee may order a commission (*Hayward* v. *Mutual Reserve Association*, [1891] 2 Q. B. 236). As to the jurisdiction in bankruptcy to order the examination of witnesses before a commissioner or examiner, see Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 105, 127 (5); Bankruptcy Rules, rr. 66, 68; *Re Drucker* (No. 2), *Ex parte Basden*, [1902] 2 K. B. 210. As to the jurisdiction in the winding up of companies, see title COMPANIES, Vol. V., p. 559. As to divorce, see Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 46; and title HUSBAND AND WIFE. As to the jurisdiction in a county court, see County Court Rules, 1903, 1904, Ord. 18, r. 18; County Court Form 132; and title COUNTY COURTS, Vol. VIII., p. 516. As to the mayor's court, see Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii.), ss. 24, 26; and title MAYOR'S COURT. As to local courts, see Borough and Local Courts of Record Act, 1872 (35 & 36 Vict. c. 86), Sched., s. 10:

SECT. 2. Examination of Witnesses.

824. Where a writ of mandamus or commission is, or letters of request (*d*) are, issued to a foreign court, the members of that court, or persons appointed by them, fulfil the functions of commissioners. More often the functions of commissioners are performed by persons directly appointed by order of the High Court (*e*).

SUB-SECT. 2.—*Examiners.*

Examiners.

825. The procedure under a commission is cumbrous and expensive, and, in modern practice, the examination of witnesses before an examiner has taken its place (*f*). An order may be made for the examination of witnesses out of court before an examiner either within or without the jurisdiction (*g*).

If the witnesses are within the jurisdiction, the examination generally takes place before one of the examiners of the court (*h*). The examiners of the court are barristers of not less than three years' standing, appointed by the Lord Chancellor to act as such for a period not exceeding five years (*i*). The examinations to be taken before the examiners of the court are distributed among them by rotation (*k*). If the court or a judge directs, an examination of witnesses can be taken before a particular examiner (*l*), or even before a special examiner, who is not one of the examiners of the court (*m*).

Witnesses out of the jurisdiction may be examined either before one of the examiners of the court or before a special examiner (*n*).

and title COURTS, Vol. IX., p. 129. Commissions were formerly issued to foreign or colonial courts, but the practice now is to issue letters of request instead, see p. 611, *post*.

(*d*) See R. S. C., Ord. 37, r. 6A, and App. K, Form 37B.

(*e*) R. S. C., Ord. 37, r. 5; see App. K, Forms 36, 37, and App. J, Form 13.

(*f*) The Supreme Court Rules have no application to proceedings in divorce (R. S. C., Ord. 68, r. 1). There appears to be no jurisdiction to order the examination of witnesses out of the jurisdiction before a special examiner in divorce proceedings. See Hume-Williams and Macklin, Taking of Evidence on Commission, 2nd ed., p. 83.

(*g*) R. S. C., Ord. 37, rr. 1, 5.

(*h*) *Ibid.*, r. 39; *Bute* (*Marquess*) v. *James* (1886), 33 Ch. D. 157. As to the procedure, see R. S. C., Ord. 37, rr. 7—20, 41—52.

(*i*) *Ibid.*, r. 40.

(*k*) *Ibid.*, r. 41. When the examiner next in rotation is unable to take the examination, the next in rotation is to replace him (*ibid.*, r. 48).

(*l*) *Ibid.*, r. 49.

(*m*) *Ibid.*, r. 39. A special examiner might be appointed where it would be extravagant to send down an examiner of the court; see *Baddeley* v. *Bailey*, [1893] W. N. 56. In *Bute* (*Marquess*) v. *James*, *supra*, a special examiner was refused even though the examiner of the court would require the assistance of a Welsh interpreter.

(*n*) R. S. C., Ord. 37, rr. 5, 39; App. K, Form 37C. It is desirable that the name of the special examiner should be stated in the application (*Doe* d. *Thern* v. *Phillips* (1831), 1 Dowl. 56). See, as to the appointment of special examiners to take evidence abroad, *Crofts* v. *Middleton* (1852), 9 Hare, App., xviii.; *Rawlins* v. *Wickham* (1858), 4 Jur. (N. S.) 990; *Edwards* v. *Spaight* (1862), 2 John. & H. 617; *London Bank of Mexico and South America* v. *Hart* (1868), L. R. 6 Eq. 467. The mere fact that witnesses are known to, or even intimately connected with, a person of credit will not prevent his being appointed as special examiner (*Ongley* v. *Hill* (1874), 22 W. R. 817). A shorthand writer ought not to be appointed as examiner or commissioner (*Bicknell* v. *Bicknell*, [1908] W. N. 97, C. A.), and a solicitor in the cause must in no case be appointed; see *Fricker* v.

SUB-SECT. 3.—*Mandamus.*

SECT. 2. Examination of Witnesses.

Mandamus.

826. The King's Bench Division of the High Court has power to issue writs in the nature of a mandamus or commission to the judges of the High Court in India, and to any judge of any colony in the King's dominions, to hold any court for the examination of witnesses, when evidence is required for the purpose of a trial in England (*o*).

SUB-SECT. 4.—*Letters of Request.*

Letters of request.

827. When it is desired to have witnesses examined before a foreign, Indian, or colonial court, the usual practice now is to apply for letters of request to examine them instead of a commission (*p*). Letters of request must also be used in those countries which do not permit the administration of an oath within their jurisdiction by anyone except one of their officials (*q*). As regards Indian and colonial courts, the proceeding by letters of request is simpler than proceeding by mandamus. In either case the court to which the letters of request are addressed may appoint some fit person to take the examination (*r*).

SECT. 3.—*When Examination out of Court will be Ordered.*

When order made.

828. Orders are made for the examination (*s*) of witnesses at any place (*t*), whether within or without the jurisdiction, where

Moore (1730), Bunb. 289; *Re Selwyn* (*G. M.*) (1779), Dick. 563; *Sayer* v. *Wagstaff* (1842), 12 L. J. (CH.) 35 (new commission issued owing to misconduct of commissioner). In a county court, the person appointed examiner may be the registrar of the court in the district in which the witness resides (County Court Rules, Ord. 18, r. 19; see, generally, rr. 18—32). A commissioner or examiner appointed to examine witnesses in a foreign country has no means of compelling the attendance of witnesses before him. In countries which are within the British dominions, but are outside the jurisdiction of the English courts, the attendance of witnesses before a commissioner or examiner is enforced by the procedure prescribed in the Evidence by Commission Act, 1843 (6 & 7 Vict. c. 82), s. 5; Evidence by Commission Act, 1859 (22 Vict. c. 20), s. 1, amended by Evidence by Commission Act, 1885 (48 & 49 Vict. c. 74).

(*o*) East India Company Act, 1772 (13 Geo. 3, c. 63), ss. 40, 44; Evidence on Commission Act, 1831 (1 Will. 4, c. 22), s. 1; *Wilson* v. *Wilson* (1883), 9 P. D. 8. Mandamus to examine witnesses is now rarely if ever used, see thereon Chitty's Archbold's Practice, 14th ed., pp. 555 *et seq.* As to taking evidence in the British possessions outside Great Britain in criminal cases, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 387. Except under certain statutes relating to British possessions abroad (see last references), and under the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), or possibly by consent in cases of misdemeanour (see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 387), there is no power to order the examination of witnesses out of court in criminal cases (*R.* v. *Upton St. Leonards* (*Inhabitants*) (1847), 10 Q. B. 827). As to the taking of a deposition of a witness who is dangerously ill in a criminal case, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 327.

(*p*) R. S. C., Ord. 37, r. 6A; App. K, Forms 37A and 37B.

(*q*) See Hume-Williams and Macklin, Taking of Evidence on Commission, 2nd ed., p. 58.

(*r*) See R. S. C., App. K, Form 37B.

(*s*) "Examination" includes cross-examination of a witness who has made an affidavit (*Rawlins* v. *Wickham* (1858), 4 Jur. (N. S.) 990; *Concha* v. *Concha* (1886), 11 App. Cas. 541).

(*t*) *E.g.*, at the witness's residence in case of illness (*Re Bradbrook, Ex parte Hawkins* (1889), 23 Q. B. D. 226, C. A.).

SECT. 3. **When Examination Ordered.**

the court deems it necessary for the purposes of justice (*u*), that is, in the interest of all the parties to the litigation (*v*). The question whether an order should be made is one for the discretion of the court, but this discretion is the subject of review (*w*).

Before making the order, the court must be satisfied that there is a question to be tried (*a*), that the application is *bonâ fide* (*b*), and that there are material witnesses (*c*), to be examined. It is a recognised, though not a rigid, rule of practice that the name of one at least of the witnesses whom it is proposed to examine must be made known to the court and stated in the order (*d*).

Practice.

Special considerations, in addition to the above, will influence the court in its decision as to the necessity of making an order according as the persons to be examined are within or without the jurisdiction. The facts of the existence of which the court requires to be satisfied should be proved by affidavit (*e*). The court may impose such terms upon the applicant as appear to it to be just (*f*).

At what stage orders may be made.

The examination of witnesses out of court may be ordered even

(*u*) R. S. C., Ord. 37, r. 5.

(*v*) *Berdan* v. *Greenwood* (1880), 20 Ch. D. 764, n., C. A., *per* BAGGALLAY, L.J., at p. 765. The question of expense is one factor, but only a factor, in influencing the decision of the court (*Baddeley* v. *Bailey*, [1893] W. N. 56; compare *Macaulay* v. *Glass* (1902), 47 Sol. Jo. 71). If it is adjudged that it was reasonable to examine witnesses *de bene esse* the costs of the examination will be allowed, even if the deposition is not used at the trial (*Bartlett* v. *Higgins*, [1901] 2 K. B. 230, C. A., approving *Delaroque* v. *Oxenholme & Co.*, [1883] W. N. 227).

(*w*) *Berdan* v. *Greenwood*, *supra*, *per* BAGGALLAY, L.J., at p. 767; compare *Coch* v. *Allcock & Co.* (1888), 21 Q. B. D. 1, 178, C. A., *per* Lord ESHER, M.R., at p. 181; see *Butterfield* v. *Financial News* (1889), 5 T. L. R. 279, C. A.

(*a*) *Re Boyse, Crofton* v. *Crofton* (1882), 20 Ch. D. 760, *per* FRY, J., at p. 771.

(*b*) See *Berdan* v. *Greenwood*, *supra*; *Re Boyse, Crofton* v. *Crofton*, *supra*; and *Ross* v. *Woodford*, [1894] 1 Ch. 38. The court may in its discretion impose terms on the applicant (R. S. C., Ord. 37, r. 5; see *Dalton* v. *Lloyd* (1835), 1 Gale, 102).

(*c*) It is not enough to show that it is probable that a person can give useful evidence (*Lane* v. *Bagshaw* (1855), 16 C. B. 576), but the materiality of the evidence of persons in whose presence the facts alleged in the pleadings had taken place was assumed (*Baddeley* v. *Gilmore* (1836), 1 M. & W. 55). A solicitor's affidavit may be enough to show that witnesses are necessary (*Healy* v. *Young* (1846), 2 C. B. 702). When the examination is to be at a great distance it is as a rule necessary to show that the evidence is admissible (*Lloyd* v. *Key* (1834), 3 Dowl. 253).

(*d*) *Howard* v. *Dulau & Co.* (1895), 11 T. L. R. 451, C. A., where the court refused to accept the excuse that the witnesses might be spirited away if their names were made known; compare *Dimond* v. *Vallance* (1839), 7 Dowl. 590; *Gunter* v. *M'Tear* (1836), 1 M. & W. 201; *Cow* v. *Kinnersley* (1844), 6 Man. & G. 981 (names dispensed with on payment of money into court); *M'Hardy* v. *Hitchcock* (1848), 11 Beav. 93; *Warner* v. *Mosses* (1880), 16 Ch. D. 100, C. A.; *Nadin* v. *Bassett* (1883), 25 Ch. D. 21, C. A., *per* COTTON, L.J., at p. 29; *Langen* v. *Tate* (1883), 24 Ch. D. 522, C. A.

(*e*) This may be shown by the party applying, his solicitor, or his solicitor's clerk (*M'Hardy* v. *Hitchcock* (1848), 11 Beav. 93).

(*f*) R. S. C., Ord. 37, r. 5; County Court Rules, Ord. 18, r. 18; *Dalton* v. *Lloyd* (1835), 1 Gale, 102 (applicant, defendant, ordered to bring into court the amount claimed); *Sheppard* v. *Dalbiac* (1885), 30 Sol. Jo. 46 (applicant, defendant, ordered to pay costs of summons in any event, and give security for costs of commission, because the application was made nearly three months after notice of trial).

SECT. 3. When Examination Ordered.

before issue has been joined (*g*), where justice requires that this course should be taken. A party must not be dilatory in applying for the examination (*h*).

The application should be made by summons, though under special circumstances the order may be made upon an *ex parte* application, but only at the applicant's risk of its being discharged upon sufficient grounds (*i*).

As a general rule an order will not be made for a witness to be examined *ex parte*, though a case might possibly arise where it would not be absolutely necessary that both parties should attend (*j*).

Interrogatories.

Where evidence is taken under a commission or letters of request, it may be ordered to be taken by written interrogatories (*k*) or *vivâ voce*.

SUB-SECT. 1.—*Witnesses within the Jurisdiction.*

Witnesses within the jurisdiction.

829. An order may be made for the examination of a witness within the jurisdiction either because of the advanced age of the witness (*l*), or because the witness is dangerously ill (*m*), or in such a precarious state of health that he cannot attend the trial with safety (*n*), or is going abroad on a *bonâ fide* voyage or journey of necessity (*o*).

In criminal cases the dangerous illness of a witness resident within the jurisdiction is a ground for taking his depositions out of court (*p*).

SUB-SECT. 2.—*Witnesses Abroad.*

Extent of power.

830. The power of the court to order the examination of witnesses extends to places without the jurisdiction (*q*). The

(*g*) *Braun* v. *Mollett* (1855), 16 C. B. 514; compare *Finney* v. *Beesley* (1851), 17 Q. B. 86; and *Elin* v. *Wilson* (1883), 75 L. T. Jo. 47 (witness going abroad); *Mondel* v. *Steele* (1841), 8 M. & W. 300. Similarly in the Probate, Divorce, and Admiralty Division leave will, in urgent cases, be given to send a commission abroad before the citation has been served (*Vallentine* v. *Vallentine*, [1901] P. 283; *Gribbon* v. *Gribbon* (1908), 24 T. L. R. 160). The practice in divorce cases is regulated by the Matrimonial Causes Rules, rr. 132—137.

(*h*) *Steuart* v. *Gladstone* (1877), 7 Ch. D. 394 (commission refused owing to dilatoriness of applicant); compare *Sheppard* v. *Dalbiac* (1885), 30 Sol. Jo. 46.

(*i*) *Bidder* v. *Bridges* (1884), 26 Ch. D. 1, C. A.; compare *Turner Pneumatic Tyre Co.* v. *Dunlop Pneumatic Tyre Co.* (1897), 75 L. T. 651.

(*j*) *E.g.*, where a witness is in imminent danger of death (see *Warner* v. *Mosses* (1880), 16 Ch. D. 100, C. A., *per* JESSEL, M.R., at p. 103).

(*k*) See R. S. C., Ord. 37, rr. 6, 6A, App. K, Form 37 ("Long Order"), paras. 2, 8, 10; Form 37B. For a full treatment of interrogatories, see title DISCOVERY ETC, Vol. XI., pp. 92—113.

(*l*) *Crammond* v. *Thompson* (1895), 11 T. L. R. 572 (witnesses over 70); *Bidder* v. *Bridges*, *supra*.

(*m*) *Warner* v. *Mosses*, *supra*; *Davis* v. *Lowndes* (1838), 7 Dowl. 107 (nature of complaint must be stated). Where a witness's evidence had been rejected at the trial, the Court of Appeal allowed it to be taken before a special examiner upon proof that the witness was dangerously ill (*Treasury Solicitor* v. *White* (1886), 55 L. J. P. 79, C. A.).

(*n*) *Pond* v. *Dimes* (1833), 2 Dowl. 730. As to pregnancy, see *Abraham* v. *Newton* (1832), 8 Bing. 274; *R.* v. *Stephenson* (1862), Le. & Ca. 165, C. C. R.

(*o*) *Bellamy* v. *Jones* (1802), 8 Ves. 31; *Pirie* v. *Iron* (1832), 8 Bing. 143; *Carruthers* v. *Graham* (1841), 9 Dowl. 947; *Fischer* v. *Hahn* (1863), 13 C. B. (N. S.) 659; *Braun* v. *Mollett*, *supra*.

(*p*) Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), s. 17, and Criminal Law Amendment Act, 1867 (30 & 31 Vict. c. 35), ss. 6, 7; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 327, 328.

(*q*) *Duckett* (*Bart.*) v. *Williams* (1851), 1 Cr. & J. 510; *Crofts* v. *Middleton*

SECT. 3. When Examination Ordered.

granting of an order for the examination of witnesses abroad is a matter of discretion (*r*), though in ordinary cases the order will be made upon an affidavit by the party applying to the effect that the evidence of the persons whom he seeks to examine is material (*s*), and that they cannot conveniently be brought to England (*t*). An order will not be made if, in the opinion of the court, it is essential that the witness should be cross-examined at the trial (*u*).

Where letters of request (*v*) in lieu of a commission are applied for, the applicant is required to satisfy the court of the facts of which proof is required before the order is made (*a*).

The court may order that the subject-matter of the action be sent out of the jurisdiction in order that it may be identified by the witnesses (*b*).

Witness abroad.

The court may order the examination of a party residing abroad. But whereas a foreign defendant is *primâ facie* entitled to have evidence, including his own, taken at the place where he resides (*c*),

(1852), 9 Hare, App., xviii.; *Fischer* v. *Ingataray* (1858), E. B. & E. 321 (commission issued to foreign court as a court and not as individuals in order to comply with foreign law); *Rawlins* v. *Wickham* (1858), 4 Jur. (N. S.) 990; *Edwards* v. *Spaight* (special examiners appointed to cross-examine witness abroad); *London Bank of Mexico and South America* v. *Hart* (1868), L. R. 6 Eq. 467; *Nadin* v. *Bassett* (1883), 25 Ch. D. 21, C. A.; *Armour* v. *Walker* (1883), 25 Ch. D. 673, C. A.; *Coch* v. *Allcock & Co.* (1888), 21 Q. B. D. 1, 178, C. A.; compare *Lawson* v. *Vacuum Brake Co.* (1884), 27 Ch. D. 137, C. A.; *Emanuel* v. *Soltykoff* (1892), 8 T. L. R. 331, C. A.; *Lewis* v. *Kingsbury* (1888), 4 T. L. R. 639, C. A., affirming 4 T. L. R. 626; *Fraser* v. *Nevins, Welsh & Co.* (1888), 4 T. L. R. 448, C. A.

(*r*) *Butterfield* v. *Financial News* (1889), 5 T. L. R. 279, C. A. The exercise of this discretion is the subject of review by the Court of Appeal (*Berdan* v. *Greenwood* (1880), 20 Ch. D. 764, n., C. A., *per* BAGGALLAY, L.J., at p. 767).

(*s*) *Armour* v. *Walker, supra; Langen* v. *Tate* (1883), 24 Ch. D. 522, C. A.; *Nadin* v. *Bassett, supra; Coch* v. *Allcock & Co., supra; The Parisian* (1887), 13 P. D. 16; *Emanuel* v. *Soltykoff, supra.* In the case of criminal proceedings in the King's Bench Division for offences committed in India (see East India Company Act, 1772 (13 Geo. 3, c. 63), s. 4) the Attorney-General's statement that the evidence of a person in India is necessary is sufficient, without affidavit, to support a rule to order the Indian court to take his evidence (*R.* v. *Douglas* (1842), 2 Dowl. (N. S.) 416; *R.* v. *Douglas* (1846), 16 L. J. (Q. B.) 417; compare *R.* v. *Jones* (1806), 8 East, 31).

(*t*) *Lawson* v. *Vacuum Brake Co., supra*; *Langen* v. *Tate, supra.* The mere fact that the witness is in the employ of the party applying does not prevent the order being made (*Coch* v. *Allcock & Co., supra*). An application to examine witnesses abroad as to foreign law will not be granted unless it is shown that the evidence cannot be obtained in this country (*The M. Moxham* (1876), 1 P. D. 107, C. A.).

(*u*) *Berdan* v. *Greenwood, supra*; *Re Boyse, Crofton* v. *Crofton* (1882), 20 Ch. D. 760; *Keeley* v. *Wakley* (1893), 9 T. L. R. 571 (libel).

(*v*) See p. 611, *ante*.

(*a*) The evidence to be obtained must be material (*Ehrmann* v. *Ehrmann*, [1896] 2 Ch. 611, C. A.). Letters of request will not be granted in addition to a commission, but may be granted although a special examiner has been appointed to take evidence abroad (*Mason and Barry, Ltd.* v. *Comptoir d'Escompte* (1890), 38 W. R. 685). Letters of request will not be issued, in a case where no witnesses are to be examined, solely for the purpose of obtaining inspection of documents (*Cape Copper Co.* v. *Comptoir d'Escompte de Paris* (1890), 38 W. R. 763).

(*b*) *Chaplin* v. *Puttick*, [1898] 2 Q. B. 160, C. A.; see Chitty's Forms, 13th ed., No. 14.

(*c*) *New* v. *Burns* (1894), 64 L. J. (Q. B.) 104, C. A., approving *Ross* v. *Woodford*, [1894] 1 Ch. 38; *Hunt* v. *Roberts* (1892), 9 T. L. R. 92; *Hartmont* v. *Daly* (1896), 12 T. L. R. 170, C. A.

SECT. 3. When Examination Ordered.

a plaintiff who applies for his examination out of court is required to make out a strong *primâ facie* case in support of his application, and is not entitled to succeed in the absence of a strong affidavit made by himself showing why he cannot attend the trial and why the order should be made (*d*). An order is more readily granted to a plaintiff who is within the jurisdiction to take the evidence of other plaintiffs who are remaining abroad (*e*).

A second order for examination will only be issued upon substantial grounds and in exceptional cases (*f*).

Witness in hostile country.

The examination of witnesses resident in a hostile country may be ordered if it is shown to the court to be just and practicable (*g*).

SECT. 4.—*Taking the Evidence.*

Taking the evidence.

831. When writs of mandamus or commissions are issued to the judges in India, the colonies, or other places in His Majesty's dominions, those judges have the same powers of enforcing the attendance and examination of witnesses as they would have in the trial of an action in their own courts (*h*), and have also power to order the examination in the manner and form directed by such commission or other process (*i*), and where a commission, mandamus, order, or request is addressed to any such judge in a civil proceeding, he may nominate some fit person to take the examination, or in a criminal proceeding the court to which a mandamus or order is addressed, or the chief judge thereof, may nominate a judge or magistrate to take the required deposition or examination (*k*).

Where one or more commissioners are appointed by order of the court, the mode in which the examination is to be taken is prescribed in the writ of commission (*l*).

When a person is ordered by the court to give evidence (*m*) or to produce documents (*n*) before an examiner appointed by the court, wilful disobedience of the order is contempt of court (*a*).

(*d*) *Fischer* v. *Hahn* (1863), 13 C. B. (N. S.) 659; *Castelli* v. *Groom* (1852), 18 Q. B. 490; *Light* v. *Anticosti Island* (*Governor & Co.*) (1888), 58 L. T. 25; see *Nadin* v. *Bassett* (1883), 25 Ch. D. 21, C. A., *per* COTTON, L.J., at p. 29; *Berdan* v. *Greenwood* (1880), 20 Ch. D. 764, C. A.; *Coch* v. *Allcock & Co.* (1888), 21 Q. B. D. 1, 178, C. A., *per* Lord ESHER, M.R., at p. 181; *Macaulay* v. *Glass* (1902), 47 Sol. Jo. 71.

(*e*) *Banque Franco-Egyptienne* v. *Lutscher* (1879), 41 L. T. 468.

(*f*) *Crowther* v, *Nelson* (1891), 7 T. L. R. 653; see *Western Bank of New York* v. *Koppel* (1892), 8 T. L. R. 36, 286, C. A.

(*g*) *Oppenheimer* v. *Robinson South African Banking Co.* (1900), *Times*, 31st January and 31st May, C. A.; compare *Barrick* v. *Buba* (1855), 16 C. B. 492; see also —— v. *Romney* (1745), 1 Amb. 61; *Cahill* v. *Shepherd* (1806), 12 Ves. 335.

(*h*) See p. 577, *ante*, and statutes there cited; Evidence on Commission Act, 1831 (1 Will. 4, c. 22), s. 2; and Debtors (Ireland) Act, 1840 (3 & 4 Vict. c. 105), s. 67.

(*i*) Evidence by Commission Act, 1859 (22 Vict. c. 20).

(*k*) Evidence by Commission Act, 1885 (48 & 49 Vict. c. 74).

(*l*) See R. S. C., App. J, Form 13. Where a commission to take evidence abroad is issued to a single commissioner, it should authorise him to administer an oath to himself (*Wilson* v. *de Coulon* (1883), 22 Ch. D. 841).

(*m*) R. S. C., Ord. 37, r. 5.

(*n*) *Ibid.*, r. 7; County Court Rules, Ord. 18, r. 20.

(*a*) Witnesses within the jurisdiction should, except in the case of an officer of

SECT. 4. **Taking the Evidence.**

Persons required to attend before a duly appointed examiner are entitled to the same privileges as to conduct money and expenses as witnesses at the trial (*b*).

Documents necessary.

The person appointed by the court as examiner must be furnished by the party applying for the examination with a copy of the writ and pleadings, if any, or with such documents as are necessary to inform him of the question at issue (*c*).

The examination.

832. The examiner has power to administer oaths (*d*). The evidence is to be taken according to the ordinary rules of examination, cross-examination, and re-examination (*e*), subject to any special directions which may be given by the court (*f*).

The examiner's duty is to write down the witnesses' statements, not as a rule in the form of question and answer. These statements must be signed by the witnesses, or, if a witness refuse to sign, by the examiner himself (*g*). They form the depositions, to which the examiner appends his signature (*h*).

If objection be taken to any question (*i*), the examiner should state his opinion as to its admissibility and make a note of the objection and of his statement, but he has no power to decide whether the question is admissible (*k*).

the court (*Re General Financial Bank*, [1888] W. N. 47), be summoned by *subpœna* (R. S. C., Ord. 37, r. 20; *Stuart* v. *Balkis Co.* (1884), 53 L. J. (CH.) 791). If a person refuses to attend, after receiving a *subpœna*, the court, upon a report from the examiner, will order such person to attend at his own expense and to pay the costs of the application (R. S. C., Ord. 37, rr. 8, 13, 15). For form of order, see Chitty's Forms, 13th ed., p. 293, No. 14; compare County Court Rules, Ord. 18, r. 26. If he still refuses, he may be attached (R. S. C., Ord. 37, r. 8; compare *Hennegal* v. *Evance* (1806), 12 Ves. 201). A witness refusing to answer may be committed for contempt of court (*Ex parte Fernandez* (1861), 10 C. B. (N. S.) 3; compare *Shurrock* v. *Lillie* (1888), 4 T. L. R. 355; *Carew* v. *Carew*, [1891] P. 360; R. S. C., Ord. 37, r. 8; County Court Rules, Ord. 18, r. 21). If he attend without a *subpœna* and refuse to answer, the court may order him to answer (*Cutler* v. *Wright*, [1890] W. N. 28).

(*b*) R. S. C., Ord. 37, r. 9; County Court Rules, Ord. 18, r. 22; see R. S. C., Ord. 65, r. 27 (9); and title PRACTICE AND PROCEDURE; compare *Wentworth* v. *Lloyd* (No. 2) (1865), 34 Beav. 455.

(*c*) R. S. C., Ord. 37, r. 10; compare County Court Rules, Ord. 18, r. 23.

(*d*) *Ibid.*, r. 19; compare County Court Rules, Ord. 18, r. 32.

(*e*) *Ibid.*, r. 11; compare County Court Rules, Ord. 18, r. 24.

(*f*) *Ibid.*, rr. 21, 22, 23; see *Re Doré Gallery* (1890), 38 W. R. 491, where NORTH, J., intimated to the examiner his opinion that applicant's witnesses should be cross-examined first.

(*g*) R. S. C., Ord. 37, r. 12. It is not essential that the evidence should be taken down in the examiner's own handwriting (*Bolton* v. *Bolton* (1876), 2 Ch. D. 217). Signature by the examiner of a shorthand transcript is not strictly in accordance with the rule (see *Re Doré Gallery* (1890), 88 L. T. Jo. 397); but this course may be taken if the parties agree (*The Knutsford*, [1891] P. 219). On the question of the costs of the shorthand writer, see *Re Hilleary and Taylor* (1887), 36 Ch. D. 262, 267, C. A. In commercial cases a shorthand writer is frequently employed to take down and transcribe the evidence.

(*h*) R. S. C., Ord. 37, r. 16; compare County Court Rules, Ord. 18, r. 25.

(*i*) Unless objection is taken at the examination, it cannot subsequently be taken (*Robinson* v. *Davies* (1879), 5 Q. B. D. 26).

(*k*) *Buckley* v. *Cooke* (1854), 1 K. & J. 29. An examiner ought not to refuse to allow any question to be put unless it is palpably inadmissible (*Surr* v. *Walmsley* (1866), L. R. 2 Eq. 439).

When a witness objects to answer, the validity of his objection is referred to the court, and the witness may be ordered to pay the costs occasioned by his refusal (*l*).

Although the parties and their legal representatives have a right to be present at the examination (*m*), the room in which the examination is held is not a public court (*n*).

Notification of examiner.

833. Where the examination is taken before one of the examiners of the court, he must be notified of the order for an examination in the manner provided by the Rules of the Supreme Court (*o*). It then becomes his duty to give an appointment in writing for the examination (*p*), and notice must be given to all parties by the party prosecuting the order, in the manner provided (*q*). The examiner has power to adjourn the examination *de die in diem*, and to recall witnesses (*r*). The examiner may, by consent of all parties, take the evidence of others than those named in the order (*s*).

Fees.

The party prosecuting the order is primarily liable for the fees and expenses of an examiner of the court, and may be ordered by the court to pay them upon the application of the examiner. Such an order is made without prejudice to any question on taxation as to the party by whom the costs should be borne (*a*).

SECT. 5.—*Return and Use of the Evidence.*

Return of the evidence

834. Where evidence is taken in accordance with a writ of commission or mandamus issued to a British court abroad, the return of the commission is to be made in the manner provided by statute (*b*).

Where evidence is taken by a commissioner or commissioners in accordance with a writ of commission issued by order of the High Court, the return of the commission is to be made in accordance with the directions in the writ of commission (*c*).

Where evidence is taken before an examiner in accordance with

(*l*) R. S. C., Ord. 37, rr. 14, 15; County Court Rules, Ord. 18, rr. 27, 28.

(*m*) R. S. C., Ord. 37, r. 11; County Court Rules, Ord. 18, r. 24. A solicitor's clerk may be heard before an examiner (*Vimbos* v. *Meadowcroft* (1901), 46 Sol. Jo. 2). The fees of one counsel only will be allowed on taxation (*Hallows* v. *Fernie* (1867), 16 W. R. 175).

(*n*) *Re Western of Canada Oil, Lands, and Works Co.* (1877), 6 Ch. D. 109; compare *Wright* v. *Wilkin* (1878), 6 W. R. 643; and see p. 593, *ante*.

(*o*) R. S. C., Ord. 37, r. 43.

(*p*) It is not always left to the examiner's discretion to fix a time. The time may be limited (see *Gedye* v. *Pelling*, [1892] W. N. 44).

(*q*) R. S. C., Ord. 37, rr. 44, 45.

(*r*) The consent of the witness to any adjournment is not necessary (*Re Metropolitan (Brush) Electric Light and Power Co., Ex parte Offor* (1884), 54 L. J. (CH.) 253).

(*s*) R. S. C., Ord. 37, r. 46.

(*a*) *Ibid.*, r. 50. As to the fees of examiner, see *ibid.*, rr. 51, 51A, and App.; and see *Linley* v. *Houlder* (1903), 88 L. T. 829, C. A.

(*b*) East India Company Act, 1772 (13 Geo. 3, c. 63), s. 40; Evidence on Commission Act, 1831 (1 Will. 4, c. 22).

(*c*) See R. S. C., App. J, Form 13.

SECT. 5. Return and Use of the Evidence.

the Rules of the Supreme Court, the original depositions (*d*), authenticated by the signature of the examiner (*e*), must be transmitted by him to the Central Office and there filed (*f*).

Depositions made before issue joined are not to be received at the trial, unless within one month after issue joined (or a longer period if allowed by the court) notice in writing of his intention has been given by the party intending to use them to the opposite party (*g*).

Discretion of court in admitting the evidence.

835. If it appears at the trial that, in spite of objection, evidence contained in the depositions has been wrongly admitted, the court will, in its discretion, deal with the depositions accordingly (*h*).

Depositions may not (apart from consent) be given in evidence unless the court is satisfied (1) that the deponent is dead, or (2) that he is beyond the jurisdiction (*i*), or (3) that he is unable from sickness (*k*) or infirmity to attend the trial (*l*).

The court will presume, in favour of the admissibility of depositions, that examiners have discharged their duties correctly (*m*).

A commission is not invalidated merely because the court to which it was addressed has been slightly misdescribed (*n*).

SECT. 6.—*Interlocutory Proceedings—Evidence by Affidavit.*

Evidence by affidavit.

836. Evidence may be given by affidavit on any motion, petition or summons (*o*), but the court may on the application of either

(*d*) It is not sufficient to send copies (*Clay* v. *Stephenson* (1835), 3 Ad. & El. 807; compare *R.* v. *Douglas* (1845), 1 Car. & Kir. 670).

(*e*) The court will not necessarily refuse to file depositions because the examiner has omitted to sign them (*Stephens* v. *Wanklin*, *Stephens* v. *Salway* (1854), 19 Beav. 585). If the examiner dies without signing the depositions, the court may order them to be filed (*Felthouse* v. *Bailey* (1866), 14 W. R. 827; *Bryson* v. *Warwick and Birmingham Canal Co.* (1853), 1 W. R. 124).

(*f*) R. S. C., Ord. 37, r. 16. See, as to time for return of depositions, *Clark* v. *Gill* (1854), 1 K. & J. 19; compare *Maple* v. *Stephenson*, [1888] W. N. 62.

(*g*) R. S. C., Ord. 37, r. 24.

(*h*) *Lumley* v. *Gye* (1854), 3 E. & B. 114; see *Hutchinson* v. *Bernard* (1836), 2 Mood. & R. 1.

(*i*) See form of "Long Order" for commission, R. S. C., App. K, Form 37, para. 10; and Chitty's Forms, 13th ed., 301, No. 33. Evidence of absence must be given by a person who speaks from his own knowledge (*Robinson* v. *Markis* (1841), 2 Mood. & R. 375). As to evidence of absence, see *Falconer* v. *Hanson* (1808), 1 Camp. 171, 172; *Carruthers* v. *Graham* (1841), Car. & M. 5; *Varicas* v. *French* (1849), 2 Car. & Kir. 1008.

(*k*) The illness need not necessarily be an incurable one (*Beaufort* (*Duke*) v. *Crawshay* (1866), L. R. 1 C. P. 699).

(*l*) R. S. C., Ord. 37, rr. 5, 18. An order to examine witnesses *de bene esse* should not state that their depositions may be given in evidence at the trial, for they may be capable of being examined at the trial (*Burton* v. *North Staffordshire Rail. Co.* (1887), 35 W. R. 536).

(*m*) Thus, where it had been ordered that witnesses should be examined separately, it was presumed that this had been done, though the return was silent on the point (*Simms* v. *Henderson* (1848), 11 Q. B. 1015). It is doubtful whether the court will presume commissioners to have taken the oath (*Brydges* v. *Branfill* (1841), 12 Sim. 334). As to the presumption, see also *Atkins* v. *Palmer* (1821), 4 B. & Ald. 377; *Greville* v. *Stulz* (1847), 11 Q. B. 997; *Hitchins* v. *Hitchins* (1866), L. R. 1 P. & D. 153; *Grill* v. *General Iron Screw Collier Co.* (1866), L. R. 1 C. P. 600; *Hodges* v. *Cobb* (1867), L. R. 2 Q. B. 652; *Richards, Tweedy & Co.* v. *Hough* (1882), 51 L. J. (Q. B.) 361.

(*n*) *Wilson* v. *Wilson* (1883), 9 P. D. 8, C. A.

(*o*) R. S. C., Ord. 38, r. 1; *Beaney* v. *Elliott*, [1886] W. N. 99 (affidavit used

party order the attendance of a deponent for cross-examination (*p*). This rule applies only to affidavits as to questions of fact which the court has at the time jurisdiction to decide, and does not apply to an affidavit verifying the name of the partners in a plaintiff's firm (*q*). It applies to a foreigner making an affidavit (*r*).

The court has a discretion to refuse to order the attendance of a witness for cross-examination (*a*), and will in general refuse to make such an order under this rule on an affidavit showing cause against a garnishee order *nisi* (*b*).

The court may refuse to act on an affidavit where it is not possible to cross-examine (*c*).

A party intending to use an affidavit in an application in chambers in the Chancery Division must give notice to the other parties concerned (*d*).

All affidavits previously read in court upon any proceedings may be used before the judge in chambers (*e*).

Any alterations in an account verified by affidavit to be left at chambers must be initialled by the officer before whom the affidavit is sworn (*f*), and documents referred to by affidavit are not to be annexed to the affidavit, but are to be referred to as exhibits (*g*).

When a judge in the Chancery Division has heard a case in chambers, he will not receive further evidence in court on a motion to discharge the order made in chambers (*h*), nor can evidence be filed, after the time which has been fixed for filing evidence has elapsed, without special leave (*i*).

on further consideration as to costs); *Evans* v. *Lewis* (1860), 2 L. T. 559 (but not an affidavit merely as to the conduct of the parties).

(*p*) R. S. C., Ord. 38, r. 1. When a motion is ordered to stand over to the hearing there can be no cross-examination on an affidavit used on the motion (*Singer* v. *Audsley* (1871), L. R. 13 Eq. 401).

(*q*) *Abrahams & Co.* v. *Dunlop Pneumatic Tyre Co.*, [1905] 1 K. B. 46, C. A. See also *Re Hardwick, Boswell* v. *Hardwick* (1907), 123 L. T. Jo. 322, and Practice Note, [1907] W. N. 180.

(*r*) *Strauss* v. *Goldschmidt* (1892), 8 T. L. R. 239.

(*a*) *La Trinidad, Ltd.* v. *Browne*, [1887] W. N. 208; *Strauss* v. *Goldschmidt, supra*. As to the court or officer before whom the cross-examination is to be conducted, see *Lumb* v. *Osburn*, [1884] W. N. 218, and *Pye* v. *Pye*, [1885] W. N. 174; *Luxmore* v. *Gordon* (1890), 7 T. L. R. 150.

(*b*) *Jeffris* v. *Tomlinson* (1886), 3 T. L. R. 193.

(*c*) *Shea* v. *Green* (1886), 2 T. L. R. 533. An interim order may be made pending cross-examination (*Lewis* v. *James* (1886), 32 Ch. D. 326, 331), or even in an exceptional case an order for committal (*Wordsworth* v. *Sugden* (No. 2) (1888), 32 Sol. Jo. 743).

(*d*) R. S. C., Ord. 38, r. 20. See *Downing* v. *Falmouth United Sewerage Board* (1887), 37 Ch. D. 234, 242, 243, C. A.

(*e*) R. S. C., Ord. 38, r. 21. Under R. S. C., Ord. 37, r. 25, evidence taken at the trial may be used in any subsequent proceedings in the same cause, and on *ex parte* applications evidence in another cause may, by leave of the court, be read (R. S. C., Ord. 37, r. 3).

(*f*) R. S. C., Ord. 38, r. 22.

(*g*) As to the right to inspection of exhibits, see *Re Hinchliffe* (*a Person of Unsound Mind*), *Deceased*, [1895] 1 Ch. 117, C. A., *per* A. L. SMITH, L.J., at p. 120; and *Sloane* v. *Britain Steamship Co.*, [1897] 1 K. B. 185, C. A.

(*h*) *Re Munns and Longden* (1884), 32 W. R. 675; *Re Marsden's Estate* (1889), 40 Ch. D. 475.

(*i*) *Re Chifferiel, Chifferiel* v. *Watson* (1888), 36 W. R. 806.

SECT. 7. **Trial on Affidavits.**

SECT. 7.—*Trial on Affidavits.*

SUB-SECT. 1.—*By Consent.*

Trial on affidavit by consent.

837. At the trial of any action or at any assessment of damages, the evidence may be taken by affidavit, provided that there has been an agreement between the solicitors of all parties that it shall be so taken (*j*). This agreement must be a formal consent in writing (*k*), and need not apply to the taking of the whole of the evidence (*l*). The court has no power to order that the evidence be taken in this manner (*m*), though a party who unreasonably withholds his consent may be ordered to pay the costs of the motion to have the evidence taken by affidavit (*n*).

In the case of infants or persons of unsound mind, the consent may be given by a guardian *ad litem* (*o*), and where the guardian *ad litem* of an infant gives his consent the leave of the court is not necessary (*p*).

Unless the agreement states that the evidence shall be taken by affidavit only, a witness present in court for the purpose of being cross-examined on his affidavit may give fresh evidence on behalf of the party for whom he has made the affidavit (*q*).

A consent that the evidence shall be taken by affidavit is equivalent to an agreement that the action shall be tried by a judge without a jury (*r*).

Power of court to refuse such evidence.

838. The court, if it considers the affidavit unsatisfactory, has power to exclude affidavit evidence altogether, and to direct that the same shall not be used, but that witnesses shall be examined orally at the trial (*s*).

Where, after the agreement has been made, a party is for good cause unable to obtain affidavit evidence, the proper course is to take out a summons to be relieved from the agreement. The court will, in a proper case, order that a reluctant witness be examined *vivâ voce* at the trial, or will, at the option of the other party, discharge the agreement and direct that all the evidence be taken *vivâ voce* (*t*).

An applicant is at liberty to read the respondent's affidavits notwithstanding the objection that on his own affidavits no case is made requiring an answer (*a*).

(*j*) R. S. C., Ord. 37, r. 1.
(*k*) *New Westminster Brewery Co.* v. *Hannah* (1875), 1 Ch. D. 278.
(*l*) *Miller* v. *Dwyer* (1891), 27 L. R. Ir. 510.
(*m*) *Gardiner* v. *Hardy*, [1876] W. N. 153.
(*n*) *Patterson* v. *Wooler* (1876), 2 Ch. D. 586.
(*o*) *Knatchbull* v. *Fowle* (1876), 1 Ch. D. 604; *Piggott* v. *Toogood*, [1904] W. N. 130; see *Lawson* v. *Quare* (1887), 32 Sol. Jo. 24, where CHITTY, J., held that in certain cases it was not right that counsel on behalf of infants should agree that an action should be tried on affidavit evidence.
(*p*) *Fryer* v. *Wiseman* (1876), 45 L. J. (CH.) 199.
(*q*) *Glossop* v. *Heston and Isleworth Local Board* (1878), 47 L. J. (CH.) 536.
(*r*) *Brooke* v. *Wigg* (1878), 8 Ch. D. 510, C. A.
(*s*) *Lovell* v. *Wallis* (1883), 53 L. J. (CH.) 494.
(*t*) *Warner* v. *Mosses* (1880), 16 Ch. D. 100, C. A.; and see *Winfield* v. *Shoolbred*, [1880] W. N. 192.
(*a*) *Re Margetson and Jones*, [1897] 2 Ch. 314, 317, 319.

SECT. 7. Trial on Affidavits.

Practice.

839. In the absence of any special agreement between the parties or of any direction of the court, the plaintiff must file his affidavits and deliver a list of them to the defendant or his solicitor within fourteen days after the consent for taking evidence by affidavit has been given (*b*). The defendant is then allowed fourteen days within which to deliver a list of his affidavits (*c*). Within a further seven days the plaintiff must deliver a list of his affidavits in reply, which can only deal with matters strictly in reply (*d*). If affidavits filed by the plaintiff in reply are not confined to matters strictly in reply, the court will not regard them, or it may give leave to the defendant to answer them (*e*).

Requiring presence of deponent at trial.

A party desiring the production of a deponent for cross-examination at the trial may, within fourteen days next after the end of the time allowed for filing affidavits in reply, serve upon the party on whose behalf the deponent has made the affidavit a notice requiring the production of the deponent at the trial (*f*).

The notice must be for the production of the deponent on the occasion, whatever it is, on which the inquiry and hearing and determination are to take place, and the affidavit is to be used (*g*).

It is doubtful whether this rule applies in the case of a witness who is resident beyond the jurisdiction (*h*). In Admiralty references, however, a deponent who is a party to the action, and is resident abroad, may be required by the registrar to attend in this country for cross-examination (*i*).

Where notice is given and a witness is not produced, his affidavit cannot be used as evidence unless by the special leave of the court or a judge (*k*). This penalty, however, does not relieve a party from the obligation of attending at his own expense where a *subpœna* has been issued (*l*).

Non-appearance of deponent.

840. The fact that a deponent does not appear before an examiner to be cross-examined is no ground for taking his evidence off the file before the hearing (*m*).

Leave to cross-examine will not be granted until the affidavit evidence is complete (*n*). A judge in chambers may refuse to

(*b*) R. S. C., Ord. 38, r. 25.
(*c*) *Ibid.*, r. 26.
(*d*) *Ibid.*, r. 27. This order, however, has not altered the practice which has always prevailed in the Court of Chancery of allowing a plaintiff to file affidavits in reply which bring forward additional witnesses (*Peacock* v. *Harper* (1877), 7 Ch. D. 648; and see *Adair* v. *Young* (1879), 40 L. T. 61; and *Roe* v. *Davies* (1876), 2 Ch. D. 729).
(*e*) *Gilbert* v. *Comedy Opera Co.* (1880), 16 Ch. D. 594.
(*f*) R. S. C., Ord. 38, r. 28.
(*g*) *Concha* v. *Concha* (1886), 11 App. Cas. 541.
(*h*) *De Mora* v. *Concha* (1886), 32 Ch. D, 133, C. A., *per* BOWEN, L.J., at p. 143; affirmed *sub nom. Concha* v. *Concha*, *supra*; and see *per* Lord HERSCHELL, L.C., at p. 559.
(*i*) *The Parisian* (1887), 13 P. D. 16.
(*k*) R. S. C., Ord. 38, r. 28.
(*l*) *Re Baker, Connell* v. *Baker* (1885), 29 Ch. D. 711; R. S. C., Ord. 37, r. 20.
(*m*) *Meyrick* v. *James* (1877), 46 L. J. (CH.) 579.
(*n*) *Muir* v. *Kirby* (1887), 32 Sol. Jo. 139.

SECT. 7. Trial on Affidavits.

allow a party to adduce further evidence after the evidence has been completed and that party has cross-examined (*o*).

No power of withdrawal.

A person, whether a party to the cause or not, who has made an affidavit, cannot withdraw the affidavit when cross-examination is threatened (*p*).

Cross-examination.

A deponent can be cross-examined under this rule, even where the affidavit has not been used by the party who filed it (*q*).

The party who produces a deponent for cross-examination is not entitled to demand the expenses thereof from the party requiring the production (*r*), even in the case of the cross-examination of a deponent not at the trial of the action, but before a master in chambers (*s*).

A party can compel the attendance of a deponent for cross-examination by *subpœna* (*t*).

Where evidence is taken by affidavit, the affidavits must be printed, and notice of trial must be given at the same time after the close of the evidence as in other cases is provided after the close of the pleadings (*a*). Further affidavits may, however, be printed with the consent of all interested parties, or by order of the court or a judge (*a*), and evidence filed after notice of trial may, when taken under a judge's order, be used at the trial (*b*).

Default actions *in rem*; Admiralty references.

841. In default actions *in rem*, and in references in Admiralty actions, evidence may be given by affidavit (*c*), but it is in the discretion of the registrar to refuse to give weight to such evidence until after cross-examination of a deponent on his affidavit, and a deponent resident abroad may, if a party to the action, be required to attend in this country for cross-examination (*d*). In actions of limitation of liability, where the defendant only puts the plaintiff to proof of his case, without raising any special defence, the practice is for the entire evidence to be given on affidavit; and in other contested Admiralty actions certain matters are in practice proved by affidavit (*e*).

SUB-SECT. 2.—*By Order of Court.*

Power of court to order evidence by affidavit.

842. The court or a judge may for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the

(*o*) *Re Davies, Issard* v. *Lambert* (1890), 44 Ch. D. 253, C. A.

(*p*) *Re Quartz Hill etc. Co., Ex parte Young* (1882), 21 Ch. D. 642, C. A.; *Clarke* v. *Law* (1855), 2 K. & J. 28; see also *Pike* v. *Dickinson* (1873), 21 W. R. 862, and *Re Sykes's Trusts* (1862), 2 John. & H. 415.

(*q*) *Re Ottaway, Ex parte Child* (1882), 20 Ch. D. 126, C. A., *per* JESSEL, M.R., at p. 127.

(*r*) R. S. C., Ord. 38, r. 28.

(*s*) *Backhouse* v. *Alcock* (1885), 28 Ch. D. 669; and see *Re Baker, Connell* v. *Baker* (1885), 29 Ch. D. 711, *Mansel* v. *Clanricarde* (1885), 54 L. J. (CH.) 982, and *Re Working Men's Mutual Society* (1882), 21 Ch. D. 831.

(*t*) R. S. C., Ord. 38, r. 29. As to *subpœna* generally, see p. 577, *ante*.

(*a*) *Ibid.*, r. 30. This order does not apply, in the Probate, Divorce, and Admiralty Division, to default actions *in rem*, or to references in actions, or to actions for limitation of liability, unless the court or a judge shall otherwise order.

(*b*) *Waring* v. *Lacey* (1876), 24 W. R. 318.

(*c*) R. S. C., Ord. 37, r. 2; and see title ADMIRALTY, Vol. I., p. 119.

(*d*) *The Parisian* (1887), 13 P. D. 16.

(*e*) See title ADMIRALTY, Vol. I., p. 110.

affidavit of any witness may be read at the hearing or trial, on such conditions as may be thought reasonable (*f*). The rule relates only to the trial of an action, and on a motion for judgment the court has no power to order that the evidence be taken by affidavit (*g*).

The order may be made at any time; thus, in administration actions, the court has power, if it thinks fit, to receive affidavit evidence on further consideration after the chief clerk has made his certificate (*h*).

Again, where there has been no judgment in an action, but merely an order in chambers for accounts, the court, on further consideration, may allow an affidavit to be read which has not been before the chief clerk (*i*).

The rule as to proving facts by affidavit only applies to the proof of isolated facts, and the court will not allow execution and attestation of a will to be proved by affidavit, even where none of the parties cited have appeared (*k*), though where it appears that every effort to trace the attesting witnesses of a will has failed, an affidavit made by one of them may be admitted as secondary evidence of execution (*l*).

Examples.

The following are instances where the court has made an order allowing the proof of isolated facts by affidavit:—

(1) In a suit for revocation of probate the court allowed an affidavit made by one of the attesting witnesses eight years previously to be admitted, it having appeared that every effort had been made to find the witness (*m*).

(2) At a trial on *vivâ voce* evidence an affidavit filed on an interlocutory motion was admitted, although the deponent was since deceased, and had not been cross-examined (*n*).

(3) The court ordered that the evidence of two witnesses resident in New South Wales should be taken on affidavit in an assessment of damages by a master (*o*).

When order will be refused.

843. Where it appears to the court or judge that the other party *bonâ fide* desires the production of a witness for cross-examination, and that such witness can be produced, no order will be made authorising the taking of the evidence of such witness on affidavit (*p*).

(*f*) R. S. C., Ord. 37, r. 1.

(*g*) *Ellis* v. *Robbins* (1881), 50 L. J. (CH.) 512.

(*h*) *May* v. *Newton* (1887), 34 Ch. D. 347; and see *Re Revill, Leigh* v. *Rumney* (1886), 55 L. T. 542, where on further consideration of an administration action an affidavit was allowed to be read which referred to the evidence of one of the parties between judgment and further consideration, but not one as to conduct of party before the action.

(*i*) *Re Michael, Dessau* v. *Lewin*, [1885] W. N. 104; 52 L. T. 609.

(*k*) *Cook* v. *Tomlinson* (1876), 24 W. R. 851.

(*l*) *Hayes* v. *Willis* (1906), 75 L. J. (P.) 86. In *Drewitt* v. *Drewitt* (1888), 58 L. T. 684, an affidavit made under similar circumstances was allowed to be read on the ground that the witness was engaged in giving evidence in another case.

(*m*) *Gornall* v. *Mason* (1887), 12 P. D. 142.

(*n*) *Elias* v. *Griffith* (1877), 46 L. J. (CH.) 806.

(*o*) *Macdonald* v. *Antelme, Patterson & Co.*, [1884] W. N. 72.

(*p*) R. S. C., Ord. 37, r. 1.

SECT. 7. Trial on Affidavits.

This provision is in accordance with the general rule that evidence is not admissible against a party unless that party has the opportunity of testing it by cross-examination (*q*), nor does the fact that an affidavit has been used on an interlocutory application give any right to read it at the trial (*r*).

SUB-SECT. 3.—*In County Court.*

Evidence in county courts.

844. Evidence in the county court must ordinarily be given *vivâ voce*, and even where evidence is required or permitted to be taken by affidavit, such evidence must nevertheless be taken orally on oath if the court, on any application at or before the trial, so directs. But the judge may at any time, for sufficient reason, order that any particular fact or facts may be proved by affidavit, on such conditions as he may think reasonable (*a*).

Where, however, a party *bonâ fide* desires the production of a witness for cross-examination, and such witness can be produced, the judge will not order his evidence to be given by affidavit (*b*).

Notice of intention to use affidavits at the trial may be given, subject to compliance with the conditions imposed (*c*).

The judge may, if he thinks fit, on the hearing of a judgment summons, admit as evidence the affidavit of a judgment creditor or debtor who does not reside within the district of the court where the summons is heard (*d*).

In proceedings under the Trustee Relief Acts, the Trustee Acts (other than proceedings under s. 42 of the Trustee Act, 1893), or relating to the maintenance or advancement of infants, or under the Settled Land Acts, 1882 to 1890, or the Guardianship of Infants Act, 1886, all facts are to be proved by affidavit, unless the judge otherwise directs (*e*).

Admiralty references.

845. On an assessment of damages in Admiralty references, evidence may be given by affidavit where a witness resides not less than ten miles from the registrar's office, or in any other case by consent of the parties (*f*). The adverse party, however, has the right to require a deponent to attend the reference for cross-examination (*f*). The cross-examining party will be liable to pay the costs of the attendance if the registrar considers that it was unnecessarily called for (*f*).

(*q*) See *Allen* v. *Allen*, [1894] P. 248, C. A., *per* LOPES, L.J., at p. 253.

(*r*) *Perkins* v. *Slater* (1875), 1 Ch. D. 83; *Blackburn Union* v. *Brooks* (1877), 7 Ch. D. 68. In bankruptcy proceedings evidence is generally given by affidavit, but deponents may be cross-examined on their affidavits by notice (*Re Ottaway, Ex parte Child* (1882), 20 Ch. D. 126, C. A.). As to Admiralty actions, see R. S. C., Ord. 38, rr. 28, 30, and *The Parisian* (1887), 13 P. D. 16.

(*a*) County Court Rules, Ord. 18, r. 1; and title COUNTY COURTS, Vol. VIII., p. 531.

(*b*) County Court Rules, Ord. 18, r. 2. This rule corresponds to R. S. C., Ord. 37, r. 1; see pp. 609 *et seq.*, *ante*.

(*c*) See title COUNTY COURTS, Vol. VIII., p. 531.

(*d*) County Court Rules, Ord. 25, r. 37.

(*e*) County Court Rules, Ord. 38, r. 5. This rule applies to applications as to funds in court (County Court Rules, Ord. 38, r. 23).

(*f*) County Court Rules, Ord. 39, r. 100.

SECT. 8.—*Form and Contents of Affidavits.*

SECT. 8. Form and Contents of Affidavits.

846. Affidavits are to be drawn up in the first person (*g*), and divided into paragraphs numbered consecutively, each of which, as far as possible, must be confined to a distinct portion of the subject. Every affidavit must be written or printed bookwise (*h*). No costs are to be allowed in respect of an affidavit which substantially departs from the rule (*i*).

Form.

Every affidavit must be intituled in the cause or matter in which it is sworn, but the names of the first plaintiff and defendant are sufficient where there are more than one; and the costs of any prolixity are to be disallowed by the taxing officer (*k*).

Every affidavit must state the description and true place of abode of the deponent, and where there is more than one deponent the names of each must be inserted (*l*).

An affidavit in a contemplated action should be intituled both in the contemplated action and in the matter of the Judicature Acts (*m*).

847. Affidavits must deal only with facts which the witness can prove of his own knowledge, except on interlocutory applications, where statements as to a deponent's belief are admitted, provided the grounds of such belief are stated, but not otherwise (*n*). An

Must deal with facts.

(*g*) An affidavit made in the third person sworn in the United States, where it is the practice so to swear them, was allowed to be filed in *Blamey* v. *Blamey*, [1902] W. N. 138, following *Re Husband* (1865), 12 L. T. 303.

(*h*) R. S. C., Ord. 38, r. 7. For formal parts of an affidavit, see Daniell's Chancery Forms, 5th ed., pp. 3—5; Chitty's Forms, 13th ed., p. 744. As to commencement of affidavit, see *Phillips* v. *Prentice* (1843), 2 Hare, 542; *Re Newton* (1860), 2 De G. F. & J. 3, C. A.; *Allen* v. *Taylor* (1870), L. R. 10 Eq. 52.

(*i*) R. S. C., Ord. 38, r. 7. The court has power to receive defective affidavits under Ord. 38, r. 14; see *Harlock* v. *Ashberry* (1883), 28 Sol. Jo. 26; *Eddowes* v. *Argentine Loan and Agency Co.* (1890), 59 L. J. (CH.) 392, C. A.; *Gates* v. *Buckland* (1864), 13 W. R. 67; *Re Heymann, Ex parte Heymann* (1872), 7 Ch. App. 488; *Down* v. *Yearley*, [1874] W. N. 158; *Re London Asphalte Co.* (1907), 23 T. L. R. 406; *Underdown* v. *Stannard*, [1871] W. N. 171; *Pearson* v. *Wilcox* (1853), 10 Hare, App., xxxv.

(*k*) R. S. C., Ord. 38, r. 2; see *Mackenzie* v. *Mackenzie* (1852), 5 De G. & Sm. 338; *Salvidge* v. *Tutton* (1869), 20 L. T. 300; *Blamey* v. *Blamey, supra*; *Hawes* v. *Bamford* (1839), 9 Sim. 653; *Re Varteg Iron Works Wesleyan Chapel* (1853), 10 Hare, App., xxxvii.; *Fisher* v. *Coffey* (1855), 1 Jur. (N. S.) 956; *Underdown* v. *Stannard, supra*; *Whiting* v. *Bassett* (1872), L. R. 14 Eq. 70. As to affidavit verifying a statutory declaration made abroad, see Practice Note, [1907] W. N. 180, and *Re Hardwick, Roswell* v. *Hardwick* (1907), 123 L. T. Jo. 322.

(*l*) R. S. C., Ord. 38, rr. 8, 9. If affidavit of all deponents is taken at one time it is sufficient to state that it was sworn by each of the "above-named" deponents. As to affidavits by parties to the action, see *Crockett* v. *Bishton* (1815), 2 Madd. 446. As to the description of the deponent, see a Filing Department Notice (dated December 4th, 1902), and *Re Orde* (1883), 24 Ch. D. 271, C. A.; *Re Horwood* (1886), 55 L. T. 373, C. A.; *Re Dodsworth, Spence* v. *Dodsworth*, [1891] 1 Ch. 657.

(*m*) *Young* v. *Brassey* (1875), 1 Ch. D. 277.

(*n*) R. S. C., Ord. 38, r. 3; *Re New Callao Co.* (1882), 30 W. R. 647; *Re Young (J. L.) Manufacturing Co., Ltd.*, [1900] 2 Ch. 753, C. A. An attested copy of a document may be exhibited as affording grounds for belief, although no evidence is adduced to account for non-production of the original (*Spencer* v. *Bailey* (1892), 93 L. T. Jo. 223).

SECT. 8. Form and Contents of Affidavits.

affidavit of information and belief must state the source of information and belief (*o*).

For the purpose of this rule, those applications only are considered interlocutory which do not decide the rights of the parties, but are made for the purpose of keeping things *in statu quo* till the rights can be decided, or for the purpose of obtaining some direction of the court as to the conduct of the cause (*p*).

The costs of affidavits containing unnecessary matters of hearsay or argumentative matter, or copies of or extracts from documents (*q*), are to be paid by the party filing the same (*r*).

The court has an inherent right to take an affidavit off the file for prolixity (*s*).

The court may order any matter which is scandalous to be struck out from any affidavit, and may order the costs of the application to be paid as between solicitor and client (*a*).

Corrections etc.

Affidavits containing any interlineation, alteration, or erasure cannot, as a rule, be read without leave of the court, unless the alterations are initialled by the officer taking the affidavit (*b*).

Form of jurat.

Unless a commissioner to administer oaths expresses the time when and the place where he takes an affidavit, it will not be permitted to be filed or enrolled without the leave of the court or a judge (*c*). A commissioner must also express the time when and the place where he does any other act incident to his office (*d*). He should state his title as commissioner (*e*).

(*o*) *Re Young* (*J. L.*) *Manufacturing Co., Ltd.*, [1900] 2 Ch. 753, C. A.; *Quartz Hill Consolidated Gold Mining Co.* v. *Beall* (1882), 20 Ch. D. 501, C. A.; see also *Bonnard* v. *Perryman*, [1891] 2 Ch. 269, 287, 288, C. A.; *Lumley* v. *Osborne*, [1901] 1 K. B. 532; *Bidder* v. *Bridges* (1884), 26 Ch. D. 1, C. A.

(*p*) *Gilbert* v. *Endean* (1878), 9 Ch. D. 259, 268, 269, C. A.; and see *Bird* v. *Lake* (1863), 1 Hem. & M. 111. In *Re Anthony Birrell Pearce & Co.*, *Doig* v. *Anthony Birrell Pearce & Co.*, *Re Same*, *Groos* v. *Same*, [1899] 2 Ch. 50, an affidavit founded on statements of an informant who might have been subpœnaed was not allowed; see also *Re Palmes*, *Palmes* v. *R.*, [1901] W. N. 146, and Practice Note, [1876] W. N. 59. As to affidavit evidence on a motion for judgment when there is an infant defendant, see *Cheek* v. *Cheek*, [1910] W. N. 37. As to an affidavit verifying a cause of action under R. S. C., Ord. 14, r. 1, see *Lagos* v. *Grunwaldt*, [1910] 1 K. B. 41, and compare *Chirgwin* v. *Russell* (1910), *Times*, 20th October.

(*q*) *Hirst* v. *Procter*, [1882] W. N. 12.

(*r*) R. S. C., Ord. 38, r. 3.

(*s*) *Walker* v. *Poole* (1882), 21 Ch. D. 835; *Hill* v. *Hart-Davis* (1884), 26 Ch. D. 470, C. A.

(*a*) R. S. C., Ord. 38, r. 11. For cases where affidavits were ordered to be taken off the file, see *Goddard* v. *Parr* (1855), 24 L. J. (CH.) 783; *Kernick* v. *Kernick* (1864), 12 W. R. 335; *Osmaston* v. *Land Financiers Association*, [1878] W. N. 101. As to expunging such matter as is deemed scandalous, see *Warner* v. *Mosses*, [1881] W. N. 69, C. A.; *Cracknall* v. *Janson* (1879), 11 Ch. D. 1, C. A., *per* FRY, J., at p. 13; *Re Jessopp*, [1910] W. N. 128 (matter irrelevant, but not scandalous, cannot be struck out).

(*b*) R. S. C., Ord. 38, r. 12; see *Gill* v. *Gilbard* (1852), 9 Hare, App., xvi. A master in the King's Bench Division has no jurisdiction to initial an affidavit sworn in an action in the Chancery Division (*Re Cloake* (1891), 61 L. J. (CH.) 69).

(*c*) R. S. C., Ord. 38, r. 5.

(*d*) *Ibid.*

(*e*) *Re Chapman*, *Ex parte Johnson* (1884), 26 Ch. D. 338, C. A. Other cases dealing with irregularities in the jurat are *R.* v. *Bloxham* (*Inhabitants*) (1814), 8 Jur. 1117; *Eddowes* v. *Argentine Loan and Agency Co.* (1890), 59 L. J. (CH.) 392, C. A.

SECT. 8. Form and Contents of Affidavits.

The parties cannot waive irregularities in the form of a jurat (*f*), but in a case where the place of swearing is omitted the court may possibly assume that the place was within the area in which the notary before whom it was taken was certified to have jurisdiction, and the irregularity may be overlooked (*g*).

Affidavit of blind or illiterate person.

Where an affidavit is sworn by a blind or illiterate person, the officer taking the affidavit must certify that it was read over in his presence to the deponent, and that the latter seemed perfectly to understand it, and made his signature in the presence of the officer (*h*). It is not sufficient to prove that the affidavit was read over to the witness by the person who prepared it, and that the witness appeared to understand it (*i*).

SECT. 9.—*Who may take Affidavits.*

Who may take affidavits.

848. Affidavits may be sworn in England before a judge, district registrar, commissioner to administer oaths, or certain other officers empowered by statute or rule to administer oaths (*k*).

The following officers are empowered to administer oaths in matters in the Supreme Court:—(1) Every master and first or second class clerk in the filing and record department of the Central Office (*l*); (2) chancery masters (*m*); (3) taxing officers (*n*); (4) district registrars (*o*); (5) officers of the court or other persons directed to take the examination of any person or witness (*p*); (6) arbitrators and umpires (*q*); (7) commissioners to administer oaths (*r*); (8) commissioners appointed under the Commissioners for Oaths Acts, 1889, 1890, 1891 (*s*); (9) first and second class clerks in the bills of sale department (*t*); (10) first and second class clerks in the Crown Office (*a*).

An officer of the court or other person directed to take the examination of any witness or person may administer an oath (*b*).

(*f*) *Pilkington* v. *Himsworth* (1835), 1 Y. & C. (EX.) 612.
(*g*) *Meek* v. *Ward* (1853), 10 Hare, App., i.
(*h*) R. S. C., Ord. 38, r. 13; see *Fernyhough* v. *Naylor* (1875), 23 W. R. 228; —— v. *Christopher* (1841), 11 Sim. 409. The attestation by a master is evidence that the deponent was regularly sworn, and that the signature is his signature (*R.* v. *Benson* (1810), 2 Camp. 508).
(*i*) *Re Longstaffe, Blenkarn* v. *Longstaffe* (1884), 54 L. J. (CH.) 516; but see *Verner* v. *Cochrane* (1889), 23 L. R. Ir. 422. As to a deponent who could not sign or make a mark, see *R.* v. *Holloway* (1901), 65 J. P. 712.
(*k*) R. S. C., Ord. 38, r. 4.
(*l*) R. S. C., Ord. 61, r. 5.
(*m*) R. S. C., Ord. 55, r. 16. Chancery masters were formerly styled chief clerks.
(*n*) R. S. C., Ord. 65, r. 27 (25).
(*o*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 62; R. S. C., Ord. 35, r. 6.
(*p*) R. S. C., Ord. 37, r. 19; see Commissioners for Oaths Act, 1889 (52 & 53 Vict. c. 10), s. 2.
(*q*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 7 (a).
(*r*) Judicature Act, 1873 (36 & 37 Vict. c. 66), ss. 77, 82, 84.
(*s*) 52 & 53 Vict. c. 10; 53 & 54 Vict. c. 7; 54 & 55 Vict. c. 50.
(*t*) Bills of Sale Acts Rules, r. 12.
(*a*) Crown Office Rules, 1906, r. 7.
(*b*) R. S. C., Ord. 37, r. 19. As to the appointment of commissioners, see Commissioners for Oaths Act, 1889 (52 & 53 Vict. c. 10), ss. 1, 2; Judicature

SECT. 9.
Who may take Affidavits.

Solicitor to parties to an action.

No affidavit is sufficient if sworn before the party on whose behalf the affidavit is to be used, or before his solicitor or his solicitor's agent, correspondent, clerk, or partner (*c*), even where the affidavit is sworn before one of the partners of the country firm of solicitors in a case where the name of the London solicitors appears alone on the record (*d*), or where an affidavit is sworn before a country solicitor who is the "correspondent" of the party's London solicitors (*e*).

An affidavit of the execution of a bill of sale sworn before the solicitor for the grantor has been held to be insufficient (*f*).

Affidavit made out of the jurisdiction.

849. In places out of the jurisdiction of the court, which are under the dominion of His Majesty, affidavits may be sworn and taken before any judge, court, notary public, or person authorised to administer oaths in the place where the affidavit is taken (*g*).

In foreign parts, out of His Majesty's dominions, affidavits may be sworn before any of His Majesty's consuls or vice-consuls (*h*), and any person having authority to administer an oath in a place out of His Majesty's dominions may take an affidavit required to be used in England (*i*).

Act, 1873 (36 & 37 Vict. c. 66), ss. 77, 82, 84. As to the duration of the commission, see *Ward* v. *Gamgee* (1891), 65 L. T. 610; *Shrapnel* v. *Gamgee* (1891), 8 T. L. R. 9. By the Oaths Act, 1909 (9 Edw. 7, c. 39), s. 3, the word "officer" in that Act means and includes any and every person duly authorised to administer oaths.

(*c*) R. S. C., Ord. 38, rr. 16, 17; *Re Hogan* (1754), 3 Atk. 813; *Wood* v. *Harpur* (1840), 3 Beav. 290; *Hopkin* v. *Hopkin* (1853), 10 Hare, App., ii.; *Bourke* v. *Davis* (1889), 44 Ch. D. 110, *per* KAY, J., at p. 126. By the Commissioners for Oaths Act, 1889 (52 & 53 Vict. c. 10), s. 1 (3), a commissioner is forbidden to administer an oath in any proceeding in which he is solicitor to any of the parties, or in which he is interested.

(*d*) *Northumberland* (*Duke*) v. *Todd* (1878), 7 Ch. D. 777.

(*e*) *Parkinson* v. *Crawshay*, [1894] W. N. 85; see also *Foster* v. *Harvey* (No. 1) (1863), 11 W. R. 899; *Re Gregg*, *Re Prance* (1869), L. R. 9 Eq. 137.

(*f*) *Baker* v. *Ambrose*, [1896] 2 Q. B. 372.

(*g*) R. S. C., Ord. 38, r. 6.

(*h*) *Ibid.* The Commissioners for Oaths Act, 1889 (52 & 53 Vict. c. 10), s. 6, enacts that an affidavit sworn in a foreign place before any of the following officials shall be as effectual as if duly sworn in the United Kingdom:—British ambassadors, envoys, ministers, chargés d'affaires, secretaries of an embassy or legation, consuls-general, consuls, vice-consuls, acting consuls, pro-consuls, consular agents. Acting consuls-general, acting vice-consuls, and acting consular agents are added by the Commissioners for Oaths Act, 1891 (54 & 55 Vict. c. 50), s. 2.

(*i*) Commissioners for Oaths Act, 1889 (52 & 53 Vict. c. 10), s. 3. As to the application of this Act to bankruptcy affidavits, see *Re Magee*, *Ex parte Magee* (1885), 15 Q. B. D. 332. As to the necessity for an affidavit verifying the signature of a foreign magistrate, and as to the authority of such magistrate, see *Omeally* v. *Newell* (1807), 8 East 364; *Haggitt* v. *Iniff* (1854), 5 De G. M. & G. 910, C. A.; *Re Earl's Trust* (1858), 4 K. & J. 300, C. A.; *Mayne* v. *Butter* (1864), 13 W. R. 128; *Levitt* v. *Levitt* (1865), 2 Hem. & M. 626; *Hayward* v. *Stephens* (1866), 36 L. J. (CH.) 135; *Re Kenah's Trusts* (1867), 15 W. R. 781; *Lees* v. *Lees*, [1868] W. N. 268; *Re Davis's Trusts* (1869), L. R. 8 Eq. 98; *Cooke* v. *Wilby* (1884), 25 Ch. D. 769; *De Leon* v. *Hubbard*, [1883] W. N. 197; *Brittlebank* v. *Smith* (1884), 50 L. T. 491; *Cooper* v. *Moon*, [1884] W. N. 78; *Sharpe* v. *Jackson* (1904), 39 L. J. 400; *Re London Asphalte Co.* (1907), 23 T. L. R. 406 (an affidavit sworn in Germany before a notary whose signature was attested by the seal of the British Consulate was allowed to be used, although the attestation did not state that the notary was qualified to administer oaths).

In India affidavits may be sworn before any judge or official of a High Court, or local court empowered by that court to administer oaths, or any magistrate, commanding officer of any military station occupied by His Majesty's troops, or notary public (*k*).

SECT. 9. Who may take Affidavits. India.

SECT. 10.—*Filing and Office Copies of Affidavits.*

850. Every affidavit used in the Supreme Court must be filed, and must have indorsed on it a note showing on whose behalf it is filed; no affidavit may be filed or used without such note, except by the direction of the court (*l*). Filing affidavits.

With the exception of affidavits used in Admiralty and Probate actions, or in proceedings on the Crown side of the King's Bench Division, or in a district registry (in which cases affidavits are filed in the Admiralty or Probate registries, or the Crown Office Department or in the registry, as the case may be), every affidavit used must be filed in the Central Office (*m*).

It is the duty of the solicitor to the party who has sworn and used an affidavit to cause it to be filed, and where affidavits are used in chambers before being filed there is an undertaking, express or implied, that they shall be filed (*n*). Using unfiled affidavits.

On *ex parte* applications unfiled affidavits are allowed to be read, on an undertaking that they shall be filed, but an unfiled affidavit of service of notice of motion cannot be read, where the defendant does not appear (*o*).

An order made *ex parte* in court will not, except by the leave of the court or a judge, be of any force unless the affidavit on which the application was made was produced or filed at the time of making the motion (*p*).

Where a special time is limited for filing affidavits, no affidavit filed after that time may be used except by leave of the court (*q*).

Affidavits are not allowed to be taken out of a district registry or

(*k*) Stringer's Oaths and Affirmations, 3rd ed., p. 51.

(*l*) R. S. C., Ord. 38, r. 10.

(*m*) *Ibid.* Affidavits used on the revenue side are filed in the King's Remembrancer's Department, Room 176. The place of filing is the Filing and Record Department, Rooms 84 and 86. Affidavits for use on appeal should be filed with the officer of the division of the High Court from which the appeal comes (*Watts* v. *Watts* (1876), 45 L. J. (CH.) 658, C. A.).

(*n*) *Taylor* v. *Gates* (1895), 72 L. T. 436, C. A., *per* LINDLEY, L.J., at p. 437. Where an infant appears by his guardian *ad litem*, R. S. C., Ord. 16, rr. 18, 19, provide for the filing of an affidavit by the solicitor.

(*o*) *Farrer* v. *Sykes* (1874), 43 L. J. (CH.) 392.

(*p*) R. S. C., Ord. 38, r. 19; and see *Re Abbott's Trade-mark* (1904), 48 Sol. Jo. 351; and *Re King & Co.'s Trade-mark*, [1892] 2 Ch. 462, C. A. As to time for filing affidavits for use at trial, see R. S. C., Ord. 38, rr. 25—27. When a summons has been adjourned into court, evidence filed after the time fixed in chambers for filing evidence cannot be used without special leave; where no time had been fixed, evidence filed after the adjournment into court was admitted (*Re Chifferiel, Chifferiel* v. *Watson* (1888), 58 L. T. 877). In references in Admiralty actions the claim and affidavits must be filed within twelve days from the day when the order for the reference is made; twelve days are then allowed for filing counter affidavits, six days only being allowed for any further affidavits (R. S. C., Ord. 56, rr. 2, 3).

(*q*) R. S. C., Ord. 38, r. 18.

SECT. 10, Filing and Office Copies of Affidavits.

out of the Central Office without the order of a judge, district registrar, or master (*r*).

A deposition of a witness filed for one purpose in proceedings in bankruptcy may be used against him as an admission in any other proceeding in the same bankruptcy (*s*).

In cases where an original affidavit is allowed to be used, it must be stamped with a proper filing stamp and must, when used, be delivered to the proper officer, who shall send it to be filed.

Office copies.

Office copies of affidavits may always be used where the original has been filed and the copy duly authenticated (*t*).

The parties must produce office copies of the affidavits they intend to read (*a*). The office copy should be produced by the party on whose behalf the affidavit was filed (*a*), except in the case of affidavits filed by a claimant or creditor in an administration action (*b*).

In cases in which an original affidavit can be used it is not necessary to take an office copy (*c*), nor is an office copy of an affidavit of documents necessary (*d*).

SECT. 11.—*Action for Perpetuation of Testimony.*

Actions to perpetuate testimony.

851. Actions to perpetuate testimony may be brought by any persons who would, under the circumstances alleged by them to exist, become entitled to any honour, title, dignity, office, or estate on the happening of some future event (*e*).

SECT. 12.—*Evidence for Use before Foreign Tribunals.*

Evidence for use before foreign tribunals.

852. Facilities are afforded by statute (*f*) for taking evidence in His Majesty's dominions in relation to civil and criminal matters for use before foreign tribunals.

Where it is made to appear to the court that any tribunal of competent jurisdiction in a foreign country before which any civil or commercial matter or any criminal matter not of a political character is pending is desirous of obtaining the testimony of any witness within the jurisdiction of the court, the court may, on the *ex parte* application (*g*) of a person duly authorised by the foreign

(*r*) R. S. C., Ord. 35, r. 22; R. S. C., Ord. 61, r. 28.
(*s*) *Re Cooper, Ex parte Hall* (1882), 19 Ch. D. 580, C. A.
(*t*) R. S. C., Ord. 38, r. 15.
(*a*) R. S. C., Ord. 66, r. 7 (f), (g).
(*b*) *Marshall* v. *National Provincial Bank of England* (1892), 61 L. J. (CH.) 465, 466. As to the proper method of preparing office copies, see *Coleman* v. *Coleman*, [1905] W. N. 160.
(*c*) R. S. C., Ord. 65, r. 27 (53).
(*d*) *Ibid.*, r. 27 (54).
(*e*) R. S. C., Ord. 37, r. 35; see title EQUITY, p. 44, *ante*.
(*f*) Foreign Tribunals Evidence Act, 1856 (19 & 20 Vict. c. 113), which applies only to civil and commercial matters. Its provisions are extended to criminal matters, other than those of a political character, by the Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 24.
(*g*) The order for examination of the witness may be obtained *ex parte* from a master in a civil matter, and from the judge in chambers in a criminal matter, upon an affidavit of the matters required by s. 1 of the Foreign Tribunals

tribunal, make such order as is necessary for the obtaining of the evidence of the witness (*h*).

The court may direct that the examination be taken in the manner requested by, or stated to be in accordance with the practice of, the foreign court for which the evidence is being obtained (*i*).

Evidence Act, 1856 (19 & 20 Vict. c. 113), to be made to appear. As to what evidence of such matters is sufficient, see *Simpson* v. *Hazard*, [1887] W. N. 115. The application is in certain cases made by the solicitor to the Treasury (R. S. C., Ord. 37, r. 60).

(*h*) Foreign Tribunals Evidence Act, 1856 (19 & 20 Vict. c. 113), ss. 1, 2; Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 24; R. S. C., Ord. 37, r. 54. As to the form of order, the person before whom the examination is to be held, and the manner in which the examination is to be certified and forwarded, see R. S. C., Ord. 37, rr. 55—57.

(*i*) R. S. C., Ord. 37, r. 58. The Foreign Tribunals Evidence Act, 1856 (19 & 20 Vict. c. 113), s. 3, authorises the taking of evidence on oath by persons acting as examiners under any order made in pursuance of the Act; s. 4 provides for the obtaining by a witness of his expenses; s. 5 entitles a witness to refuse to answer incriminating questions and any other questions which he would be entitled to refuse to answer in a cause pending in the court which has ordered his examination. R. S. C., Ord. 37, rr. 54—58, apply to applications under the Evidence by Commission Act, 1859 (22 Vict. c. 20) (R. S. C., Ord. 37, r. 59).

EXAMINERS.

See COURTS; EVIDENCE; PRACTICE AND PROCEDURE.

EXCHANGE.

See COMPULSORY PURCHASE OF LAND AND COMPENSATION; REAL PROPERTY AND CHATTELS REAL; STOCK EXCHANGE.

EXCHEQUER.

See CONSTITUTIONAL LAW; REVENUE.

EXCHEQUER BILLS.

See BILLS OF EXCHANGE ETC.

EXCISE.

See INTOXICATING LIQUORS; REVENUE.

EXCOMMUNICATION.

See ECCLESIASTICAL LAW.

END OF VOL. XIII.

INDEX.

EQUITY,
accident, bond destroyed or lost, relief in equity, 25
profert of, dispensed with at law, 26
document, under hand, lost or destroyed, former procedure in equity, 26
where lost or destroyed, 25
executor, loss of assets, not charged with in equity, 27
law, cases recognised at, 25
lease, coal mine, deficiency of coal, no relief, 27
rent not suspended, in case of fire, 27
negotiable instrument, if destroyed, relief at law, 26
lost, equity exercised jurisdiction, 26
personal representative, matters done in course of business, relief, 27
policy, insurance, lost, effect of decree of court directing payment, 26
power, defective execution of, relief in equity, 27
relief in equity more advantageous than at law, 26
how far concurrent, 25
person seeking, in equity only where no remedy at law, 25
title deeds lost or destroyed, 26
what the term includes, 25
will, omission to make, no relief in equity, 27
account, action for at law, not restrained except for strong considerations, 28
assumpsit, action of, formerly at law for balance due, 27
law, actions that formerly lay at, 27
mortgagor and mortgagee, between, property out of jurisdiction, 66
mutual, accounts, bill for, properly brought in equity, 28
of profits, option in plaintiff to have, or damages, 68
plaintiff seeking, must account, 72
relief, facilities afforded in equity, 27
in equity, reasons for assumed jurisdiction, 27
matters of, in Chancery, 6, 10
not always given where remedy at law, 28
acquiescence, breach of trust, in, by *cestui que trust*, effect of, 172
circumstances raising estoppel, party so acquiescing cannot complain, 166
upon which estoppel rests, 166
double meaning of term, 166
estoppel, by, elements constituting, 167
circumstances upon which founded, 166, 167
fiduciary relationship of person lying by, 167
fraud, the foundation of doctrine, 167
ignorance of title, prevents application of doctrine, 168
improvements, in, by person other than owner, 168
innocent purchaser, in purchase by, 168
land, building on, of another knowing him to be the true owner, effect of, 167
lapse of time of no importance, the estoppel is immediate, 166
marriage settlement, ignorance of title no claim to relief against, 168
married woman, where restrained from anticipation, 168
notice of claim avoids equity against owner, 167
operates by way of estoppel, 166
person lying by, must state his adverse title, 167
rights of person expending money on another's property, 168
standing by, party, without objecting to dealings of another adverse to his rights, 166
while person acquires what he thinks is a good title, 167
statutory provision relating to, 166
actual notice, agent, to, acting within scope of his authority, 84

EQUITY—*continued.*
actual notice, agent, to, affects principal whether communicated or not, 84
as such, must be in same transaction, 85
employed in transaction, 84
imputed to principal, 84
knowledge if fraudulent, not imputed to principal, 84
must be material to transaction, 85
where there has been fraud, 84
companies, having common officer, 85
with common officer, of matters of internal regulation, 86
Conveyancing Act, 1882, effect of, 85
corporation, to, to whom given, 84
definition of, 84
fraud by agent, must be independent of mere concealment, 85
matter not material to transaction, 85
person giving, status of, when given, 84
purchaser must follow up matters of which he has, 87
registration not affected by, under Yorkshire Registries Act, 1884...86
rent, adverse claimant in receipt of, effect of, 88
solicitor, one, not necessarily agent of both parties, 85
where knowledge of, imputed to principal, 84, 85
ademption, effect of decision that doctrine applies, 135
gifts before date of will cannot operate as an, without consent of donee, 130
legacy to son, of, by subsequent settlement on his marriage, 134
provision by will, of, by subsequent advance, although persons to whom limited not the same, 135
will, beneficiary under, no choice between provisions, 131
administration, administrator, bond of, for benefit of legatees and next of kin, 31
assets, available for creditor, at law, in equity, 34
equitable, subject to equity only, 34
general liability for debts, 37
land as, how formerly liable, 34
legal and equitable, distinction between, 33
meaning of, 34
not important since Act of 1869...35
order of distribution not affected by Act of 1897...37
beneficiaries, assets marshalled in favour of, 37
order of liability of assets for distribution among, 37
right to marshal, where debts charged on realty and paid out of personalty, 37
Chancery, Court of, how jurisdiction acquired, 30
creditor, advantages to, in proceeding in equity, 31
at law reached only legal assets, 31
deficiency in former remedy of, against deceased's estate, 31
former power of executor as to debts in higher degree, 31
rules relating to payment of, at law, in equity, 33
formerly sued for himself, afterwards for all creditors, 31
his position before decree *dominus litis*, 31
priority gained by decree, over subsequent judgment creditor, 33
procedure by, where real estate involved, 31
proceedings by restrained, when general decree made, 33
remedy of, after judgment, execution *de bonis testatoris*, *de bonis propriis*, 33
right of executor to have bill dismissed on paying debt and costs, 31
rights of persons after decree, 31
to goods in hands of sheriff before decree, 33
specialty, partly paid out of legal assets, deferred as to equitable, 33
taking assignment of administrator's bond, 31
where execution restrained, 33
creditors, action at common law by, restrained after decree for general, 32
debts, specialty and simple contract, effect of placing on equal footing, 35

EQUITY—*continued.*
administration, decree, effect of, for general administration, 32, 35
or judgment, registration whether necessary for priority, 35
equitable jurisdiction, basis of, in, 32
estate duty, effect of marshalling on descended real estate, 37
executor, affidavit of assets by, where general decree made, 33
creditor partly preferred by, subsequent administration, 36
former right of preference of, in payment of creditors, 36
preference by, when stopped by action, 36
protection of, by court when decree made, 33
retainer by, 36
assets available for, in what degree, 36
basis of right, 36
exercisable against superior debt without notice, 37
not affected by administration judgment, 37
out of funds in court, 37
right of preference of, since Judicature Acts, 36
under Act of 1869...36
executors, devise to, nature of assets, 34
undisposed of residue, trustees of, intention of will, 32
heir-at-law, no right of retainer for simple contract debt out of realty, 36
retainer, not where legal right to sue in trustees, 36
right of retainer, of specialty debts where heir bound, 36
insolvent estates, effect of Judicature Act, 64
judgment, against executor, priority formerly given by, 35
testator, executor cannot discharge himself by paying inferior debts, 35
notice to executor presumed, 35
priority of unregistered, 35
registration of, statutory provision, 35
land, devise of, for payment of debts, effect of, 34
former proceedings at law to charge with debts, 34
legatee, action by, priority of debts over legacies, 32
bill by, necessary parties, 32
equity intervened on behalf of, 31
former proceedings by, for own legacy, then generally, 32
remedy at law, specific legacy, pecuniary legacy, 31
proceedings by, in Ecclesiastical Court, restrained when bill filed in equity, 32
until decree in proceedings by, other legatees or creditors could proceed, 32
where executor admits assets and otherwise, 32
married women, separate estate of, nature of assets, 34
next of kin, Ecclesiastical Court could not distribute among, 32
personal representative, whole of estate devolves on, since Land Transfer Act, 189...737
power, appointment under general, of personal property, now legal assets, 34
real estate subject to, statutory provision, 34
proceedings, restraint of, in other courts, 32
real estate, charge on, for payment of debts, under will, effect of, 35
liability of, to specialty and simple contract debts, 35
no charge of debts on, until administration decreed, 35
priority of specialty debts where heir bound, 35
after-acquired property, assignment, operation of, covenant to assign when acquired, 74, 104
defective title, person conveying for value, afterwards acquiring good title, effect of, 104

EQUITY—*continued.*
agent, accountable to principal for secret profits, 68
actual notice, acting within scope of authority, 84
affecting principal, 84
imputed to principal, 84
material to transaction, 85
must be in same transaction, 85
to fraudulent, not imputed to principal, 84
solicitor, 84
where there has been fraud, 84
claim against, by principal and third party, 57
purchase by, for principal, not allowed to retain, 75
agreement for abandonment of criminal prosecution against public policy, 73
appointment, illusory, when, principle of relief, 70
apportionment, annuities, when formerly apportioned, 29
contract, application of rule of law and of equity, 28
enjoyment, interference with, ground for, in equity, 29
where value of premises diminished, 29
executors of tenant for life entitled to proportion of rent, 29
interest apportionable, but periodical payments neither at law nor in equity, 29
law, rule of, in reference to, followed in equity, 28
lease, for lessor's life, former effect of lessor's death, 29
rent, former difference in respect of time and estate, 29
rentcharge, apportionment at equity, 29
extinguishment of rights to, on purchase of part of land, not allowed in equity, 29
rent service, on severance of reversion, apportionable, 29
statute, provision by, for, of periodical payments, 29
arbitration, failing of mode provided for settling contract, no relief, 27
assent, devisee or legatee by, in testator's lifetime to parol trust, 75
assets, legal and equitable, 33, 34, 35
assignee, equitable, agreement to take assignment, 97
purchaser for value with notice is subject to equities, 78
subject to all equities of assignor if volunteer, 78
assignment, after-acquired property, basis of efficacy, 74
operation of, as covenant to assign, 104
contingent rights, of, former policy of law relating to, 102
debt, by, person taking may use as a set-off, 163
equitable, assignee takes subject to all rights existing between debtor and assignee, 104
basis of, operation by contract, valuable consideration, 102, 103
charge, merely a, requires valuable consideration to support it, 103
consideration, not necessary, 103
effect of, assignor trustee for assignee, 103
notice, consequences of omission to give, 103
not necessary to complete title of assignee, 103
operates by way of agreement or contract, 103
registration of, under Patents and Designs Act, 1907, effect of, 103
voluntary, when absolute, assignee in place of assignor, 103
leaseholds, of, equitable, 64
personal property, *inter vivos*, creating successive interests, necessity for trust, 96
property having no existence, treatment of, in equity, 74
assumpsit, action of, for balance of account due, formerly at law, 27
auxiliary jurisdiction, Chancery, Court of, empowered to determine questions of law since 1862...43
exercised jurisdiction in aid of law, 42
claims, preventing injury to third persons, from conflicting, 42
discovery of facts or documents, 6
evidence, procuration and preservation of, 42
injunctions, granted in, 6
the use of, in preventing oppressive enforcement of judgments, 42

EQUITY—*continued.*
auxiliary jurisdiction, instruments, void or voidable, preventing use of, 42
interpleader, remedy of, 6
law, prevails in matters of legal right, 43
matters, subject of aid of equity to law, 42
perpetuate testimony, suit to, 6
procedure, applicable to rights equitable and in principal suit 43
where equitable relief depended upon legal right, 43
proceedings, restraint of or facilitation of, at law, 42
property, provision for safety of, pending litigation and when out of possession, 42
receiver, appointment of, 6
right of law, determination of, when binding, 43
rights in other courts, relation to, 6, 42
restraining assertion of doubtful, 42
suits, avoiding multiplicity of, in respect of same right, 42
bankruptcy, trustee in, takes subject to prior equities, 79
bills of peace, Chancery, Court of, foundation of jurisdiction to entertain, 58
claim to legal right by two persons, one cannot sue in equity, 59
common right, plaintiffs' rights differ *inter se*, 59
copyholders might file a bill where fine excessive, 58
ejectment, actions of, at law, restrained in equity after judgment, 59
parties, some adverse claimants only necessary, 59
plaintiff, result favourable to, litigation restrained, 59
procedure, where title legal, 58
right, in what cases of, resorted to, 58
of common, parties necessary, 59
way, claim of, when bill might be filed, 58
vexatious litigation, where restrained, 59
bond, accident, destroyed or lost, relief, 25
action on lost, at law, 7
plea of accord and satisfaction, 64
consideration, illegal, evidence *dehors*, former aid to relief, 73
defence, payment to one obligor how far a, 64
fraud of creditors, where in, at law, in equity, 20
marriage, where given before, relief in equity, 20
profert of, dispensed with, 26
relief to plaintiff where restrained when amount under penalty, 48, 49
violation of condition wilful, 151
void for immoral consideration, no relief were consideration patent, 73
boundaries, lands, of adjoining owners, early assistance of equity, 39
wrongful possession by defendant must be shown, 39
title, clear legal in plaintiff, necessary to give jurisdiction, 39
building scheme, covenant affecting land where no scheme, 102
restrictive, who entitled to benefit, 101
what will constitute a, 101
cancellation of documents, agreement, when unenforceable, what will justify relief, 53
annuity, deed of, when void, terms of cancellation, 53
consideration, illegality of, not necessarily ground for relief, 54
deed, where a cloud upon title to land, 53
defence to action in respect of document, proper remedy, 54
fraud, constructive, relief to party subject of, 53
party subject of, may maintain action for, 53
gambling transactions, instruments given in, 54
ground for, to entitle party to relief, 52
public policy, party *particeps criminis*, relief on grounds of, 54
relief, equitable right to, 53, 54
trustees, charity; lease by, set aside *in toto*, 53
void, and defect apparent, equity does not interfere, 53
defect not apparent, relief in anticipation, 53
"*caveat emptor*" *See* fraud.
cestui que trust, assignee of, payment of share of fund to, by trustee, constructive notice, 88

EQUITY—*continued.*
cestui que trust, breach of trust, acquiescence in, 172
indemnity, trustee's right to, may be followed, 97
interest of, how far postponed, 79
may be defeated, 89, 90
intestacy of, when part of land not sold, effect of conversion, 106
legal estate, burdens incident to, borne by legal owner, not by, 96
right of, former, merely personal, 89
now equitable estate attaching to the land, 89
trust, interest in subject of, vests in, 79
waiver of breach of trust by, effect of, 166
Chancery, Court of, advantages afforded by, 7
chancellor, opinions followed by, 7, 8
common law jurisdiction of, foundation, 4
conflict with common law, termination of, 5
conveyancing counsel, appointment of, 6
encroachments of, protested against, 5
equity jurisdiction, development of, 5
establishment, cause of, 7
Exchequer, Court of, equity side transferred, 5
history, early, authorities for, 5
injunction, early use of, 5
lunatics, no jurisdiction in regard to, 10
matters formerly referred to, 5
origin of, 4
petitions for redress, 4
principles of, how applied, 6, 9
remedy of, where legal, lost, 6
removal of defects in, 6
reports, when commenced, 5
restraint by, of proceedings at common law, 6
rights enforced in, not recognised at law, 6
separate existence, cause of, 5
subpœna, writ of, introduction of, 5
specific performance, as alternative remedy, 6, 11
staff of, 6
trusts, early enforcement, 5
charge, agreement to execute mortgage on request does not create immediate charge, 93
enforcement of, when created by will or settlement, by sale only, 93
chattels, assignment of after-acquired, 64
compensation in lieu of return, 13
real estate, article associated with, rights in, 13
specific delivery, decree of, 12
trust of, retention of article in breach of, 13
chose in action, assignment, equitable, of, notice to debtor not necessary, 98
of a legal, where absolute and of entire debt, 103
debtor, after notice of assignment, cannot diminish rights of assignee, 104
rights of, against assignor, bound by instrument creating, 103
notice to debtor, priority by, 79
choses in action, assignment, effect in equity, 10
collateral warranty, law, no interference by equity, 8
commission, evidence by, basis of jurisdiction in equity, 46
proceedings, restraint of, until return of, 46
when appointed at law, 46
witnesses, examination of, abroad by, 46
company, security by, for money advanced if *intra vires*, if *ultra vires*, effect of, 74
compromise. *See* mistake.
concurrent jurisdiction, basis of in equity, 10
equity, interference with law, 11
multiplicity of suits, avoided, 10
nature of, 6
tithes, equitable jurisdiction, 10
confirmation of invalid transaction, person confirming must know of its invalidity, 166
constructive notice, basis of, purchaser's gross negligence, 86
before Conveyancing Act, 1882...86

EQUITY—*continued.*
constructive notice, commercial transactions, does not apply to, 88
Conveyancing Act, 1882, under, 87
meaning of "ought reasonably," 87
courts, unwilling to apply, 88
debentures, notice of issue, not notice of contents, 88
deed, draft, notice of preparation, not of execution, 86
notice of, within period for which title investigated, 87
definition of, 86
fraudulent intention, does not depend on, 86
latent title, purchaser under no duty to inquire, 87
neglect to inquire to whom tenant pays rent is not, of lessor's interest, 88
negotiable securities, not implied where taken, 88
policy of assurance, mortgage of, applies to, 88
possession is, of tenant's rights, 87
of title deeds, by third person, 88
purchaser is bound to investigate title fully to avoid, 87
treated as having, of defect in vendor's title, 86
registration of charge by deposit of deeds, Yorkshire Registries Act, 1884...87
subsequent registrable document, 86, 87
priority by, nature of notice to prevent, 86
under Patents and Designs Act, 1907...87
settlement, notice of, 86
ship, mortgage of, registration of, gains priority, 87
trustee paying share of fund to assignee of *cestui que trust*, 88
contingent remainders, legal estate outstanding in mortgagee, a protection to, 94
protection of, legal estate vested in trustees, 93, 94
contract, agricultural land, for sale of, vendor must keep cultivated, 99
apportionment, application of rule as to, at law, in equity, 28
completion, date for, does not affect equitable relation of parties, 100
interests of parties affected by, 100
of, no date for, what is the time for, 100
enforcement of, by specific performance, 6, 11
fire, loss by, falls on purchaser, 99
for sale, conversion by, contingent upon parties being entitled to specific performance, 74
interest, payment of, where not stipulated under, 100
land, for sale of, effect of signing, 98
position of parties, before conveyance, at law, 98
if specific performance compellable, 99
money due under, not performed by defendant, 74
part performance of, for sale of land, effect of, 65
performance by one party, treatment in equity, 74
public policy, where against, 73
purchaser, deterioration after possession by, 99
entitled to accessions to value from date of, 99
takes all risks from date of, 99
service, of, part performance does not affect application of Statute of Frauds, 65
third person, for benefit of, such person is *cestui que trust*, 97
vendor, a trustee for purchaser, 99
must make out his title before requiring completion, 99
take reasonable care of property until completion, 99
retains interest in subject of, pending completion, 99
vendor's liability, test of, reasonable care, 99
contribution, basis of, 30
law enforced in early times, at, 30
payment by one party liable releases others who therefore must contribute, 30
principle applies where all parties liable to common demand, 30
procedure in matters of, concurrent at law and equity, 30
sureties, as between, equitable ground for, 70
surety, no contribution where liability is for distinct part of principal debt, 30
position of, who pays debt under a bond, 30
wherein rules of law and equity relating to, differ, 30

EQUITY—*continued.*
conversion, actual, gives no fresh title to proceeds of land, 107
state, intention to take in, 113
agreement to sell land, doctrine applies, 110
under Lands Clauses Act, 1845, effect on, 110
beneficiaries of money to be laid out in land, each can elect, 113
capital money "at home," effect on trust, 116
meaning of, 116
receipt by beneficiary discharges trust, 115
cestui que trust, intestacy of, where part of land not sold, 106
proceeds of sale or money to be invested passing under will or intestacy of, 106
under residuary bequest by, 106
character in which property results, how decided, 109
circumstances from which it arises, 104
consequences of, must follow, where rightly made, 111
contingency, where depending on, 108
contract, principle applied from date of, 110
signing of, marks date of conversion, 110
where unenforceable, doctrine does not apply, 110
court, sales by the, property converted out and out, 112
under order of, 111
date of, not affected by express direction as to time of sale, 108
death of testator, from, when directed by will, 107
declaration merely that personalty shall devolve as realty, or *vice versâ*, 105
deed, intention of, property to remain as existing until future date, 108
partial failure of purposes, property results to settlor, 110
total failure of purposes, effect of, 110
or partial failure, principle same as in will, 110
when directed by, operates from delivery, 107
devise of share in specific estate taken under a will, effect of, if converted, 107
directed in certain event, which exists at testator's death, 105
direction that proceeds be considered to all intents and purposes personal estate, 105
to change nature of property must be imperative, 105
convert must be effectual, 105
resettle "hereditaments" subject to a settlement, when it extends to money, 107
doctrine of, rule giving rise to, 104
dower, effect of Dower Act, 1833...107
would probably attach where money theoretically converted, 107
effect of application of doctrine on land, money, 104
elect, person to, must be *sui juris*, 114
election form of, implication from limitations, 116
mere receipt of income does not raise presumption of, 115
presumed from circumstances, 115
to take in unconverted state may be express and by parol, 115
land, when presumed, 115
escheat to Crown, effect of Intestates Estates Act, 1884...107
express direction not essential, 105
felony, formerly money was saved by notional conversion in cases of, 107
fund described as money agreed to be laid out in land, 107
heir-at-law, how he takes, where partial failure of purpose, 109
heir, no equity in favour of, against personal representative, when, 116
rights of, what is necessary to deprive of, under intestacy, 105
income, intermediate, where conversion postponed, 108
infant, cannot elect to take money or land subject to, 114
for benefit of, court will elect, 114
sale of land of, when doctrine applicable, 112
jointress, where person interested as, 113
jurisdiction of equity, exclusive, 10, 104
land, holding for two years too short for presumption of reconversion, 115
money invested in, limitation to heirs of beneficiary, 116
lease, with option of purchase, grant of, no presumption of election, 115

EQUITY—*continued.*
conversion, lease, with reservation of rent to grantor and heirs, indication of intention, 116
limitations applicable to investment in realty, no option, 105
to "heirs" not sufficient to convert into realty, 105
lunatic cannot elect, but the court can on his behalf, 114
compulsory sale of land of, does not effect, 111
married woman can elect when her interest is separate estate, 114
electing to take land unconverted by deed acknowledged, 114
money in court in partition action, how paid out, 114
subject to be laid out in land, former practice, 114
where entitled to proceeds of sale of land as non-separate property, 114
money directed to be laid out in land, total failure of purposes of, 109
to be paid by ancestor, trusts becoming exhausted, effect of, 107
mortgagee in possession, death of, while statute running in his favour, 112
sale by, after mortgagor's death, 112
surplus unpaid at death of mortgagor, 112
next of kin, where partial failure of purposes, 109
none, where land directed to be sold and proceeds re-invested in land, 104
mere power to sell or direction optional, 105
option codicil confirming will, effect of, 111
death of vendor before exercise of, 111
effect of exercise, 111
of purchase, agreement for, made after will containing specific devise, 111
rule where vendor dying testate or intestate, 111
parol contract of ancestor, adopted and carried out, doctrine applies, 110
portioners, where there are, reconversion of money, 113
power, disposition under, effect of, 111
involving change in nature of property, 111
partial failure, 111
when conversion takes place, 111
mere, generally does not effect, 105
to sell, discretionary, exercise required by trusts, 106
for purpose of distribution, none till sale, 105
principles underlying doctrine of, 104
remainderman can elect to take unconverted, 113
rents and profits pending sale, to whom payable, 108
sale, power to postpone, effect on, of vesting of share in possession, 113
under Partition Acts, beneficiary dying before payment, 112
settled land, compulsory sale of, does not effect, 110
settlement, covenant to lay out money in purchase of land, effect where money "at home," 116
of land or money, where doctrine applies, 105
tenancy by the curtesy, where money theoretically converted, 107
tenant in tail, election under disentailing deed, 113
entitled to money in court under Lands Clauses Act, 1845...114
power of, under old law, 113
timber on settled land, character of proceeds, 112
trust for, at request of specified person, 106
dealings by beneficiary without actual receipt, effect of, 116
investment in land generally, not included in devise of land in particular county, 107
on joint request of two persons, 106
partial failure of purposes, effect of, 109
property vested in absolute owner, 112
sale, effect of, until election to reconvert by all owners, 113
void under rule against perpetuities, none, 104
where discretion given as to form property to take, 106
implied, 106
language of, shows consent essential, 106

EQUITY—*continued.*
conversion, trust for, where specified consent required, 106
trustee, by, effect of, 111
for sale when also remainderman, and object payment of debts, reconversion, 115
vendor, death of, before exercise of option, effect on heir or devisee, 111
where contract goes off after, 110
in agreement for option or will can indicate intention as to proceeds, 111
when effected, how treated, 106
will, in, bequest of money to be laid out in land, 105
trust for sale in, 105
conveyance, equitable interest, of, an innocent conveyance, 79
form of, absolute, where held a mortgage, 75
set aside as against purchaser, on terms, 78, 79
repayment of money paid on, 90
copyholds, descent of equitable estate in, 94
fine, where excessive, copyholder's right to bill of peace, 59
copyright, infringement of, account in action for, principle of, 68
libellous or immoral publications, 73
Court of Requests, establishment and early abolition, 5
poor suitors, relief granted to, 5
covenant, charge created by, in settlement, 93
no, by, where lands unascertained or settlor has option, 93
under power, covenantor becoming insane, 93
covenantor being also covenantee, no relief, 69
deed of separation, in, to live apart enforced, 73
equitable claim under, when supported, 69
marriage settlement, in, to become freeman of City of London, death before admission, 74
restrictive, binding on equitable owners with or without notice, 100
building scheme, absence of, rights of subsequent purchasers, 102
under, benefit extends to purchasers severally, 101
disclosure of, after contract, purchaser can refuse to complete, 101
disseisee, bound by equity arising out of, 89, 90
enforceable, will not be, if character of neighbourhood altered, 102
interest, nature of, created by, a negative easement, 100
Lands Clauses Act, purchase under, effect of, 102
land, in leases of, runs with the reversion and term at law, 100
relating to, otherwise than under lease, 100
legal owner, when binding on, 100
negative, burden of, equitable doctrine relating to, 100
perpetuities, not obnoxious to rule against, 101
positive in form, but negative in substance is enforceable as, 102
property, changed user of, acquiesced in, unenforceable, 102
purchaser of neighbouring plot, absence of building scheme, 102
rights of, adjoining lots sold under similar, 101
who is shown building plan, *quære* entitled to benefit of, 101
registration of, effect of, 101
relating to thing not *in esse* at time of demise, when binding 100
released, where long enjoyment inconsistent with, 102
vendor under building scheme may reserve right to dispense with, 101
ships, doctrine relating to notice, applies to, 101
void, at law, no relief, 69
creditors, equitable lien of, how enforced, 93
execution, take subject to prior equities, 79
judgment, take subject to prior equities, 79
customary freeholds, death of mortgagor, heriot not payable, 95
damages, claim for, equitable relief may be without prejudice to, 67
loss caused by fraudulent prospectus, 67

EQUITY—*continued.*
de bene esse, bill, aid of Chancery by, to action at law, 46
nature of, its object, 46
trial, depositions taken in suit, when used at, 46
deed, title, accident, destroyed by, 26
possession established by decree, 26
defendant, death of, tort, action in nature of, effect of, 68
property appropriated as result of, relief, 63
delivery up and cancellation of documents, 52
deposit of title deed, foundation of equitable charge, 71
deeds, advances, further, when covered by, 92
agreement to execute legal mortgage, treated as, 93
devisee, gift to, upon parol trust, 75
discovery, bill of, and bill for discovery and relief, distinction, 44
limitation of extent of, 44
relief sought by plaintiff in, effect of relief, 44
what was necessary to maintain in equity, 44
where allowed, 44
equity, discovery on oath of defendant compelled in, 43
jurisdiction assumed through, 43
property, not granted against purchasers of, for valuable consideration without notice, 44
purchaser for value without notice, plea of, now no bar to, 65
remedy of, assisting law, 43
right to, usually gave right to substantial relief in equity, 43
distribution of property, aim of equity, 70
documents, delivery up and cancellation of, 52
donatio mortis causâ, bequest of same amount later, no satisfaction, 130
dower, account, decree for, of rents and profits from husband's death, 42
basis of jurisdiction of Court of Chancery in, 41
discovery and valuation of lands, 41
equitable estates, allowed out of, Dower Act, 1833...96
equity of redemption, allowed out of, 96
legal estate, incident of, not of equitable, 95
not out of equitable estate, basis of principle, 95
prevented by satisfied term, or mortgage for term of years, relief in equity, 42
relief, nature of, in equity, 42
rule that "equity looks on that as done which ought to be done" does not apply, 73
satisfied term, removal of, 7, 41
term of years, not removed as against a purchaser, 42
title of widow, good against purchaser for value without notice though with legal estate, 42
trust estate existing at date of marriage, none formerly out of, 96
trustee, where legal estate in, dowress took subject to trust, 95
widow, formerly not entitled to discovery against purchaser for value without notice, 42
duress. *See* fraud.
Durham and Lancaster, Chancery Courts. *See* title COURTS, Vol. IX., pp. 120—127...5
election, action pending, accounts and inquiries necessary for, can be taken in same, 124
assent of parties, arrangement with, not readily disturbed, 126
beneficiary, after paying compensation, entitled to surplus remaining, 123
also entitled as next of kin of owner of property disposed of by testator, 124
benefits conferred on, treated as compensation fund, 123
claim by, in own right must be matured at death of testator, 124
deriving title from third party who elected and paid compensation, 124
under true owner at time of testator's death, 124
duty imposed on, to compensate, is such as will furnish ground for action, 123
election by one, not binding on others interested in same property disposed of by testator, 125

EQUITY—*continued.*
election, beneficiary, keeping his own property, need not abandon all benefits conferred by instrument, 122
under will, taking property under derivative title after testator's death, 124
case for, cannot arise, unless there is a fund for compensation, 123
compensation by persons electing against will, is included in benefits taken by persons to whom paid, 125
co-owners, devise of property by one without restriction of share, 122
Crown, grant from, application of doctrine doubtful, 118
death of person to elect, obligation to compensate falls on persons succeeding to fund for compensation, 123
debt, release of, due to third party upon whom a benefit is conferred, 119
deeds and other instruments *inter vivos*, doctrine equally applicable, 118
devise, property must be specifically described to apply doctrine, 120
to heir-at-law whose property disposed of to another, he must elect, 119
doctrine of, 116, 122
applicable to all classes of interests and persons, 119
not where property inalienable, 117
requisites of, 117
enjoying benefits of will, creates presumption of, 126
erroneous disposition, application of doctrine, 118
election, evidence of, 126
testator's intention, 121
fact, a question of, and must be so ascertained, 125
generally, free disposable property must be given to person put to, 123
gift, failure of, in codicil, legatee being also residuary legatee, no election under will, 117
through inability to take, effect on residuary legatee, 117
of property of another, who benefits under the will, intention presumed, 118
one aggregate, of beneficial and onerous legacies, legatee must accept or reject both, 117
gifts, beneficial and onerous, doctrine not applicable where distinct, 117
heir, enjoyment of lands by, ineffectually devised to him for limited interest, presumption, 126
heirlooms, doctrine not applicable to, 117
ignorance of rights, prevents implied election, 126
illegality, doctrine not available to cure, 119
implied, binding on representatives of person electing, 126
if not clear, representatives may elect on offering compensation, 126
question usually arises where party has died, 126
requirements of, 125
incumbrances, devise inconsistent with continuance of, incumbrancers' beneficiaries, 122
subject to, does not of itself raise case for, 122
infant, court will elect for with or without inquiry, 128
joint interest of wife in stock bequeathed to third party, benefits also conferred on wife, she must elect, 122
legacy, receipt of, shows intention to take under will, 126
legatees required by testator to take in satisfaction of debts, doctrine not excluded, 118
life interest only, testator disposing of property, no case for, 122
lunatic, not so found, *quasi*-committee elects under direction of court, 127, 128
so found, committee elects under direction of court, 127
married woman, ante-nuptial settlement, confirmation of, 127
bound by settlement if not repudiated within reasonable time after majority, 127
by, depends upon her capacity to deal with property, 126
distinguished from election proper, 127
court will direct inquiry and elect in appropriate proceedings, 127
effect of restraint on property passing under instrument and not so passing, 126
electing to confirm settlement after attaining majority, effect of, 127

EQUITY—*continued.*
election, married woman, legacy to, conditionally on her conveying restrained property fails, 126
property disposed of, if her separate estate, she elects as *feme sole*, 127
if not separate estate, formalities to be observed, 127
restrained from anticipating either property cannot elect, 126
restraint on anticipation shows intention of testator not to put her to, 126
settlement of separate property while an infant, 127
taking benefits in property of others under post-nuptial settlement, 127
testator disposing of property of, husband administrator and benefiting, 124
will of, rights of husband and benefits under, whether he must elect, 120
where void, heir or next of kin, not put to election, 120
mistake, under, or before rights ascertained, not binding, 125
next of kin not bound by election by administrator, 125
obligation to elect, enjoyment with knowledge of, creates presumption, 126
paraphernalia, bequest of husband of, "all his jewels," effect on wife's jewels, 121
parol evidence as to testator's intention inadmissible, 121
party electing may be ordered to convey his own property, 117
must have full knowledge of facts, 124
person electing allowed time to consider, if necessary, until accounts taken, 124
can bring action to ascertain value of properties, 124
deliberately, claimants under, bound, 125
persons, all, electing have right to exercise judgment as to way they elect, 125
power, appointment under, request to object to give property to stranger, 124
to stranger, gift of free property to object of, necessary to raise case for, 124
of appointment, erroneous exercise of, application of doctrine, 119
proper appointment to object of, but void modifications, no election, 119
to appoint to children of one marriage, appointment to children of second, 119
precatory words in appointment, appointees do not elect, 119
presumption of, against will, acts constituting, 126
regard to history of properties must be had, 126
principle of doctrine, introduced by equity, 116
that of compensation, 122
recital, erroneous, as to hotchpot clause, without appointing unappointed residue, 122
reconversion by, 112
Scotland, land in, ineffectual devise by English will, person inheriting must elect, 120
settlement, beneficiary also claiming property ineffectually settled, must elect, 118
general words in, affecting property not in law included in, 121
person taking no interest under, claiming from party not bound by, none, 118
revocation in excess of power, application of doctrine, 117
settlements, two ante-nuptial, where held one for purpose of, 118
testator, erroneous gift by, and appointment under erroneous belief, no distinction, 119
intention of, evidence of, 121
to confine election to particular property, 118
with limited interest, disposing of whole, 121
testator's error, the court takes will as it is, beneficiaries must give effect, 118

EQUITY—*continued.*
election, testator's intention must appear on face of will, to enable doctrine to apply, 121
presumption as to, 121
to dispose of property other than his own must be clearly shown, 121
knowledge of no title, does not affect doctrine, 118
time, no definite limit can be assigned, 125
person not electing within, as required by court, treated as electing against instrument, 125
where property has been devised away and enjoyed for considerable period, 125
widow, having legal claim on husband's estate, where doctrine applies, 121
must elect, where husband devises property which belongs solely to her, 121
will, admittance of evidence *dehors*, testator believing property his own, 121
amount of compensation payable in case of, ascertained as at testator's death, 123
benefit conferred by, subject to forfeiture for non-compliance, doctrine applies, 119
no application as between two clauses in, 117
party electing against, must compensate out of benefits, 117
to take under, is bound, 117
recital in, erroneous belief as to interest of beneficiaries, apparent from, 122
regard to context and inaptitude of limitations of, 122
where part of benefits in testator's property conferred by, fail, 117
two, same testator, beneficiary must compensate, 117
equality is equity, meaning of maxim, 69
equitable assignments, trust, implied declaration of, by assignor, 10, 102
estate, construction of, where intention clear on face of deed, 95
words of limitation, 94
conveyance, early forms of, modern system of, 94
devise of, at common law, 94
equitable limitations, rule in *Shelley's Case* applied, 94
husband's interest in, 94, 96
interests in, concurrent or successive, 93
legal, and, early resemblance between, 94
limitations in favour of child of unborn person forbidden, 94
maxim, "equity follows the law" applies to, 93
may arise, without a written instrument, 89
real property, in, is either trust or mortgage, 88
third party rights, analogy between legal and, does not apply, 95
title to, follows the law, 68
transfer of, in what form, 94
execution creditor, remedy of, against debtor's equitable estates, 94
sequestration, decrees of Court of Chancery enforced by, 56
interests, gift of, notice to trustees not necessary, 98
liens, enforcement of, 10
mortgage, deposit of title deeds, must be actual, 92
Scotland, in, enforcement of, 65
jurisprudence, principles emphasised by Judicature Acts, 4
jurisdiction, advantages in, not at law, 10
agreement, rectified and performance ordered, 62
auxiliary, 42
boundaries, determination of, 10, 39
cause, is "pending" until final judgment, 62
Chancery Division, matters specially assigned to, 61
charging order on shares, enforcement of, 62
charities, the subject of, 9
claims by defendant, specific provision for, 62
plaintiff, specific provision for, 62
concurrent, 10
conflict of rules, equity to prevail, 64
contract, assumed in matters of, 11
counterclaim, for specific performance, action not always transferred, 63
where defendant may, 62, 63

EQUITY—*continued.*
equitable jurisdiction, County Palatine of Chester and Wales, Courts of, jurisdiction abolished, 5
Court, High, now a court of complete jurisdiction, 61
deed, claim by defendant to set aside, 62
defendant, resorting to equity must accept entire principles, 63
description of, references, 4
Divorce Division, matter of equity affording defence in, 63
doctrines, exclusively applied, 6, 9, 10
election, exclusive in doctrine of, 10
equitable claim, "he who comes for equity must do equity," 62, 70
equity, rules of, to prevail, meaning of, 64
exclusive, 9
execution creditor, subject to equities affecting property, 63
foreclosure, mortgagor may raise question of charges in, 62
foundation for, in contract, 11
Judicature Act, 1873, effect as to remedies available before the Act, 62
fundamental idea of, 61
Judicature Acts, effect of, not "the fusion of law and equity," 61
general effect of, 64
land, possession of, equitable right will prevent enforcement of legal right to, 62
law, at, where remedy inadequate, 11
prevails, in questions of legal right, 65
proceedings at, no longer restrained in equity, 63
lease, defence of equitable right to, 63
matters particularly affected by rules under Judicature Act, 1873...64
to be recognised by High Court, 62
money borrowed without authority, right of subrogation, 63
not excluded by common law obtaining jurisdiction, 11
plaintiff, declaration of legal right of, without terms, 62
proceedings, stay of, right to apply for preserved, 63
receiver, appointment of, during action, 62
relief, on equitable grounds, where obtainable, 65
remedies, provision for all, to which parties entitled, 61
rights, legal and equitable, not treated as identical, 64
rules, effect of Judicature Act, 1873, on, of equity and law, 64
satisfaction, exclusive in doctrine of, 10
specific performance peculiar to, 11
stay of proceedings, before delivery of defence, 63
Supreme Court of Judicature, divisions of, 61
trustee, in action by, claim against *cestui que trust* may be set up, 62
undue influence, deed obtained by, unenforceable, 63
securities, creation of, by will or settlement, and arising under lien, 92
on equity of redemption in form of legal mortgage, 92
remedy of incumbrancer, chief distinction in, 92
title deeds, deposit of, with or without memorandum, 92
equities, conflicting, priority between, 80
"equities rank in order of time," principle governing the rule, 79
equity, administration of, prior to Judicature Acts, 4
aim of, 7
auxiliary jurisdiction, how exercised, 6
contract, no relief where unexpectedly burdensome, 27
corrective jurisdiction, 8
definition of, 4
development of, adherence to precedent, 8
"follows the law," 8, 68
matters in which maxim applied, 69
meaning of, how far applied, 68
interference of, ground for, 7
law, effect of equity on, 7
followed implicitly, in what matters, 7
grounds of difference from, 7

EQUITY—*continued.*
equity, no relief where mode provided for settling terms of contract fails, 27
plaintiff in, conduct of, in relation to equity sued for, 72
must come with clean hands, 72
property, application of doctrines to, 10
reasons of, reference to precedent, 8
Roman law, extent of use in, 8
system of, when settled, 8, 9
technical impediments, removal of, 7, 41, 42
term, the, what it implies, 6
"equity looks on that as done which ought to be done," 73, 74
equity of redemption, clog on, not allowed, 91
rule as to, application to property generally, 92
collateral advantage, limited to duration of security, 91
mortgagee may stipulate for, 91
creation of, by equity, 6, 10, 90
debenture stock may be irredeemable, 92
land, an estate in, 91
mortgage for fixed term, must be reasonable, 91
legal, under, when arising, 90
of public-house, covenant making "tied," 91
mortgagee, charging bonus or commission, 91
mortgagor, right of, until day of payment passed, 90, 91
nature of, 91
repayment, on, property to go back to mortgagor, free and unfettered, 91
rights of owner of, against tenant, 64
rules of descent relating to, 94
to set aside deed, assignment of, 90
devise of, 90
is equitable interest in land, 90
position of parties until money repaid, 90
settlement, 10, 71
wife's conduct a bar to, 72
escheat, equity of redemption, the legal estate, not the equity, escheated, 95
extension of doctrine to equitable estates, 96
incident of legal, not of equitable estate, 95
none where *cestui que trust* died intestate without heirs, 95
exclusive jurisdiction of Court of Chancery, 9
executed trust, equitable limitation, by way of, without words of inheritance gives life estate only, 94
executor, accident, loss of assets by, relief against, 27, 48
executory gift, future interest created by, 96
trust, construed with freedom, 95
expectant heir. *See* fraud.
expenses, in dealing with property of another, 71
fiduciary relationship, 156
following assets, 159
foreclosure, agreement to execute legal mortgage, carries remedy of, 93
charge created by debentures, 93
deposit of title deeds, charge by, carries remedy of, 93
mortgage, of, property abroad, 65
right of, allowed under judgment which is a charge on land, 93
how originated, 91
sale formerly not ordered in lieu of, 78
settlement on will, charge under does not carry right of, 93
title by, an entirely new title, 91
forfeitures, cases for relief recognised in equity, 153
covenants, breach of, in lease, relief against not general in equity, 153
jurisdiction to grant relief conferred on courts of common law, 153
negligence, no relief in case of, 153
possession, recovery of, out of court or under judgment, the old lease continues, 153
relief against, none when wilful, 72
rent, non-payment of, extent of relief, 153
statutory provision relating to relief, 153
fraud, action, subject of based on, no laches during ignorance of fraud, 170
actual, concurrent jurisdiction, 15
as defence to action, 13, 14

EQUITY—*continued.*
fraud, agreement, in fraud of creditors, at law, in equity, 20
caveat emptor, application of maxim, 14
consent, want of, unsoundness of mind, 15
consideration, inadequacy of, as ground for relief, 16
constructive, equitable jurisdiction, 15
heirs expectant, advantage taken of, 15
party not a free agent, 15
surprise, relief against consent obtained by, 15
third parties' rights infringed, 15
contract with lunatic, extent of relief, at common law, 16
for necessaries, 16
where in good faith, 16
no relief, 16
court, appropriate, how determined, 14
creditors, deed of composition, repudiation of, 20
debtor and creditor, agreement between, 20
recovery of money paid under, 20
deceit, proof required in action for, 14
drunkenness, relief against contract, 16
duress, bail given under legal arrest, where relief granted, 19
degree of, how far relief granted, 19
effect of, 19
prison, conveyance or contract made in, 19
fine obtained by, party decreed to be a trustee, 47
goods, passing off, 15
heirs expectant, ancestor, consent of, effect on bargain, 21
elements constituting fraud on, 20
former grounds for relief, 21
foundation of doctrine of fraud on, 21
relief, costs, 21
removal of pressure on, confirmation by, 21
sale by auction, *bona fides* of, 21
terms on setting aside bargains, 21
unconscionable or catching bargains with, relief against, 20
usury laws, loans under, 21
how arising, *suggestio falsi*, *suppressio veri*, 14
innocent party, restitution from, 14
land, will of, power of Court of Chancery, 13
law, procedure at, not interfered with, 11
legatee fraudulent declared trustee, 13
loans, persons having general expections, terms unconscionable, 21
lunatic, acts of, principles relating to, 16
innocent parties, relief against, 16
marriage brocage contract, relief against, 20
secret contracts defeating agreement on, relief against, 20
security by husband or wife to person procuring, 20
settlement, cannot be set aside for, 17
married woman, disposition by, in fraud of marital rights, 20
fraud on, 16
misrepresentation, innocent, 15
person *particeps criminis*, relief to, 20
probate obtained by, interference of equity, 13
procedure at law and in equity, 14
property abroad, action founded on, 66
relief against, restitution to former position, 17
remedy for, better in equity, 14
right to complain of, not marketable, 90
surprise, ground for resisting specific performance, 17
relief against, 17
third party, relief in cases involving injury to, 20
on grounds of public policy, 20
trade mark and name, in, equitable jurisdiction, 15
unconscionable transaction, relief against, 21, 22
undue influence, evidence of, 17
fiduciary relationship, rule applies during existence of, 18
gift after fiduciary relationship terminated, 18
guardian and ward, 18
husband and wife, rule not applicable to, 19

EQUITY—*continued.*
fraud, undue influence, innocent third parties, restitution by, 18
parent and child, 18
parents, ceasing, 18
disproved, 18
not exercised for parents' benefit, 18
person *in loco parentis*, 18
physician and patient, 19
religious superior, 19
resettlement by child, where upheld, 18
restitution ordered when property passed, 17
settlement of property, mutual interests, rule not applied, 18
solicitor and client, 19
trustee and *cestui que trust*, 18
where presumed, 18
unsound mind, persons of, 15
voluntary settlement, when may be set aside, 17
where power of revocation omitted, 17
weakness of mind, unfair transaction, ground for relief, 16
will, cognisance of Probate Court, 13
obtaining by, interference of equity, 13
Frauds, Statute of, dispensed with in equity, where, 12
not allowed to be made instrument of fraud, 75
freebench, none out of trust estate existing at date of marriage, 96
fund in court, separate account, carried to, title of assignee, 104
gambling transaction, suit in equity not maintainable, if by statute unlawful, 73
gift, devisee, to, upon parol trust, 75
imperfect, not assisted, 97
intention to make, property becoming vested in donee, 98
heir-at-law, devise to, where his own property disposed of, doctrine of election applies, 119
heirlooms, election, doctrine of, does not apply to, 117
"he who comes into equity must come with clean hands," basis of maxim, 72
"he who seeks equity must do equity," meaning of, 70, 71
rule acted upon in granting relief, 70
hire-purchase agreement, purchaser with notice, subject to, 81
illegal consideration, deed, founded on, delivery up of, 73
defendant, plea by, 73
maxims, application of "*ex turpi causâ actio non oritur*," *in pari delicto melior est conditio possidentis*, 73
plaintiff *particeps criminis*, 73
transaction, action on, none will lie in equity, 72
where intended use of property is immoral, 73
imperfect gift, equity will not assist, 98
trust, declaration of, court will not treat as, 98
improvements, by person other than owner, acquiescence in, 168
permanent, under mistaken belief of title, relief, 71
incumbrancer, former protection of, by getting in satisfied term, 84
injunction, accounts of rents, profits, and interest, where delay created, statutory bar, 49
agreements, enforcement of, where in substance negative, 50
where negative and positive stipulation, 50
covenant not express but inferred from positive contract, 50
bond, relief to plaintiff restrained while amount due less than penalty, 48, 49
copyright, ground for equitable jurisdiction in infringement of, 50
Court, High, general jurisdiction of, 51
principles of law a guidance to, 50
covenants, negative and positive, relative relief in, 51
damages, power to give, in lieu of, or in addition to, 51
doubtful rights, restraint of assertion of, 42
equity, proceeding in, restrained to compel interpleader, 48
matters investigated at law, not retried in, 48
no interference by, with other courts, but only with defendant, 47
equitable doctrines, injunction enforced by, 48
executor, action against, restrained where assets lost by fire, 48
where action against, does not now lie, 48

EQUITY—*continued.*
injunction, foreign court, proceedings in, restrained by, 48
injury, relief against, by, where damages inadequate, 50
where only threatened, 51
interim injunction, granted on undertaking, 50
judgment, effect of injunction on, in equity, 47
relief against, where receipt for debt found, 48
jurisdiction in, when auxiliary, concurrent, or exclusive, 47
law, principle of equity in restraining actions at, 47
principles of, are followed in legal rights, 50
proceedings at, process in restraint of, 7, 47
restrained when administration decreed. 47
where remedy lost by restraint in equity, equity relieved, 48
libel, use of in cases of, an innovation, 49
light, interference with, ground of jurisdiction of equity, 50
matters in which legal rights must first be established, 50
nuisance, public or private, relief against to prevent irreparable injury, 49
patents, ground of equitable jurisdiction as to infringement of, 50
proceedings in other courts, where interfered with, 48
not restrained, 48
public body, against, 50
purposes of, 47
remedy of, a foundation of equitable jurisdiction, 46
the early use of the, 47
rights, must be proprietary or contractual, 49
infringement of, in what matters relief granted, 49
injunction must be prayed in bill, 49
restrained, 49
right to, test of, 50
terms of, formerly negative, now mandatory, 47
title, legal, relief before established at law, 50
trespass, originally matter only for action at law, 49
where no injury to landowner, 50
waste, ground for interference of equity in restraining, 49
immediate relief in plain cases, 50
relief extended to legal and equitable, 49
in personam, equity acts, not *in rem*, 65
interpleader, agent, claim against by principal and third party, 57
bailee, action of detinue against, by bailors, 57
bill of, plaintiff must claim no interest, 57
charterparty, conflicting claims under, 57
claims, conflicting, legal and equitable, 58
where both equitable, 58
deposit, assignment of interest by depositor, 58
doctrine of, 58
equity, jurisdiction in, supplemental to law, 57
finding, applied in cases of, 57
law, at, matters to which remedy formerly confined, 56
matters in which remedy applied, 57
did not lie, 57
proceedings, effect given to equities, 63
remedy, extension of, by Court of Chancery, 57
tenant, claim against, adversely to recognised landlord, 58
by annuitants, 58
intestacy, where procured by heir, on representation, 75
joint account clause in mortgage, how treated, 70
tenancy, marriage, effect of, 70
settlement, ante-nuptial, severed by, 70
severed by contract for sale, 70
jointure, agreement to, power not exercised, 74
judgment, relief against unconscientious, 7, 47
Judicature Acts, effect of, 61—65
jurisdiction abroad, extent of relief where property, 66
Crown dominions, not restricted to, 66
defendant within, property without, court intervenes, 66
equity declined if damages claimed at law, 67
foreclosure, action for, property out of, 65

EQUITY—*continued.*
jurisdiction, foreign court, litigation in, 66
land abroad, delivery of possession, court cannot decree, 66
lands abroad, will of, question of validity of, 66
property abroad, foreign law, no order in breach of, 66
realty abroad, extension of, to 66
rentcharge, where situate abroad, 66
subjects not within, contracts and trusts enforced *in personam*, 65
title to land abroad, claim depending on, 66
laches, accounts, re-opening of, where fraud recently discovered, 171
acquiescence on plaintiff's part, effect of, 169
the chief ground for creating a bar, 169
bar by, when allowed, 168
beneficiary, action by, to follow assets, 173
cestui que trust, acquiescence by, how far a bar, 172
class, by, less readily imputed, 169
company, claim by, against director in respect of acts *ultra vires*, 169, 172
considerations upon which doctrine founded, 169
constructive trust, relief after long acquiescence refused, 173
contract, rescission of, relief should be promptly sought, 174
conveyance, claim to set aside, circumstances considered, 171
delay in prosecuting claims not favoured, 168
depends on circumstances affecting each case, 169
directors, acts of, where *ultra vires*, acquiescence by shareholders, 169,172
donor must act promptly after discovery of rights, 173
expenditure by defendant allowed by plaintiff knowingly, 171
fidelity of another person, entitled to rely on, not bound to inquire until suspicious, 171
fraud, discovery of, when imputed, 171
full knowledge of facts and of rights necessary to condone, 171
ignorance of, without fault, no laches, 171
relief must be sought promptly after discovery, 171
will prevent, until person defrauded is aware, 170
gifts under undue influence, none till acquaintance with rights and end of influence, 174
guardian and ward, as to claims between, 172
infancy, cannot be imputed during, 170
injunction, right to, not barred till legal right is barred, 169
when interlocutory, how affected by laches, 169
interlocutory injunction where defendant has incurred expense during delay, 169
knowledge of rights implied by acquiescence, 169
lease, agreement for, possession under, delay in applying for lease no bar, 174
length of delay and nature of acts done during interval, effect of, 169
time, evidence of assent or acquiescence, 169
lunacy, during, no acquiescence can be imputed, 170
married woman, now in position of *feme sole* and affected by doctrine, 170
position of, no bar to acquiescence, 170
mistake, until discovered or reasonable means of doing so, no bar, 170
mortgagees, claims to set aside sales by, and to follow assets, 173
partnership interests, as applied to, 173
person entitled must be first ascertained, 170
plaintiff's conduct amounting to, 169
delay by, may be so great as in itself to constitute, 171
position of defendant as result of plaintiff's delay must be looked at, 171
on defendant's part becoming changed, 169
poverty added to other circumstances may be an ingredient, 170
prompt action, cases in which, necessary to bar, 173
property, conveyance of, claim to set aside, defendant's altered circumstances looked at, 171
relief in aid of stale demands refused, 168
remainderman, not imputed to, until interest falls into possession, 170
omission to have fund secured, 170
resistance, means of, lost through delay in bringing claim, doctrine applies, 171
reversion, contract for purchase of, purchaser cannot wait until reversion falls in, 174
sale of, claim to set aside, 172

EQUITY—*continued.*
laches, right presumed to be known where the facts from which it arises are known 170
shares, contract to take, claim must be made immediately on facts becoming known, 174
specific performance, delay for one year or less a bar, 174
relief must be sought with great promptitude, 174
Statute of Limitations, under, ignorance does not exclude, 170
statutory period, plaintiff entitled to full benefit of, 168
tenant for life, recoupment of deficiency of income out of existing fund, no bar to, 173
time, which in practice will bar claim on account of delay, 172
trust, breach of, no bar to action for, except where assented to or condoned, 172
express, time apart from statute, no bar, 172
of mining property after long time and much expenditure, 174
trustee, improper sale by, property passed through various hands, reason for non-interference, 171
trustees, claims against, to set aside sales, 172
undue influence, no laches until removed, 170
law, administration of, intention of all systems in the, 7
where ineffectual, 7
lease, fire, rent not suspended, 27
coal-mines, deficiency of coal, no relief, 27
legal estate, absence of, prior equity prevails, 79
effect of "getting in" where no notice of priorities, 82, 83
importance of, in equity, is instance of principle, "equity follows the law," 82
land, in, notice by subsequent incumbrancer to holder of, does not give priority, 80
may be got in after proceedings commenced to establish priorities, 83
mortgage of, when postponed, 80
mortgagee satisfied, holding, with notice of trust is trustee, 83, 84
outstanding, rule governing priorities, 79
passing by estoppel not available where estoppel not binding on prior claimant, 82
priority by better right to call for conveyance of, 81
purchase from trustee, subsequent discovery of trust, 82
purchaser of, after notice of trust in, 83
for value without notice, 81
with notice of trust becomes trustee, 83
protection of, by, 82
subsequent, obtaining absolute protection, 82
without, may subsequently get it in, 82
notice from trustee holding upon express trust, 82
"*qui prior est tempore, potior est jure*," when departed from, 79
subsequent getting in, notice immaterial, 83
trust affecting, nature of, 84
of, for subsequent purchaser, 81
legatee, gift to, upon parol trust, 75
lien, land abroad, no order to establish, 66
vendor's, 92
Locke King's Acts, effect on marshalling, 145
lunatic, acts of, principles relating to, 16
charge and estate devolving otherwise than by purchase, merger of, 148
when paid off by court, 148
contract with, at common law, 16
extent of relief, 16
for necessaries, 16
where no relief, 16
incapacity as to own act, plea of, 16
innocent parties dealing with, relief, 16
laches not imputed to, 170
marriage settlement, acquiescence in ignorance of title, no relief, 168
mistake in, 24, 25
married woman, election to confirm settlement, 126, 127
by, 126
equity to settlement, 10, 71
estoppel against, where separate property subject to restraint, 168

EQUITY—*continued.*
married woman, reconversion by, 114
right of husband, court assists on terms, 71
separate property recognised by Court of Chancery, 6
where no trust, 9
settlements, effect of equitable jurisdiction, 9
testator disposing of property of, husband administrator and benefiting must elect, 124
will of, husband's rights and benefits under, election, 120
when void, no election by heir or next of kin, 120
marshalling, administration, in, 37, 142—146
of estates, distinction between creditors abolished, 144
doctrine as formerly applied in, 144
Admiralty actions, application of principle to, 146
applied to estates of whatever nature, 143
bankruptcy, application in, 146
beneficiaries, as between, restricted to real estate descended to heir, 145
where one disappointed by creditor, 144
charitable legacies when void, doctrine not applied unless testator directed, 146
court, when matter under control of, 142
creditors, claims by, what is necessary for application of, 142
right of, where one fund not under control of debtor, 143
Crown, claims by, when against whole property and by creditors against part, doctrine applied, 146
devised estate, charged with debts, legatee's right to marshal, 145
subject to mortgage to be paid out of personalty, right of pecuniary legatees, 145
devisee preferred to legatee, 145
direction to pay debts, enables pecuniary legatees to marshal, 145
doctrine, explanation of, 142
first incumbrancer, right of not interfered with, 142
jurisdiction of equity exclusive, 10
Land Transfer Act, 1897, effect of, on charge of debts not adverse to doctrine, 145
legatees, right of, where legacies charged, 145
liens, in favour of, actual lien essential, 144
mortgagee, in favour of, of part of goods distrained upon, 146
subsequent, of property under voluntary settlement taking legal estate without notice, 143
mortgages, second mortgagee will be assisted by application of doctrine, 143
paraphernalia of widow, principle of, applies to, 145
pecuniary legatee not entitled to marshal against a residuary devisee, 145
legatees, right of, on exclusion of application of Locke King's Acts, 145
principal and surety, effect when applied to claims against, 142
rights necessary to authorise, 143
settlement, mortgage of property settled, remedy of beneficiaries, 143
surety for mortgage debt, paying off, rights in property against another mortgagee, 143
rights of, to creditor's securities, the foundation of, 146
third party, not to be prejudiced by, exception, 144
volunteers, doctrine applied in favour of, 143
titles of, confined to different properties, doctrine not applied, 143
under settlement not prejudiced by rights of subsequent mortgagee, 143
Master of the Rolls, office of, early duties, 4, 6
merger, advantage that less of two estates be kept alive, no merger, 146
application of doctrine in equity, depends upon intention, actual or presumed, 146
charge, taking transfer of, in name of trustee, is evidence, but not conclusive, against, 148
court will decide for or against application of doctrine where person incapable, 147
disposition of property by will, or *inter vivos*, free from purchased charge and for value, 148

EQUITY—*continued.*
merger, devise to stranger on condition, heir entering for breach is trustee for legatee, 149
doctrine of, at law, in equity, 146
equity of redemption, purchaser of, can keep alive prior incumbrance, 148
fee liable to be defeated by executory devise, no application, 147
simple and absolute ownership of charge, merger presumed, 147
owner of, paying off charge, where presumption does not arise, 148
infant tenant in tail, charge paid off by court, no merger, 148
intention, from what inferred, 148
not expressed, presumption from circumstances, 146
Judicature Act, 1873, effect on doctrine of, 146
land, charge on, when purchased by owner, merges where no intention expressed, 147
devised to heir-at-law subject to condition, condition enforced, 149
person entitled, acquiring charge upon it, when kept alive, 147
life interest in charge, not terminating in lifetime of owner of land, no merger, 147
limited owner, charge acquired by, presumption against, 147
long term, treatment of, when to advantage of holder, 146, 147
lunatic, charge and estate devolving upon otherwise than by purchase, 148
where charge paid off by court, effect of, 148
mortgagor, paying off first charge, cannot set up charge created by himself, 148
owner, incapable of intention, no presumption arises, 148
remainderman not to benefit by purchase of charge by limited owner, 147
rights, estates held in different, no application, 146
tenant for life, with ultimate remainder in fee, paying off charge, charge does not merge, 147
in tail, doctrine applies to, unless forbidden by statute to bar, 147
trust, declaration of by owner of charge will prevent merger, 148
mistake, agreement, after construction of, by court and payment, no relief, 22
circumstances inducing, of fact, of law, 23
in, as to interest of parties, relief, 23
by both parties, relief in equity, 22
one party, parol evidence, at law, in equity, 22, 23
cause of, language, circumstances inducing, 22
language, intention of parties, 22
meaning of mistake of "law," 23
compromise, in, considerations applied, of fact or law, 24
doubtful law, no ground for relief, 24
duty of disclosure in, family arrangement, 24
effect of non-disclosure by party in, 24
point of law known to party's legal adviser, 24
relief, why not general, 24
set aside for mistake of fact, 24
what facts are relevant, 24
where relief on questions of law, 24
withholding of knowledge by one party, 24
contract, double meaning, alternative plea, 23
in, when unilateral, parties not *ad idem*, 23
private right in subject of, a matter of fact, 23
words clear, no relief, 23
deed, mistake by all parties and proof of actual intention necessary to relief, 24
one party, no relief unless induced by fraud, 25
in form of, if of law, how far relieved, 25
one party dead, relief on parol evidence of another, 25
parcels in conveyance, how rectified, 25
parties to relief in, must show clearly the amended form, 25
poll, in voluntary, power of revocation omitted, relief, 25
purchaser buying his own property, relief, 25
when intention of parties not expressed, 24
marriage settlement, as to mistake in, 24, 25
money, payment of, mistake of fact, relief in equity, 22
remedy at law, in equity, 22
trustee in bankruptcy must refund, 22
under mistake of law, relief in equity, 22

EQUITY—*continued.*
mistake, money, recovery of when paid by, 9, 22
order, by consent, when set aside, 24
relief against obtained, 6, 10, 22, 25
law and equity, differences in nature, 22
specific performance, defence to action for, 23
where refused, damages in lieu of, 23
title, where defect in, remedy, 25
money-lender, security of, when void under statute, relief, 71
mortgage, agreement fettering the equity, when made subsequent to, 92
doctrine of "*tabula in naufragio*," 83
equity of redemption, 90
further advance, parol agreement not admissible, 92
personal property, equity of redemption in, 96
priorities of mortgagees, 81
rights of parties adjusted, 10
third mortgagee lending without notice of second charge, effect of getting in legal estate, 83
mortgagee, death of mortgagor intestate and without heirs, former right of mortgagee, 95
leaseholds of, by deposit, position of, 97
taking assignment of, liability, 97
legal estate of, when postponed, 80
mortgagor and, accounts between, property out of jurisdiction, 66
notice to, where immaterial, 83
second, with security in form of legal mortgage, 92
security of first, effect of appropriation of payments under rule in *Clayton's Case*, 84
shares, taking mortgage of, position of, 97
with legal estate, further advances by, 84
ne exeat regno, account, in matters of, 60
alimony, former use of, to enforce payment, 60
equitable bail, formerly constituting species of, 60
matters in which formerly issued, 60
mesne process, arrest on, bail under, 59
procedure since Judicature Acts and Debtors Act, 1869...60
under Debtors Act, 1869...59
writ deemed properly issued unless defendant moves to discharge, 61
issue of, where peremptory time for payment, 60
of, matters in which, now issued, 60
original use of, 60
prevention of defendant leaving country, 59
principles now applied, 60
negotiable instrument lost or destroyed, relief granted at equity, at law, 26
notice, denial of, what is, 76
paraphernalia, bequest by husband of "all his jewels," effect on wife's, 121
marshalling in favour of widow, 145
part performance, title deeds, delivery of, an act of, 92
partition, account of rents and profits decreed where co-owner has been in possession, 41
tenant in common in occupation, how charged, 41
possession of more than his share, 41
basis of juisdiction of the Court of Chancery in, 40
commissioners, duty of, where rights of parties ascertained, 40
where no guide to, might draw lots, 41
conveyances, power in equity to direct, 40, 41
copyholds, or customary freeholds, formerly not subject to, 40
division of separate properties unnecessary, 41
equity, facilities granted in, for inquiry into title, for ascertaining value, 40
will make award for owelty of partition, 40
jurisdiction assumed in equity owing to inadequacy of at law, 6, 10, 40
law, inadequacy of remedy at, 40
lien of co-owner for improvements, 41
parceners, remedy at law formerly only available for, 40
practice, formerly by commission, then in chambers, 41
procedure, mode of where several properties, 41
property abroad, court cannot interfere, 66

EQUITY—*continued.*
partition, remaindermen unborn, represented by tenant for life, 40
right, was a matter of, 41
sale as a rule now ordered in lieu of, 40
title, reason for requiring legal to be before court, 41
where outstanding, as in mortgagee, 41
writ of, when abolished, 40
partnership account, when decreed without dissolution, 38
agreement for, where specific performance decreed, 38
assets marshalled in favour of creditors, 39
discovery, remedy available at equity in partnership matters, 38
dissolution ordered in equity, in what cases, 38
where it had occurred, account decreed, 38
equity, jurisdiction in partnership matters, 6, 10, 38, 39
injunction, partners restrained by, 38
partner, judgment creditor of, what is available in execution for, 39
partners, joint covenant by, treated as several on death of one partner, 39
real estate, conversion of, 39
devolved as personalty, 39
receiver, appointment of in, equity, 38
remedy affecting partnership more effective in equity than at law, 38
trust in favour of widow of partner, 97
part performance, contract of service not taken out of Statute of Frauds by, 65
contracts, applicable to all, of which specific performance would have been granted, 65
land, contract for sale of, taken out of Statute of Frauds by, 65, 76
patent, infringement of, account of profits, 68
penalties, bond, relief, where violation of condition wilful, 151
charterparty, relief against penalty in, 151
condition precedent, when relieved against, 152
damages, liquidated, or penalty, 151
debt, part to be accepted in settlement if paid at certain time, no relief for default, 152
payable by instalments, whole debt payable on default being made, not penal, 152
interest, commission in addition to, in default of payment, not a penalty, 152
higher rate stipulated for in mortgage, but at lower rate if punctually paid, no relief on non-payment, 152
liquidated damages, where sum ascertained to be, no relief, 151
matters in which relief granted, 151
money payment, provision for diminishing amount or payment by instalments, effect of, 152
mortgage, higher rate of interest where not regularly paid, penalty not recoverable, 151
reduction of interest on, prompt payment, not illegal, 152
negative covenant, breach of, penalty no bar to injunction, 151
non-payment, on, of smaller sum, larger sum to be paid, a penalty, relief, 151
principle of relief against penalty the foundation of the equity of redemption, 152
property, forfeiture of interest in, on non-payment of money, penal, and can be relieved against, 152
punctual payment, day fixed for payment, 152
purchase-money, balance of, where not paid, possession resumed, relief on terms, 152
relief against, ground of, 151
only when compensation can be made, 151
sale with right of repurchase within specified time, right lost on default, 152, 153
will, condition in, ignorance of, no ground for relief, 153
penalties and forfeitures, relief against in equity, 6, 10, 150, 153
performance, act, when presumed a, 139
after-acquired property, as to covenants affecting, 140
beneficiary, purchase by, with money obtained from trustees, 140
charge on purchased lands not created during lifetime of settlor, 140
covenant to exercise a limited testamentary power, application of principle, 141

EQUITY—*continued.*
performance, covenant to exercise limited testamentary power, as to validity of, 141
provide money at or after death, doctrine applies, 141
purchase and settle lands, effect of suitable purchase without settlement, 139
settle, lands purchased but unsettled bound as against heir-at-law, 140
less in value, satisfaction *pro tanto*, 140
literal compliance with not necessary, 140
specific lands, effect of, 140
doctrine not applied until death of covenantor, 141
intestacy, amount received under includes the £500 which widow takes, 141
operates as performance of covenant wholly or in part, 141
share of estate devolves on covenantee under covenant to provide money, 141
under, not applicable where covenant is to provide an annuity or life interest, 141
presumed if money payable in covenantor's life, 141
presumed, whether covenant "to leave" or "executors shall pay," 141
widow can take under a covenant a life interest in whole and her distributive share under, 141
lands, subject to covenant, exchange of, for other lands and money, effect of, 141
mortgage of lands purchased, equity of redemption only subject of settlement, 140
principle governing doctrine, 139
purchase of copyholds, where covenant to settle freehold, not presumed a, 140
lands presumed a, when covenant was to settle lands or rentcharge of specified value, 140
leaseholds for life, when covenant to settle estates in fee simple, none, 140
reversion on leaseholds for life, one life outstanding, where covenant to settle freeholds, 140
subsequent to covenant, presumption will only arise when, 140
purchased interest of same nature as that specified in covenant, 140
lands, subsequent sale of, nullifies presumption, 140
where mortgaged by settlor, presumption not rebutted, 140
statute, obligation arising under statute, 139
tenant for life, expenditure by, in improvements, not satisfaction of covenant to pay money to trustees, 140
trustees, purchase by, holding funds for investment in land, presumption, 140
value of lands, the price paid for them if *bonâ fide*, 141
widow, application of doctrine, where covenant to convey specific share, 141
cannot take her distributive share in addition to what taken under doctrine, 141
doctrine applied in case of a, without her taking out administration, 141
will, by, of covenant, intention must be clear, 142
when within rule of satisfaction of debt by legacy, 142
provision by, not *primâ facie* performance of covenant to provide money, 142
perpetuation of testimony, action for, 46
bill for, commission prayed only in, 45
practice under, 45
legitimacy, right of child to settled property, 46
matter, nature of, in respect of which suit maintained, 45
procedure, where most frequently used, 45
proceedings in, how now commenced, 46

EQUITY—*continued.*
perpetuation of testimony, property, nature of, in respect of which suit maintainable, 45
statutes affecting, 45
suit for, object of, 45
personal property, assignments *inter vivos*, necessity for trust, 96
foreclosure or sale proper remedy on mortgage of, where not passing by delivery, 96
legatee for life of, entitled absolutely to things *quæ usu consumuntur*, 96
passing by delivery, mortgage operates as pledge, 96
principles applied to realty, apply also to, 96
trust of, an equitable interest, 96
mode of creating successive interests, 96
representative, accidental loss of assets, 27
policy of insurance, lost, court will direct payment, 26
notice, constructive, applicable to mortgage of, 88
power, execution, when defective, relief, 27
illusory appointment under, formerly set aside, 70
purchase set aside, terms of relief, 72
purchaser, actual notice, must follow up matters of which he has, 87
assistance formerly refused against, for value and without notice, 76
contract, entitled to accessions to value after date of, 99
for value without notice favoured in equity, 76
includes a mortgagee and lessee, 87
innocent, acquiescence of owner standing by, 168
legal estate, obtaining, 76
of, subject to trust with notice, 83
notice, constructive, to avoid, must investigate title fully, 87
of equitable interest to, must make inquiries, 81
persons entitled to plea of "purchase for value without notice," 76
plea of, by defendant, with legal estate, 77
course of practice as to, 77
effect of Judicature Acts on, 78
for value without notice, requisites to, 82
how far equity gave effect to, 78
rejected in equity against legal estate, when substantial relief asked for, 77
when an absolute bar, 77
where claim merely equitable, 78
not admitted, 77
a bar to declaration of right, 77
still available against equities, 78
plot, of, absence of building scheme, effect on covenants, 102
protection of, by getting in legal estate, 82
title founded on fraud on vendor, impeachment of by, 90
"purchaser for value," term includes mortgagee, 81
"*qui prior est tempore, potior est jure*," when departed from, 79
quia timet, bill of, to secure property, transferable *in futuro*, 52
indemnity, covenant of, bill to relieve covenantee, 51
plaintiff entitled to, as surety or under contract of, may maintain, 52
money, payable *in futuro*, when court interfered, 52
relief, how now granted, 52
plaintiff must show imminent danger, 52
remedy of, 51
reversioner, bill by, to compel payment of arrears of annual charge, 52
shares, where action will lie in respect of, 52
surety, bill by, to compel debtor on bond to pay, 51
"writs of prevention," former remedies of, 51
receiver, appointment of, for whose benefit, 55
where usually made, 54
when it appears "just and convenient," 55
creditor, equitable, appointment in aid of, 55
proceedings at law by, formerly necessary before appointment, 56
creditors, equitable rights of, appointment in aid of, 56
debtor, equitable reversionary interest of, extension to, 56

EQUITY—*continued.*
receiver, equitable execution, by way of, circumstances necessary to appointment of, 56
procedure since Judicature Acts, 56
law, judgment at, in aid of, 56
mortgagee, at instance of, now appointed, 55
in possession, when interfered with, 55
when not in possession, right of subsequent incumbrancer, 55
payment into court, analogous remedy by, 54
possession by, interference with, leave of court, 55
preservation of property, pending litigation, 54
procedure for appointment of, 56
property, defendant in possession of, when appointed, 55
of mortgaged, out of jurisdiction, 66
preservation of, in equity by appointment of, 54
where "*in medio*," 55
real property, when receiver will be appointed, 55
title, legal, relief only where special grounds, 55
securities, enforcement of, 55
reconversion, actual conversion does not effect doctrine of, 108
devise of property, describing it as land at particular place, will effect, 115
direction to invest in land, money uninvested for fifty years, 116
election to effect, 112
failure of purposes for which conversion directed, 108
trusts, instances of, 108
final, only by direction of all persons absolutely entitled, 113
heir, disposition necessary to exclude, 109
takes income undisposed of, 109
where purposes of conversion fail, 108
income of proceeds of sale disposed of, resulting trust of capital, 109
mixed fund, where debts and legacies payable out of, 109
real and personal estate have become, 108
money, when notional land, subject to devise on trust for sale, 108
mortgagee, sale by, in lifetime of mortgagor, none of surplus, 112
next of kin, disposition necessary to exclude, 109
where purposes of conversion fail, 108
total failure of purposes, 109
testator may avoid by absolute directions, 109
where sale by court, 112
release, accord and satisfaction, discharge of right of action by, 164
agreement to, for valuable consideration, effective, 164
gratuitous, should in practice be under seal, 165
instrument under seal, right of action arising on, how released, 164
knowledge of rights by person releasing, essential to be effectual, 166
right of action, of, where equitable, under hand or verbally, 165
verbal, when, must be clear and show immediate release, 165
relief, at law, and in equity, principles underlying, 67
restraint on anticipation, married woman cannot bind separate estate subject to, 72
restrictive covenants. *See* covenant.
satisfaction, ademption by later smaller gift, effect *pro tanto*, 130
only when gift subsequent to date of will, 130
annuity by will generally, and annuity by deed payable at fixed date, effect of, 138
arises only where the person making payment is bound to pay, 129
cases in which doctrine applied, 128
charge on testator's estate, legacy to owner of charge, presumption arises, 139
child, benefit must accrue to, to raise presumption, 130
of debt due to, by advancement, how rebutted, 139
presumed by an advancement in parent's lifetime, 139
where gift of less amount, uncertain or contingent, presumption rebutted, 139
payment of a liability to, no presumption, 130
child's debts, provision for payment of, no presumption, 130
claimant under child who has to account, must also account, 129
contingent interest, when satisfaction of vested interest, 133

EQUITY—*continued.*
satisfaction, court, when it favours, when it leans against doctrine, 129
debt by legacy, acceleration in date of payment, consistent with, 138
no presumption where less advantageous to creditor, 138
not presumed if legacy contingent or of uncertain amount, 138
presumption, 129, 136
founded on maxim *debitor non præsumitur donare*, 137
rebutted where not a proper equivalent, 138
where differences of title between, effect of, 138
not *ejusdem generis*, as a devise of land, no presumption, 138
creation of, contemporaneous with will, a reason against, 136
creditor and legatee must be same person to raise presumption, 137
legacy to wife of, no presumption, 137
direction to pay, covers indebtedness on covenant in favour of wife or beneficiary, 137
subsequent contraction of debts, legacy by codicil to creditors, effect of, 137
discharge of, before testator's death, 137
due at testator's death, legacy payable at fixed date after death, not presumed, 138
fixed date after death, legacy without fixed date, no presumption, 138
legacy less than, not satisfaction *pro tanto*, 136
none by gift of a share of residue, 138
not existing at date of will, no presumption, 136
payable at death, legacy given generally, presumption, 138
presumption as to, applies equally to testator's children, 137
when unascertained, 138
debts, of, by legacies, declaration as to, debt not so mentioned, presumption rebutted, 139
definition of, 128
direction that portions be deemed satisfied by subsequent advances by specified person during his life, effect of, 128
donatio mortis causâ, later bequest of same amount, no presumption, 130
gift, for specific purpose, subsequent gift effecting purpose, foundation of presumption, 129
large, of which circumstances unknown, presumption of, 130
of small sums or an annuity during testator's lifetime, no presumption, 130
gifts, must be *ejusdem generis*, 133
illegitimate child, father of, presumption arising, 132
in loco parentis, an uncle making provision for brother's family, 132
in situation of lawful father of donee, 131
person may be, although father of donee living, 131
presumption not from mere legacy, 132
question of fact, parol evidence, 131
relation of, when inferred, 131
relative, evidence of intention necessary to place, 132
intention, evidence of, intrinsic and extrinsic, 129
in absence of expression of, presumed, 129
of testator or settlor, regard must be paid to circumstances at date of instrument, 128
when expressly declared, 128
land in satisfaction of money, or *vice versâ*, on testator's valuation, 133
legacies, ademption of, by portions, 129
legacy given in satisfaction of debt liable to abate, 137
married woman, where creditor-legatee, where debt formerly payable to husband, effect of, 138
owner of the estate charged with payment, gift by, 129
"parent," word restricted to father, 131

EQUITY—*continued.*
satisfaction, parol evidence admitted to rebut or support presumption of, 136, 139
not admitted to vary or add to written instrument, 136
of subsequent transaction not in writing, 136
presumption must be raised before evidence admitted, 136
purpose for which admitted, 136
rejected when intention expressed by will, 139
portion, by advancement, on marriage, or to establish in business, 130
double, from different estates, no presumption, 130
gifts must be *ejusdem generis* to raise presumption, 133
never presumed by adding up small gifts, 130
provisions by father or person *in loco parentis*, 131
rule against, presumption may be rebutted, 132
satisfied by legacies or subsequent portions, 129
power of appointment, where person exercising, 129
presumed, legacies to same person by different instruments or different legacies by same instrument, 129
when gifts of same nature and to same person, 129
presumption strongest where provision by will followed by settlement, 132
less strong when will follows settlement, 132
pro tanto, will be presumed, 130
provisions, double, limitations in, effect of difference, 134
slight differences, presumption not rebutted, 133
residue, bequest of share of, adeemed by subsequent advance, 133
gift of, to creditors proportionately, 137
to children and strangers, how far children account, 133
single child and stranger, presumption not admitted, 133
settlement, in favour of devisee or legatee may be in form of covenant to pay, 128
of, by will, election by beneficiaries, 135
may operate as to some persons and not others, 135
of wife's life estate does not affect husband's or children's rights, 135
persons benefiting must elect, 135
electing against will must compensate, 135
some beneficiaries not within settlement, those under both instruments must elect, 135
preceded by will, difference of limitations, presumption, 134
direction to pay debts, no effect on, 132
no presumption where persons different, 135
preceding will, direction to pay debts, effect of, 132
double portion, charge on real estate to pay incumbrances, effect of, 134
effect on differences in limitations, 134
settlor no right to substitute provision, donee may elect, 131
substituting by will, only with beneficiaries' consent, 131
subsequent, value of provision at date of, deducted from legacy, 131
settlements, consecutive, double provisions, how construed, 132
power of revocation unexercised, effect on presumption, 133
Scotland, rule against double portions does not apply in, 129
testator or settlor father of donee or placed *in loco parentis*, foundation of presumption, 129
trustee, debt due from, legacy to *cestui que trust*, no presumption, 137
legacy by, liable for breach of trust *primâ facie* a satisfaction, 138, 139
two dispositions for satisfying specified moral purpose, presumption arises, 129
gifts in nature of portions, presumption arises, 130
wife, gift to, by will and during last illness, same amount, 129

EQUITY—*continued.*
satisfied term, relief against, in aid of dower, 7, 42
security, action on, improperly obtained, 72
company, money advanced to, 74
void, or voidable, relief on terms, 71
sequestration, enforcement of decrees by, 65
set-off, administrator who is sole next of kin, and debtor to testator, 163
arbitrator's award or order of court, moneys due under, 163
bankruptcy, right of, in, where there have been mutual dealings, 162
basis of doctrine, the intention of parties, 162
chose in action, assignee of, takes subject to a right of, unless excluded by contract, 164
companies, in winding up of, creditor-shareholder, no set-off against calls, 164
company and debenture-holder, application of principle between, 164
as between, and trade customer, where floating charge by debentures, 164
credit given on faith of contra debt being paid, 162
cross-demands, when subject of, 162
dealings in which doctrine does not arise, 161
debts must be recoverable by action to enable application of doctrine, 163
when acquired by assignment, may be, 163
executors, retainer by, of legacy for debt, not where fund appropriated for, 164
executrix and residuary legatee, debt due from cannot be set off against debt to testator, 163
fraud, which raises a special equity to, 163
joint debt against separate debt, when allowed, 163
law, at, former remedy of parties having mutual dealings, 162
legatee-debtor bankrupt before or after testator's death, extent of executor's right, 164
executor can retain debt, even if statute-barred, 163
retainer by executor, principle applying, 163
share paid to as legatee, and not to a legatee under whom debtor claims, 164
mortgagee, as against, of costs of defendant in specific performance, mortgage being subsequent to contract for sale, 164
proceedings, where independent, no set off of costs, 163
restricted in general to liquidated demand, 162
right of, early recognition of in equity, 162
to, debts must accrue in same right, 163
statute-barred debt cannot be against debt not so barred, 163
statutes, effect of, on right of, 162
surety, where joint debtor, 163
wife, sum due to, husband's debt set off against, 163
settlement, ante-nuptial, where two, held one for purpose of election, 118
beneficiary also claiming property ineffectually settled must elect, 118
claim by, to property comprised in but not bound by settlement, 118
covenant, by way of, of copyholds, when not complete, 97
general words in, affecting property not legally included in, so as to raise case of election, 121
revocation, in excess of power, effect of, in raising case of election, 117
wife's equity to, enforcement of, 10, 71
specific performance, contract for sale of land abroad, 65
contracts in which decree not made, 11
damages in addition to or in lieu of, 12
grant of, when formerly made, 12
jurisdiction in, object of, 11
marriage consideration, conveyance of land decreed, 12
misrepresentation by plaintiff, no relief, 72
parol agreement, enforcement of, 12
person entitled to, may have rights of legal owner, 64
purchase to acquire right to set aside deed for fraud not assisted, 90
remedy, in what cases applied, 12
of, right to compensation, 67
work, performance of, not generally decreed, 12

EQUITY—*continued.*
Statute of Frauds, land, contract for sale, part performance, 12, 65
not intended to prevent relief against fraud, 75
person using, to accomplish fraud, relief against in equity, 75
Limitations, application of, in equity in absence of fraud, 175
equity acts in analogy to, 175
land and rentcharges, equitable claims to, effect in equity, 175
personalty, claim to, equity will not impose a limitation analogous to realty, 175
secret profit, action in respect of, statute runs from time of discovery, 175
by director or promoter, as to, 175
statute not to be made an instrument of fraud, 75
stay of proceedings, equitable ground for must be shown, 63
stop order on fund in court by second incumbrancer without notice, 103
subrogation, agent borrowing in excess of authority, lender's right against principal, 150
application of doctrine in equity, 149
company borrowing in excess of powers, loan applied in reducing liabilities, 49
loan to, lender does not rank before later creditors partly paid with his money, 150
not entitled to securities of creditor paid off with his money, 150
placed entirely in shoes of prior creditors paid with his money, 150
creditor subrogated to executor's right is subject to defences available against executor, 150
doctrine of, how arising, at law, 149
executor, liability incurred by, in carrying on business of testator, 149
of, indemnified by right against assets, creditor can enforce the indemnity, 150
insurance, where contract for indemnity, remedy of underwriter or assurer, 149
wife, right of persons supplying necessaries to, rests on an equitable assignment, 150
supplying money for necessaries to, lender's remedy against husband, 149
sureties, contribution as between, 30, 70
surprise. *See* fraud.
tacking of bond debt formerly allowed, 71
mortgages, 71, 83
tenancy by the curtesy, allowed out of equitable estate, 96
in common, preferred in equity, 69
tenant for life, a trustee for remainderman for some purposes, 90
waste, equitable, liability for, 90
time, equities equal except as regards, legal estate prevails, 81
when made of essence by notice to complete 154
mining lease, contract for, 154
of essence of contract, 154
effect of Judicature Act, 1873...154
public-house, contract for sale of, 154
title, declaration of, is also that of title deeds, 78
deeds, agent in possession of, fraud by, owner postponed 81
equitable mortgage entitled to, omission to obtain, 80
owner, not postponed by fraud of trustee, 80
lost or destroyed, 25, 26
mortgagee parting with possession of, subsequent advance, 80
omission to inquire for, postponement of legal mortgage, 80
purchaser bound to inquire and call for, 88
may accept good reason for non-production, 88
statement to, "deeds at bankers for safe custody," 88
suppression of, by plaintiff, 72
trade mark and name. *See* fraud.
trespass, land abroad, no action will lie, 66
trust for sale, mortgage, by way of, 91
trustee, advance by, to *cestui que trust*, without notice of prior charge, 82
cestui que trust is bound to indemnify, 97

EQUITY—*continued.*
trustee, disability of, to make profit, 158
purchase, 156
legacy by, liable for breach of trust, *primâ facie* a satisfaction, 138
power of sale only, effect of mortgage by, 81
purchaser, a, buying back trust property, 82
from, purporting to sell under trust for sale, 80, 81
shares, of, liability for calls falls on, not *cestui que trust*, 96
not limited to amount of trust estate, 97
may be qualified as director, 97
trusts, agent, fiduciary relationship to principal, 156
banker, position of, in relation to customer, a debtor, 156
when money placed with, can be followed, 159
breach of, action for, where procured by plaintiff, 72
remedy for, by way of account, 67
of restoration, 67
bribe to agent, no trust until after judgment, 160
cestui que trust, as to the term, 89
cestui que trust and trustee, relation between, one has the legal title, the other the equitable, 155
classification of, 154
common law, at, how treated, 89
company, sale to, by mortgagee who is a member, 157
constructive trust, trustee obtaining a new legal interest in the property, 155
when equity considers legal owner trustee for another, 155
conveyance in name of person other than person providing purchase-money, 155
creditor, right of, to follow assets, extent of, 160
director or promoter of company, how far principles relating to trustees apply, 158
directors and promoters, fiduciary relation to shareholders, 156
doctrine of, applies to contracts, 97
early form of, in uses, 89
execution of, property abroad, 65
executor, discovering debts after payment of legacies, right of, 161
paying legacies while debts remain, a breach of trust, 160
right of, making overpayment to legatee by mistake, 161
to follow assets against legatee, 161
in respect of contingent liabilities, 161
who has neither proved nor disclaimed, not a trustee, 158
express or by operation of law, 154
trust, failure of, resulting trust to settlor or his representatives, 155
is, although all terms of instrument have to be consulted, 155
matters necessary to be defined in, 155
fiduciary character, the test for disability to purchase, 158
incumbrancer without notice, priority by notice to trustee, 79
interest in, vested in *cestui que trust* on creation, 79
laches, when a bar to action for breach of, 172
land, express trust of, by deed, will or other written instrument, 154
law, by operation of, either constructive or resulting, 155
leaseholds, trustee of, taking new lease in own name, 155
legal estate taken by escheat, not the equitable, 95
legatee, paid, becoming preferred through subsequent accidental loss, does not refund, 161
right of, to follow assets paid away by executor, 160
where fund insufficient and another has been paid an over proportion, 160
legatees, payment of some, out of fund in court, 160
limitation of, construction of in equity, 95
mercantile transactions, principles applicable to trusts apply to, 158
money, earmarked in equity and can be followed, 159
mortgage of assets created by executor-residuary legatee, 160
parol, assignment, creation by, as to personalty, 154
before Statute of Frauds, 94
partner not a trustee of partnership assets, 156
person, position of, involving confidence, impresses him with character of trustee, 156

EQUITY—*continued.*
trusts, personalty (other than leaseholds), express trust of, created by parol, 154
precatory trust by words of recommendation, not readily construed, 155
property, disposal of, purchase of other, with money added, rights of *cestui que trust*, 159
rightful or wrongful, proceeds may be followed, 159
equitable interests in, 9
retains its nature, in original and altered state, 159
subject to trust, may be followed by *cestui que trust*, 159
purchaser, for value without notice, not affected by right of *cestui que trust* to follow money, 160
receiver, or trustee in bankruptcy, *quasi*-trustees, 156
resulting trust arising through failure of express trust, entire or partial, 155
none where gift intended, 155
when arising, 155
rights in, enforcement of, 6
rules relating to persons standing in fiduciary position to others, 154
solicitor, receipt of money by, for transmission, not in fiduciary nature, 156
property by, when treated as trustee, 156
trustee, as to remuneration of, 159
Statute of Frauds, use of, to avoid, not allowed, 75
stockbroker, money placed with, can be followed, 159
stranger, participating in breach of trust, 156
trafficking with another's money, how far a constructive trustee, 158
tenant for life, a trustee for remainderman, 155
receiving purchase-money of property, a trustee, 159
trustee and *cestui que trust*, essence of relation, 89
cannot make profit out of trust, 158
purchase trust property from himself, 157
contract for purchase by, with *cestui que trust*, what will support, 157
drawing money from mixed fund, draws his own, 160
expenses of, allowed as first charge on estate, 159
express, treated as, effect as to Statute of Limitations, 156
has no sporting right over trust estate, 158
interests of, must not conflict with those of *cestui que trust*, 156
may divest himself of character of, to become purchaser, 157
mixing money with own, *cestui que trust's* charge on whole, 159
trust funds with own in business, effect of, 158
money not actually reaching, but only credited in account, not earmarked, 159
must account to beneficiaries for benefits acquired, 158
profit by, not allowed except by consent of *cestui que trust*, 154
purchase by, after trusteeship has ceased or with consent of *cestui que trust*, 157
when good, 157
set aside by *cestui que trust*, terms of relief, 157
on account of fraud, 157
of trust property by, at auction, or from co-trustees, 157
reason for no remuneration of, 158
retention of trust funds by, must pay interest, 158
takes no remuneration, in absence of special clause, 158
where, has only an equitable interest, 155
two trust funds, application of *Clayton's Case*, 160
volunteers claiming through legatees, may have to refund, 160
where legal owner, trustee holds for benefit of the *cestui que trust*, 88
word "trust" not necessary to creation of, 155
undue influence. *See* laches.
unsound mind, persons of. *See* election, fraud, lunatic.
vendor, position of, under contract for sale, while in possession, 99
subsequent contract for sale, remedy of first purchaser, 100
trustee, not a mere dormant, 99
under building scheme, rights of, 101
vendor's lien, an equitable estate, 79
none against purchaser for value without notice, with legal estate, 79
purchaser, as against, 92
postponement of, by conduct, 79

EQUITY—*continued.*
voluntary conveyance, verbal arrangement to hold in trust, enforced, 75
reconvey, conveyance decreed, 75
settlement, power of revocation, omission of, 17
setting aside, 17
when valid and effectual, 98
volunteers, defeated by covenantor conveying, claim against assets, 97
equitable interests created in favour of, 97
waiver, acted upon, sufficient consideration, 165
bankruptcy, disclaimer by trustee, statutory requirement as to time, 165
bill of sale, promise not to enforce accrued right to seize goods, when binding, 165
breach of trust, of, by *cestui que trust*, effect of, 166
definition of, 165
conduct of person entitled to right, looked to, 166
consent of party necessary to, 165
contract, of stipulation in, 165
parol waiver of, 165
covenant, by open use in violation of, 166
delay, not necessary to, but evidence of, 165, 166
implied, from conduct inconsistent with right, 165
mortgage, acceptance of interest in arrear, not waiver to right to call in principal, 165
notice of, prior to sale by mortgagee, 165
person acquiescing in, must be aware of his right, 166
right, the abandonment of a, express or implied, 165
statutory provision of, 165
where forbidden, 165
with consideration operates as release, 165
waste, equitable, tenant for life, liability of, for, 90
treated as a breach of trust, 90
relief extended to legal and equitable, 49
immediate in plain cases, 50
will, devisee taking on parol trust, 75
gift, mere recital does not amount to, 122
omission to make, no relief, 27
procured by fraud, 13
"with clean hands" use of expression, 72

ESTATE AND OTHER DEATH DUTIES.
account, corrective may be signed only, 216
delivery of, at same time as delivery of affidavit, 315
duty, appointees of specific sums when bearing duty rateably, 222
dispositions which are substitutes for wills, when liable to, 181
payable by donee on gifts made between 31st May, 1881, and 2nd August, 1894...220
payment of, when conferring exemption from estate duty, 199
survivorship, title by, accruing after 31st May, 1881, and before 2nd August, 1894, liability of, to, 192
expenses of fresh, charged upon interest of successor, 297
form of, 216
full and true, to be delivered to the Commissioners, 296
jointure charged on land, owner accountable, 217
lapse of time, relief after, 218
matters to be disclosed in, 296
mortgagor, position of, as to, 216
person accountable a "debtor to the Crown" for duty, 217
persons accountable, 216
liable to, may raise succession duty on security of property, 301
not accountable, 218
succession duty, for, persons liable to render, 295
timber, on sale of, persons accountable for duty, 217
trustee of settlement, by, on death of tenant for life, 217
unsatisfactory, procedure by Commissioners, 297
verification of, by production of books for inspection by Commissioners, 297
Act of Parliament or royal grant, lands or chattels settled by, how valued, 209
active service, death from causes arising from, extent of duty remitted, 182

ESTATE AND OTHER DEATH DUTIES—*continued.*
administration, court must provide for succession duty out of property under control, 301
legacy duty provided for by court, 254
provision of, by the court, 258
security to be given to the court to cover corrected gross assets, 216
advowson, estate duty, when not payable in respect of, 202
payment of succession duty on, when disposed of, 294
sale of, duty payable on, 214
succession duty not payable unless disposed of for money or its worth, 281
successor, sale in concert with, what duty chargeable, 287
affidavit, for Inland Revenue, is not an account for purpose of settlement estate duty, 231
duplicate, to be in, if required, 216
duty payable on delivery, 213
executor, full inquiry by, before deposing, 215
payment must be made by, 214
extent of, to verification of account, 316
form of, 216
as prescribed by the Commissioners, 314
meaning of, 215
oath, persons before whom made, 216
penalties for non-compliance with provisions as to delivery of, 225
swearing of, 215
after-acquired property, covenant to settle, payment of covenantor on acquiring, not a payment on settled property, 197
aggregation, accretions after death subject to, 204
national interest, things of, not subject to, 203
property in which deceased never had an interest not subject to, 203
not exceeding £1,000 in value not subject to, 203
passing on any death, not aggregated more than once, 203
subject to, for purpose of estate duty, 203
sale or mortgage of interest in expectancy after 1st August, 1894, and before 9th April, 1900, proviso as to, 204
settled property, deceased dying before 9th April, 1900, 203
passing under disposition by person dying prior to 2nd August, 1894, not subject to, 203
agricultural property, conversion to more profitable use, expectation of increased income by, 208
exception relating to, 208
management, deductions for expenses of, 208
meaning of, 208
rule applied to where death took place before 30th April, 1909...208
successor to, for life, mode of calculating duty, 287
ancestor, meaning of, 268
annuitants, settlement estate duty payable by, 231
annuity, allowance, none made for when ceasing on the death, 212
cesser of interest by death within four years, proportion only of succession duty payable, 282
exemption from duty when not exceeding £25...201
fund, liability of, to settlement estate duty, 229
measure of taxation, 230
where bequeathed after annuitant's death settlement estate duty is payable, 230
gross value, rule for determining, 245
when annuity payable out of another legacy, 246
instalments, payment of duty by, 214
interest accruing or arising on death is property passing, 192
in, ceasing by death before four years' payment due, effect of, 242
legacy by way of, when charged on another legacy, by whom duty payable, 253
duty, payment of, when direction to purchase, effect of, 252
repayment of upon any contingency other than death, 262
rule as to payment of, 251
to purchase, payment of duty, 250

ESTATE AND OTHER DEATH DUTIES—*continued.*
annuity, provision must be deceased's gift to be liable to estate duty, 192
secured by bond or covenant, how described, 263
stamped receipts, rule applicable to, 255, 256
third person, provided at cost of, not subject to estate duty, 192
valuation of, for purpose of succession duty, 289
appeal, accountable party may, 303, 304
any person aggrieved by decision of Commissioners may, 226
conditions of, as directed by rules of court, 226
costs of, in the discretion of the court, 226
county court, when may be made to and from, 227
where assessed duty does not exceed £50...304
further, only with leave of High Court or Court of Appeal, 226
real and leasehold property, how made, 227
apportionment, Commissioners' acceptance of accounts binding in questions of, 222
disputes as to, how determined, 222
estate duty, of, between owner and person having charge, 221
marriage settlement, as to cost of raising duty on funds in, 223
personal property appointed, duty not a specific charge on, 219
arbitration, costs of, to be part of the costs of appeal, 228
real and leasehold property, appeal to, in respect of, 228
assets, application of term to personal property appointed by will, 218
attachment, order for, on non-compliance with writ, 226
British possession, estate duty not a charge on property in, 221
order applying provisions relating to allowance of death duty may be revoked, 200
proceedings cannot be taken in, by Commissioners, 226
provision relating to allowance of death duty, how applied, 200
when death duty paid in, to be allowed against estate duty, 200
ships, situation, the port of registry, 310
certificate, Commissioners not compelled to give in any particular form, 292
further probate duty, of payment of, must be written on grant, 316
liability of persons to whom given only affected, 256
of discharge, Commissioners to give certificate on satisfaction of claim for duty, 256
commutation of duty, on, when amount agreed, 225
estate duty, granted by Commissioners in respect of, 218
form of, as prescribed by Commissioners, 218
power of Commissioners as to, 300
fraud will render inoperative, 182, 219
of, to trustee before distribution of fund, 298
property, does not affect, afterwards shown to have passed on the death, 207
purchaser exonerated from succession duty by, 302
when obtainable, effect of, 224
certificate of payment, repayment (if any) made to person producing 221
succession duty, to be given by Commissioners, 292
cesser of interest, benefit accruing by, mode of ascertaining capital value, 208, 209
liability to estate duty, 197
charge, determination of, benefit arising on, when succcession duty payable, 294
duty, for payment of, an "equitable charge," 223
extinction of, deemed a succession, 272
where Succession Duty Act, 1853, does not apply, 272
charities, duty not payable on death of a recipient from a charity, 196
charity, property subject to trust for, succession duty payable, 286
succession duty, rate chargeable, 284
trust for purposes of, conferring a succession, when duty payable, 293
power of trustees to raise duty on property, 300, 301
church patronage, succession duty on, when payable, 294
collection of duty, acceptance of real or leasehold property in satisfaction of duty, 212, 213, 292
account of "other property," 216
advowson, payment on sale of, 214
executor, duty of, 215
meaning of, 215
grant made *pendente lite*, 215
Inland Revenue affidavit, meaning of, 215

ESTATE AND OTHER DEATH DUTIES—*continued.*
collection of duty, land may be transferred in satisfaction of settlement estate duty, 230
national interest, sale of objects of, when payment to be made, 214
personal property, executor must pay duty, 214, 215
persons not accountable for estate duty, 218
postponement of payment, when allowed, 214
practice and law as on the 2nd August, 1894, applicable, 213
stamps, by means of, or as Commissioners may prescribe, 212
Commissioners of Inland Revenue, account to be delivered where Commissioners believe property passed, 217
when unsatisfactory, procedure by Commissioners, 297
affidavit, proof may be required in support of, 316
appeal from decision of, on payment of duty, in what cases, 226
without payment of duty, when allowed, 227
assessment of succession duty by, 297
British possession, cannot take proceedings in, 226
certificate, form of, 292
as they may think fit, 300
of discharge by, on commutation of duty when amount agreed, 225
must be given on payment of duties, 182
to be given by, 218
when obtainable, effect of, 224
payment of estate duty, what it should specify, 221
value accepted by, 209
compounding of duty, power of, 258
duty, may accept real or leasehold property in satisfaction of, 212, 213
of, as to collection of legacy duty, 249
to keep books and to give receipts in respect of succession duty, 292
estate duty, may prescribe means for collection of, 212
executor, retainer of legacy by, particulars must be sent to, 255
expenses of undertaking fresh account charged on interest of successor, 297
fraud in obtaining certificate of discharge renders it inoperative, 224
interest, court may order payment by, or to, 227
in expectancy, commutation of duty as to, by, 224
jurisdiction as to estimate of principal value, exclusive in first instance, 207
land, transfer of, to, no stamp duty payable, 213
legacy duty, commutation of, by 258
non-payment of legacy duty after assessment, proceedings by, 261
notice to, of payment out of fund in court 255
overpaid duty, refund to be made by, 228
payment, may allow time for or give discount for prepayment of succession duty, 295
penalties, power of to reduce, 226
penalty, waiver of, by, 260
power of, to compound death duties in complicated cases, 181
grant probate on credit, 315
powers of, as managers of death duties, 181

ESTATE AND OTHER DEATH DUTIES—*continued.*
Commissioners of Inland Revenue, proceedings by, by means of writ sued out of King's Bench Division, 304
for account by, 261
real or leasehold property, appeal in respect of, how made, 227
refunding by, where legacy duty overpaid 261
remission of duties, powers of, as to, 224
duty and interest by, 258, 302
repayment of probate duty, when declined, 318
time for payment of duty, power of Commissioners, 318
valuation, must defray cost of, when made by their nominee, 209
value of property, how ascertained by, 209
valuers, may be appointed by, 209
commutation of duty, contingencies to be considered, 225
future claims for succession duty, 302
practice as to, 224
company, private limited, shares in, value of, 208
compensation, payable under Employers' Liability Act, 1880, or Workmen's Compensation Act, 1897, not liable to duty, 192
compromise, conflicting claims to real property, succession duty follows strict rights of parties, 285
contingent legacy, duty on, how chargeable, 247
legacy duty on, person liable for, 253
settlement, repayment of settlement estate duty when contingency does not arise, 229
settlements, property in, is settled property, 229
conveyance, stamp on, none when, of land to Commissioners, 213
copyholds, allowances made in respect of fines on payment of succession duty, 291
corporate body, legacy duty not payable on bequest of specific articles to, 240
succession duty payable on principal value, 286
power of, to raise amount payable for, 301
corrective affidavit, acceptance of without same being resworn, 216
costs, arbitration, of, to be part of costs of appeal, 228
county court, appeal, for purpose of, is as if the High Court, 227
to, where assessed succession duty does not exceed £50...304
when may be made to and from, 227
apportionment, settlement of disputes as to, in, 222
real and leasehold property, appeal to, in respect of, limit of amount in dispute, 227
covenant, after-acquired property, payment on covenantor acquiring, not a payment in respect of settled property, 197
debt of covenantor not deducted from covenantor's estate in calculating duty, 197, 198
donee, by, for donor's benefit, effect of in relation to gifts, 190
further assurance, for, where assignor of legacy not bound, 257
debt, estate duty not payable out of, in absence of express direction, 219
Crown debt, legacy duty, where executor liable for, as a, 252
liability of persons for duty as a, 253
succession duty, liability of accountable persons for unpaid, as for a, 295
death duties, accountable person, wishing to compound must give all information, 181
active service, death from causes arising whilst on, extent of duty remitted, 182
certificate of discharge on payment of, 182
classes of, 180
communications respecting, how addressed, 181
compounded, may be, in complicated cases, 181
gift made *bonâ fide* to avoid, 188
gifts for public purposes, duty on, may be remitted, 182
management of, 181
remission of payment after twenty years from death, 182
substance of transaction rather than form of conveyance should be looked to, 180
debts, deduction allowed in calculating duty, 210

ESTATE AND OTHER DEATH DUTIES—*continued.*
debts, direction to pay another person a legacy, 234
does not subject them to payment of duty, 234
doubtful, to be accounted for when paid, 313
expectancy, interest in, incurred in connection with, 210, 211
forgiveness of, when becoming liable to legacy duty, 234
incurred *bonâ fide*, meaning of, 210
marriage and money the consideration for, not allowed, 210
motive for incurring, immaterial, 210
payable to persons out of the United Kingdom, 211
philanthropic purpose, for, not allowable against estate duty, 210
probate duty, deductions allowed in respect of, 313, 314
property against which allowed, 211
reimbursement, right to, effect of, 211
release of voluntary debt, consideration for, not allowed against estate duty, 210
"deceased person" and "deceased," meaning of, under Finance Act, 1894; Finance Act, 1896...183
deductions, allowance for increment value duty, 211
allowances, kind of, made in respect of succession duty, 290
what may be made, 210
where there is right to reimbursement, when made, 211
cost of realising or administering foreign property, how far allowed, 212
debts, against what property allowed, 211
payable to persons out of the United Kingdom, 211
what may be and what may not be, 210
duty, in respect of, where already paid, when exercising power of appointment, 291, 292
foreign property, duty paid in respect of, 212
funeral expenses, 210
interest in expectancy, mortgage of, where no allowance made for, 211
legacy duty, allowed in respect of, 249
mortgage, none allowed where by tenant for life and remainderman, 290
probate duty, deductions allowed against, 313, 314
succession duty, of necessary outgoings on payment of, 289, 290
where allowed on payment of, 291
tenant for life and remainderman, incumbrances by, not allowed as, 290
disclaimer, legacy, of, effect on legacy duty, 244
discount, Commissioners may allow when succession duty paid in advance, 295
dispositions, conferring a succession, when deemed to be, 266
term, extent of, 265
domicil, British settlement of personal property *inter vivos*, payment of duty not affected by, 275, 276
estate *pur autre vie* in real property in this country, but owner of foreign, liable to duty, 238
legacy duty, payment of, dependent upon testator's or intestate's, 238
natural children, where legitimate according to law of the father's, effect of, 243
person entitled, of, immaterial, 276
of foreign, directing creation of British settlement of personal property, succession duty payable, 274, 275
leaving British personal property not subject to legacy or succession duty, 274
probate duty, not affected by, 309
succession duty, where affected by, 274, 275
test of liability to succession duty in relation to, 273
testator, of, *situs* of property in contemplation of law is the, 238
donatio mortis causâ, "deemed to pass" on donor's death, 187
donor dying between 30th May, 1881, and 2nd August, 1894, account duty payable, 187, 188
gift, every, taking effect as, is a legacy, 233
of real and leasehold property, none by, 187
dower, apportionment of estate duty relating to estates in, 222
estate in, a settled estate for purpose of estate duty, 184
entail, disentailing assurance and resettlement form the disposition for succession duty, 198
conferring power of appointment, effect of, on succession duty, 266

ESTATE AND OTHER DEATH DUTIES—*continued.*
entail, disentail and resettlement, series of deeds form settlement for purpose of Settled Land Act, 1882...198
resettlement by tenant for life and remainderman, the latter is predecessor, 270
estate by the curtesy, for purpose of estate duty is a settled estate, 184
pur autre vie, domicil of foreign owner, legacy duty payable on such estate in realty in this country, 238
includes, what it, 236
duty, account, form of, 216
persons accountable, 216, 217
accretions after death are aggregated with other property, 204
active service, property of persons, claim in, exemption relating to, 201
advowson, payable on sale of, 214
when not payable in respect of, 202
after-acquired property, liability in respect of, 197
aggregation not applied to things of national interest, 263
agricultural property, deduction for "management" in small estates, 208
exception relating to, 208
expectation to convert to more profitable use, effect of, 208
meaning of, 208
rule applicable where death before 30th April, 1909...208
allowance in respect of duty paid before 2nd August, 1894, how made, 200
previously paid duty not affected by loss of capital value, 200
allowances, what may be made, 210
where right to reimbursement, when made, 211
annual benefit to donor greater than usual interest on trust property, 190
annuity, in respect of, payment by instalments, 214
no allowance when ceasing on the death, 212
not exceeding £25, exemption as to, 201
or other interest to extent of interest accruing or arising on death is subject to, 192
appeal against decision of Commissioners on payment of, 226
without payment of, when allowed, 227
appointed personal property, not a specific charge on, if appointment by will and power general, 219
apportionment, disputes as to, how determined, 222
of, as to estates in dower, 222
between owner of property and person having charge on, 221
question of, bound by Commissioners' acceptance of accounts, 222
beneficiaries, liability of, in proportion of their respective interests, 221
British possession, allowance of death duty paid in, 200
condition on which allowance made for death duty paid in, 200
revoking power relating to provision of duty, 200
capital money may be applied in payment of, 223
sum set aside by executors to meet annuity, duty not payable on annuitant's death, 194
certificate of discharge, how obtained, 218
when obtainable, effect of, 224
payment of estate duty, debts and incumbrances should be specified, 221
when conclusive evidence of first charge on property, 221
value accepted by Commissioners, 209
cesser of actual income applied, duty payable, *sed quære*, 193
interest, benefit accruing by, 208, 209
liability in respect thereof deferred, 197
when property incumbered, 209

ESTATE AND OTHER DEATH DUTIES—*continued.*
estate duty, charge, first, on property not passing to executor as such, 220
collection of, law and practice relating to, 213
commutation of, contingencies to be considered, 225
practice as to, 224
company, private limited, value of shares, 208
consideration in money, as to what is not, 195
partial in money, as to what is not, 195
cost of realising or administering foreign property, how far allowance made, 212
covenant debt out of debtor's estate does not bear portion of, unless by express direction, 219
no allowance made for, in calculating duty, 197
for donor's benefit makes gift liable to, 190
death must occur after 1st August, 1894...183
debt incurred in respect of any interest in expectancy, 210, 211
debts, property against which allowed, 211
to persons out of the United Kingdom, when deductible, 211
what may be deducted and what not, 210
deduction for duty previously paid, when only allowable, 200
depositor in Post Office or Trustee Savings Bank, regulations as to, 201
depreciation in principal value by reason of deceased's death, allowance made, 208
direction as to payment of probate duty does not cover, 219
directions charging payment of, out of particular funds, 222
discount, none allowable on full payment of instalments within twelve months of death, 225
distribution of estates under £100, no grant required, 201
donatio mortis causâ is liable for, 187
donee a member of restricted class, duty payable on death of donor, 189
dower or by the curtesy, estates in, subject to, 184
exceptions to charge of, 183
executor accountable for, in respect of all personal property, 214
limit of liability of, 218
meaning of, 215
property for which he is liable to pay duty, 215
exemption as to things of national interest dates from death, 202
from, where account duty has been paid, 199
expectancy, interest in, how valued for, 209
payment of duty upon value of interest in, 197
expenses incurred in paying the duty, 223
fixed duty, estates over £300 and under £500...206
when allowance made, 207
foreign property, allowance for duty paid in foreign country, 212
test of liability to, 192
fraud in obtaining certificate of discharge, 224
certificate of discharge in operation in case of, 219
fund in court, retention of sum to satisfy, 225
gift, effect of retention of use or benefit, 189
in pursuance of antecedent, moral, or enforceable voluntary obligation liable to, 188
of interest bearing bonds which remained unpaid at donor's death, not property held by debtor as trustee for creditor, 193
of property must be made *bonâ fide* within three years of donor's death to avoid charge of, 188
something reserved not comprised in, 190
the right to possess, is not possession, 189
under will of ancestor who survived the deceased, 186
gifts in consideration of marriage not exceeding £100, exempt from, 201
inter vivos, bear their own share, 220
how collected, 212
husband's interest in wife's property reverting to her on his death, property not liable to duty, 195
immediate gift *inter vivos* not made *bonâ fide*, is liable to, 188
income of settled property acquired on death of spouse, duty not payable until death of survivor if survivor is settlor, 194

ESTATE AND OTHER DEATH DUTIES—*continued.*
estate duty, increment value duty, allowance for, 211
Inland Revenue affidavit, meaning of, 215
interest as holder of an office ceasing on death exempt from duty, 196
in expectancy, future claim may be commuted, 224
mortgage of, when no allowance made, 211
passes on death of the person competent to dispose of it, 186
rule as to payment of duty, 213
sale or mortgage of, prior to 2nd August, 1894, effect of, 196
value of, for purpose of, 203
on, rate of, 225
recoverable as part of, 225
when payable, 213
interests in property ceasing at death on which no duty payable, 196
jointure, directions as to payment of, affecting, 222
lands inalienably settled by Act of Parliament or royal grant, not settled property for, 184
or chattels settled by Act of Parliament or royal grant, how valued, 209
settled by Act of Parliament or royal grant, duty payable out of successor's interest, 220
lapse of time, relief after, 218
leviable on property passing at death, 180, 183
liability of mortgagor of interest in expectancy, if equity of redemption sufficient, 196
life interest, no allowance for duty paid on, 200
surrender of, when property subject to, 187
surrendered to remainderman three years before death, property not subject to, 187
limitation of charge on property, 223
lunatic, committee of, paying duty on realty out of personalty, charge of, 221
marriage, property disposed of in consideration of, when liable to, 185
meaning of, 183
mode of raising, by sale, mortgage or terminable charge, 223
out of property passing, 223
mortgage charged on real property paid out of personalty on which probate duty paid, 199
national interest, objects of, payment of duty after sale, 214
on sale of objects of, person accountable for duty, 217
not a disbursement, 215
payable in respect of personal property settled by will of person dying before 2nd August, 1894, unless deceased competent to dispose of it, 199
on enlargement of life interest into an absolute interest, 194
"other property," how accounted for, 216
not paid on, on Inland Revenue affidavit, 216
overpaid, repayment of, law and practice relating to, 228
payable on property in settlement reserving a life interest or a power of revocation, 191
passing by survivorship, 191
payment by limited owner, not a charge against purchaser for value without notice, 221
of, on real estate, charge is an "equitable charge," 223
out of fund in court, 223
on gift, to escape, deceased must have been excluded entirely from property, 189
postponement of, when allowed, 214
pro ratâ on extent of benefit in subject-matter of gift reserved to the donor, 189
to be in full, although application is for grant *pendente lite* only, 215
penalties, reduction of, incurred in respect of, 226
pension to widow of officer by Government of British India, exempt, 201, 202
person accountable for, a "debtor to the Crown," 217

ESTATE AND OTHER DEATH DUTIES—*continued.*
estate duty, person having limited interest paying duty entitled to a charge on the property, 221
personal liability for, limitation of, 218
persons not accountable, 218
taking life estate competent to dispose of property prior to disposition, liability to, 194
policy moneys payable by British company to representative of person dying domiciled abroad, 217
of assurance kept up for donee's benefit liable to, 190
possession and enjoyment by donee necessary to avoid estate duty, 189
meaning of, 189
power exercisable in fiduciary capacity not a competency to dispose, 186
when "clear" sum appointed, duty is payable out of residue of appointed property, 222
payable rateably out of appointed sums, 222
price in open market, what is, 207
principal value as to fractional parts, 206
how estimated, 207
meaning of, 207
probate duty, payment of, in respect of an interest in expectancy in personal property settled by deed, effect of, 199
property consisting of things of national, scientific, historic, or artistic interest exempt until sold, 202
in British possession, not a charge on, 221
which deceased's interest ceased at death, extent of duty payable, 186
out of which payable, 219
passing must be aggregated to form one estate, 202, 203
on any death not aggregated more than once, 203
under settlement made by person dying before 2nd August, 1894, where other duties had been paid, 199
payment, not obligation to pay, confers enjoyment, 189
reverting to disponer in his lifetime, not subject to, 194
settled by deceased dying after 8th April, 1900, but before 19th April, 1907, limited aggregation, 203
springing up on death and vesting in another, liable to, 192
upon which fixed duty payable subject to a certain charge, allowance made for such charge, 206, 207
when deceased's estate in net principal value does not exceed £1,000, such value is not aggregated, 203
purchase, *bonâ fide*, for full consideration in money, no duty on vendor's death, 195
partial consideration of money, duty only payable on part, 195
rate as first determined may be subsequently rectified, 207
rates of, 204, 205
applicable to deaths taking place after 29th April, 1909...204
real and leasehold property, appeals in respect of, how made, 227
estate, payment of duty by instalments, 213
specific bequest does not exonerate, where residuary personal estate is sufficient to pay estate duty on the deceased's personal estate, 219
or leasehold property may be taken in satisfaction of, 212, 213
receiver, appointment of, in proceedings to recover, 226
recovery of, law and practice relating to proceedings, 226
refund of, by trustees or owners of property when has been paid by executor, 221
remission of duty and interest, 224
repayment (if any) to person producing certificate, 221
reservation in gift released three years before donor's death, no duty payable, 189
settlement of any interest, property in which interest reserved is liable to, 191
resettlement by person expectantly entitled, 198
when an appendage to original settlement, 198
sale of interest expectant on death of more than one person, duty paid on first death, is repayable on last, 196

ESTATE AND OTHER DEATH DUTIES—*continued.*
estate duty, sale or mortgage of interest in expectancy after 1st August, 1894, and before 9th April, 1900, proviso for aggregation, 204
sale or mortgage of interest in expectancy after 18th April, 1907, and before 30th April, 1909, rates applicable to, 205
sale or mortgage of interest in expectancy after 8th April, 1900, and before 19th April, 1907, rates applicable to, 206
settled property does not pay two duties, 199
settlement, limited aggregation of property in, deceased dying after 8th April, 1900...203
interest of person under, failing by his death not subject to, 193
meaning of, for purposes of, 198
reservation of life interest or power of revocation, property passing on settlor's death, 190, 191
to settlor, interest reverting to settlor, where duty not payable, 194
tenant for life, liability of, for interest on, 223
where duty already paid under, since the date, when further payment required, 197
shares in Ionian Bank, transfer on payment of duty, 215
stamp duty, is a, 212
surrender, where enforceable interests retained, duty is payable, 187
surrenders for public or charitable purposes if more than twelve months before death not liable to, 187
tenant for life and expectant successor, mortgage by, effect of, 212
on death of, trustee of settlement must account, 217
" testamentary expense," where and where not, 219
timber, on, how payable, 213
persons to account on sale of, 217
trust property exempt from liability to, 193
valuation of property, cost defrayed by Commissioners if valuation by their nominee, 209
how value to be ascertained by Commissioners, 209
value at time of death not the value at sale at later date, 207
valuers, appointment of, for inspection of property, 209
when duty is due, 213
estates not exceeding £100, no grant of probate or administration required, 201
pur autre vie, legacy duty, when payable on, 235, 236
subject to and when not, 235, 236
exceptions, legacy duty, from charge of, 239, 240
executor, accountable for payment of duty, 214
affidavit, duty which may be paid on, 216
Inland Revenue, full inquiry before deposing to, 215
covenant debt when satisfied by, not liable as such to account for succession duty, 296
disposition by will in favour of, is a legacy, 234
duty of, 215
estate duty, refund of by trustees or owners of property to, 221
foreign personal property does not pass to him as executor, 219
legacy duty, payment of, at too high a rate through negligence, liability of, to legatee for interest, 259
when liable for as a Crown debt, 252
legatee not liable to, when payment made to agent who misappropriates, 254
liability, limit of, 218
of, for duty on legacy enjoyed by persons in succession, 253
legacy duty, 252
when personal estate appointed by will under power in a settlement, 252
penalties, when wilfully failing to comply with provisions of Finance Act, 1894...225
where court administers, 254, 255
meaning of, 215
penalty, liability for, on failure to pay duty within fourteen days of retainer for his own use, 259

ESTATE AND OTHER DEATH DUTIES—*continued.*
executor, personal liability of, for duty, limitation of, 256
power of, to discharge legacies, on payment of duty accrued, 252
property on which he must pay estate duty, 215
retainer of legacy, particulars must be sent to Commissioners, 255
exemptions, probate duty, from charge of, 311
expectancy, estate duty payable upon value of interest in, 197
interest in, debt incurred in purchase of, 210, 211
duty on, how payable, 213
how duty estimated, 209
mortgage of, when no allowance for against estate duty, 211
sold or mortgaged before 2nd August, 1894...204, 211
value of, for purpose of estate duty, 203
provision as to aggregation of interest in, when sold or mortgaged between 1st August, 1894, and 9th April, 1900...204
Finance Act, 1894, Acts to be construed with, 183
proceedings under, for recovery of duties are, where applicable, the same as for other death duties, 226
fine on renewal, succession duty, when payable on, 288
fines, allowance made for, on payment of succession duty, 291
fixed duty, how paid, 212
interest, when not payable, 225
paid by adhesive stamp, stamp affixed to affidavit, 212
probate duty purposes, for, 312
foreign domicil, policy moneys payable by British company to representative of person having, 217
property, bonds charged on foreign real property payable to bearer locally situate in England liable to duty, 193
cost of realising or administering, 212
duty paid on, allowance for, 212
immovable, devolving as such not liable to succession duty, 274
directed to be sold and proceeds vested in British trustees, duty payable, 274
liability of, to pay duty, test of, 192
mortgage debt on immovable property abroad, as to, 193
partnership business, foreign, property of, not an asset in United Kingdom, 311
real property as asset of, subject to legacy duty, 238
personal, does not pass to executor as such, 219
fraud, certificate of discharge, in connection with, 224
inoperative in case of, 182
rendered inoperative by, 219
fund in court, as to payment thereout of estate duty, 223
notice of payment out given to Commissioners, 255
retention of sum to satisfy claim for estate duty, 225
funeral expenses, reasonable, allowance against estate duty, 210
probate duty, 313, 314
gift, account duty payable on, by donee where made between 31st May, 1881, and 2nd August, 1894...220
annual benefit to donor greater than interest on trust property does not affect liability to duty, 190
benefit of subject-matter of, remaining in donor, duty payable, 189
bonâ fide, may be, even where made to avoid death duties, 188
child, to, or other issue, who predecease testator leaving issue, property of dead legatee liable to duty, 237
confidence, in, to apply in particular manner, not a legacy to ultimate objects of bounty, 237
construction of, in sense of *res data* not of *res donata*, 188
covenant for donor's benefit is sufficient to incur liability to duty, 190
delay by donee in assuming possession and enjoyment, liability to estate duty, 189
disposition by way of, how made, 188
donor, by, to member of restricted class, 189
free of duty, added legacy is also free, 241
inter vivos, as to, when not to entire exclusion of donor, 187
bear their own charge of duty, 220
settlement estate duty, liability to, 229
legacy duty, the subject of, when contained in a will, 233
marriage, in consideration of, effect of Finance Acts on, 189

ESTATE AND OTHER DEATH DUTIES—*continued.*
gift, normal expenditure of deceased not exceeding £100...201
policy of insurance, of, succession duty on, 271
possession and enjoyment must be assumed by donee to escape estate duty, 189
of, meaning of, 189
predeceasing legatee, to, or his representatives, his legatees take as substituted legatees, 237
pursuant to antecedent moral or enforceable voluntary obligation is liable to estate duty, 188
reserving contingent reversion to donor in *corpus* of property given upon trusts, effect of, 190
secret trust, when bound by, effect of, 237
trustees, to, for benefit of person chosen by them, such person is a legatee, 236
gross value, annuity determinable on contingency, calculation of, 246
rule for determining for purpose of legacy duty, 245
legacy duty, rule as to, in estimating amount payable, 245
heirlooms, trustees, when liable for duty on, 253
High Court, appeal to, from decision of Commissioners, 226
without payment of duty, when allowed by, 227
interest, may order payment of, by Commissioners or appellant, 227
increment value duty, allowance against estate duty as a debt, 211
incumbrances, contingent, when taking effect, return of succession duty to be made, 291
no allowance against succession duty if created by successor, 290
Indian securities, personal estate in England, when deemed to be, 310
instalments, annuity, payment of duty in respect of by, 214
discount, none allowed when all instalments of estate duty paid within twelve months of death, 225
how payable, 213
real estate, duty on, may be paid by, 213
interest, Commissioners, court may order payment by or to, 227
debts, on, direction to pay, subjects the interest to legacy duty, 234
estate duty, on, payable from what time, 213
rate of and how payable, 225
recoverable as part of, 225
fixed duty, on, when not payable, 225
in expectancy, advance to successor, an acceleration, 294
commutation of duty, contingencies to be considered, 225
duty on, may be commuted, 224
of which the deceased is competent to dispose is deemed to pass on the death, 186
probate duty, valuation for purpose of, 313
reversion expectant on determination of lease is not, 186
sale or mortgage of, prior to 2nd August, 1894, rule applicable to, 287
what is included in, 186
legacy duty, on, how computed, 259
obligation on Commissioners to pay, only where obligation statutory, 228
probate duty, rate payable upon duty in arrear, 317
provisions as to payment of, on succession duty same as for estate duty, 303
remission of, where amount small, 182
tenant for life, liability of, for payment of on the duty, 223
intestacy, legacy duty, when payable under, 236
residue under, chargeable with legacy duty, 235
Ireland, provisions in Finance (1909-10) Act, 1910, exclusively affecting, 183
issue, gift accruing under Wills Act, 1837, liable to duty, 186
joint tenancy, legacies given in, predecessors of part accruing by survivorship, 238
tenants, legacy to persons as, rule as to payment of duty, 247
persons taking succession as, predecessor of interest accruing by survivorship, 272
property vested in persons as, predecessor for succession duty, 272
jointure, directions as to payment affecting charge of estate duty, 222
owner of land upon which charged accountable for the estate duty, 217
land, transference of, in payment of succession duty, 292
lease, fine upon renewal chargeable with succession duty, 288
real estate with option to purchase, when chargeable with probate duty, 308
successor on determination of, when purporting to be at rack rent, not liable for additional duty, 278

ESTATE AND OTHER DEATH DUTIES—*continued.*
leaseholds for years excepted from payment of legacy duty, 239
for purpose of succession duty are real property, 213
mortgage debt of, may be deducted when accounting for probate duty, 314
probate duty when chargeable on, 306
legacy, disclaimer of, when not allowed, 237
executor, power of, to discharge, on payment of duty accrued, 252
gift, every, by will or testamentary instrument, is a, 233
payable out of or charged on real estate, must pay succession duty, 264
power of appointment, general and absolute, 247, 248
retainer of, what amounts to a, 250
where none, 250
satisfaction of, without payment, 250
legacy duty, Act of 1796, how far still in force, 232
administration action, court must make provision for, 258
provides for duty in, 254
annuities, gross value, rule for determining for purpose of, 245
rule as to payment of duty on, 251
annuity, interest in, ceasing by death before four years' payments due, effect of, 242
legacy given to purchase, how duty payable, 250
payment of duty by person directed to purchase, effect of, 252
repayment of duty on, where determined on any contingency other than death, 262
where payable out of another legacy, how valued for purpose of, 246
assessment of property not reduced into money for purpose of, 261
beneficiary named in will, amount of benefit in discretion of trustees, effect of, 237
benefits, as accruing from time to time, how charged, 246
charged on several sums applied from time to time, rule affecting, 250
Commissioners, duty of, in collecting, 249
commutation of, power of Commissioners to make, 258
compounding of, Commissioners may agree to, 258
contingent legacy, by whom duty payable, 253
how charged upon, 247
covenant, legacy in satisfaction of, when duty payable, when not, 234
death of testator or intestate after 30th April, 1909, rate applicable, 243
debt, forgiveness of, when liable to duty, 234
debts, direction to pay, does not render them liable to, 234
interest on, makes the interest liable to, 234
of another person, direction to pay, confers a legacy, 234
deductions, what are allowed, 249
directions as to payment of legacies and annuities free from, what will amount to, 240, 241, 242
disclaimer of legacy, effect of, on, 244
domicil of testator or intestate, payment of duty dependent upon, 238
donatio mortis causâ is subject to, 233
estates *pur autre vie*, when subject to, when not, 235, 236
evidence of payment, entry in Commissioners' books, 255
exceptions from the charge of, 239, 240
executor, liability of, for duty when personal estate subject to general penalty for neglecting payment within 14 days of retainer to his own use, 259
power of appointment which is exercised, 252
may discharge legacies on payment of duty accrued, 252
when liable for a Crown debt, 252
false statements in relation to, punishments as if for perjury, 260
foreign personal property, payable on, where testator domiciled in this country, 238
gift, arising from profits of testator's business carried on by executors, chargeable, 233
by way of secret trust may be subject to, 237
in confidence, to apply in particular manner, ultimate objects of bounty not legatees, 237

ESTATE AND OTHER DEATH DUTIES—*continued.*
legacy duty, gift of indefinite part of a legacy in trust for another, liability to legacy duty of sums applied, 237
to child or other issue who predeceases testator, gift forms property of dead legatee, 237
with a condition annexed, how far subject to, 233, 234
gifts to executors and trustees are subject to, 234
which duty applicable, 233
Government charge on and follows the legacy, 257
gross value, general rule for determining, 245
heirlooms, trustees when liable for duty on, 253
imposition of duty, extent of charge, 232
interest on, how computable, 259
joint tenancy, legacies given in, how treated, 238
legacy to persons in, how duty payable, 247
leaseholds for years not subject to, 235
legacies given in succession to different persons, how duty payable, 246, 247
legacy compounded for, duty chargeable, 249
disclaimer of, when not allowed, 237
enjoyed by persons in succession, executor must pay, 253
given free of duty, out of what property duty payable, 258
receipt for, transmission to Commissioners, 256
to be enjoyed in succession, when duty payable, 251
what is a, 233
legatee, when a Crown debt due from, 252
liability of executor for, 252
lighthouse tolls not subject to, 235
marriage of legatee to person liable to lower rate of duty, effect of, 244
money applied under direction in will for payment of, not subject to, 240
appointed by will under limited power in marriage settlement does not pay, 242
mortgage debts when subject to, 235
national interest, objects of, when duty payable, 252
subject to, 240
nature of, a stamp duty, 249
non-payment of after assessment, proceedings by Commissioners, 261
partnership, foreign real property as asset of, is subject to, 238
interest in, is included in personal estate and is subject to, 235
payable when legacy paid, 249
payment by legatee to agent who misappropriates, executor cannot recover from legatee, 254
of without deduction, right of recoupment, 253—254
penalty for altering receipts for, 260
non-presentation of receipt or discharge for stamping, 259
where mistakes in paying duty rectified within three months, 259
personal estate, property is, and subject to, reason for, 235
liability, limitation of, 256
property, direction to apply in purchase of realty, duty payable as if personal estate, 248
policy of insurance under Customs Annuity and Benevolent Fund not liable to, 242
power of appointment, legacy subject to limited power, 247
with general, donee entitled in default, 248
not entitled in default, 248
predeceasing legatee, persons entitled to legatee's personal estate must pay, 237
probate, revocation of, and administration granted, effect on rate of, 244
proceedings for account as required by Commissioners, 261
order in, where legatee refused to accept legacy after deduction of duty, 260

ESTATE AND OTHER DEATH DUTIES—*continued.*
legacy duty, professional person as executor or trustee and empowered to charge, effect of, 235
property, out of which paid, 256, 257, 258
rate of duty, exceptions as to the 1 per cent. duty, 243, 244
rates of duty, how determined, 242, 243, 244, 245
refunding in case of overpayment of, 261, 262
remission of penalties to persons offending who discover the other offenders, 260
power of Commissioners and Treasury, 182, 258
repayment of, where grant made void, 262
residue under intestacy is chargeable with, 235
Royal Family, exemptions of, from duty, 242
satisfaction of legacy without payment, 250
settled articles sold or in possession of person having an absolute interest, by whom payable, 253
specific articles bequeathed in succession, while enjoyed in kind not subject to, 240
enjoyed in succession when duty payable, 251
stamped receipts must be taken by person paying, 255, 256
penalty for paying or receiving legacies without, 259
temporary or partial interests, rules as to payment of duty, 251
testator, date of death of, immaterial, 232
trustees, where liable, 253
will, powers of appointment exercised under, how affecting payment, 238
when challenged, but allowed to stand on terms, rate of payment of, 244, 245
legacy and succession duty leviable alternately on beneficial interests acquired on death, 180, 181
legatee, gift to trustees in favour of person to be chosen by, such person is a, 236
legatees, legacy in succession to, rule as to, 246, 247
liability of, for legacy duty, when a Crown debt, 252
payment of duty by, to agent of the executor who misappropriates, executor cannot recover from, 254
life interest, surrender to remainderman when liable to estate duty, 186, 187
where death before 30th April, 1909, and after 31st March, 1900...187
limitation, charge of estate duty on property as against purchasers and mortgagees, 223
time of, within which persons are liable to succession duty, 301
lunatic, estate duty on realty paid out of personalty, effect of, 221
marriage, gifts in consideration, not above £100 in value, 201
of, 188, 189
inter vivos, in consideration of, not liable to duty, 185
legacy duty, rate of, when affected by, 244
property, dispositions of, in consideration of, 185
valuable consideration, where not for purpose of succession duty, 278
settlement, apportionment of costs of raising duty on funds in, as to, 223
money appointed by will under limited power does not pay legacy duty, 242
premiums on policy settled under, paid out of husband's interest, effect of, 192
trustees of, when they are purchasers for valuable consideration, 220
mistake, legacy duty, in payment of, penalty where rectified within three months, 259
payment of succession duty by, or overcharge by, refund of, 304
money, person having power to charge on property of another, 186
mortgage charged on real estate settled by will and paid out of testator's personal estate on which probate duty paid, 199
debts, when subject to probate duty, 306
higher duty where payable by mortgagor is a charge subsequent to that of the mortgagee, 205
power to raise estate duty by, 223
tenant for life and remainderman, by, not to be deducted from succession, 290
mortgagor, account, position of, as to, 216

ESTATE AND OTHER DEATH DUTIES—*continued.*
national interest, articles of, when legacy duty payable, 251, 252
legacy duty only payable when objects sold, and then only on last death, 240
objects of, estate duty payable within one month of sale, 214
not subject to succession duty until sold, 281
person by whom or for whose benefit sold is accountable for estate duty, 217
natural children, domicil, effect of father's, on legacy duty payable by, 243
succession duty payable by as strangers in blood, 283
notice, succession, of, to be given to Commissioners by accountable parties, 296
oath, persons before whom made, 216
what it includes, 216
parol trust, settlement created by, 184
partnership, annuity to deceased partner's widow by partner acquiring share under partnership deed, 191
appointment of share in partnership to one of limited class at appointor's death, effect of, 191
legacy duty, payment of, on foreign real property as asset of, 238
real estate when belonging to partners as tenants in common, effect on legacy duty, 235
impressed with character of personalty chargeable with probate duty, 308
"passing under," expression is of a comprehensive nature, 190
word "passing" equivalent to and co-extensive with disposition, 190
penalty, acceptance of duty and interest constitutes a waiver, 303
interest of Commissioners, waiver of, 226
double duty, when payable, 317
executor failing to make payment of legacy duty within fourteen days after retainer, liable to, 259
executors and other accountable persons, liability of, for, 225
liability of person to, for paying or receiving legacies without stamped receipts, 259
to, in respect of succession duty, 303
mistakes in payment of duty where rectified within three months, amount of, 259
receipt or discharge, non-presentation of, for stamping, liability for, 259
receipts for legacy duty, liability of persons altering, 260
reduction of, by whom made, 226
waiver of, by payment of duty with interest, 260
pendente lite, grant made, full payment of duty on, 215
pension, payable to deceased officer's widow or child by British Indian Government, 201
personal property appointed by will under general power is subject to charge for probate duty, 316, 317
bequest of, taking effect notwithstanding death of legatee in testator's lifetime, probate duty payable, 308, 309
building a house with, does not come within the words "purchase of real estate," 248
direction to apply in purchase of realty, effect of on duty, 248
invested by direction in real property, when subject to succession duty, 265
leaseholds for years are not for purpose of legacy duty, 235
not included in, 263
person domiciled abroad, duty not payable on English, 274
probate duty, where payable on, 306
succession duty, first charge on successor's interest, 298
in, when transmitted, person liable for duty, 295
to, provisions as to payment of duty, 292
transmitted successions in, rate of duty payable, 285
trust of, for investment in realty, calculation of duty, 289
what is included in, for purpose of legacy duty, 235
plate, furniture etc., succession duty not payable while enjoyed in kind, 280, 281
policy of insurance, claim for succession duty not affected where insurer had no insurable interest in assured's life, 192
kept up for benefit of donee "passes on assumed death," 190
liability to duty is independent of assured obligation, if any, to keep up, 190

ESTATE AND OTHER DEATH DUTIES—*continued.*
policy of insurance, money payable by British company under, to representative of person domiciled abroad, person accountable, 217
received from, is money payable under an engagement, 263, 264
under Customs Annuity and Benevolent Fund, legacy duty not payable, 242
settlement of, by deceased who paid the premiums, 192
possession, cause of, not necessarily the occasion entitling person to, 266
immediate on death, not necessary to be, 266
upon death as one of alternative events, 266
power of appointment, duty, when payable proportionately by appointed sums, 222
estate duty when paid out of residue of appointed property, 222
executor primarily liable for legacy duty when personal estate appointed by will under general power contained in a settlement, 252
exercisable in fiduciary capacity under a disposition not made by deceased, not a competency to dispose, 186
legacy given with general power, donee entitled in default of appointment, 248
subject to general power, but legatee not entitled in default of appointment, 248
limited power, payment of legacy duty, how chargeable, 247
limited powers under, person creating power is predecessor, 270
person appointing deemed to be successor from donor of power as predecessor, 272
exercising, when a predecessor, 270
having, domiciled abroad, property subject to British settlement, liability to duty, 276
prior duty allowed for on exercising, 291
probate duty, when payable out of part of a fund appointed as residue under, 317
reserved and exercised, appointment is read into settlement creating power and appointed property passes the settlement under, 191
will, exercised by, under general power, limited power, effect of, 238
predecessor, creditor, when a, 269
deceased joint tenant is deemed to be, 272
gift of policy of insurance, when derived from donor as, 271
inheritance, person becoming by, 271
meaning of term, 268
more than one, where, how duty apportioned, 268
predecessors when joint, when only one, 269, 270
property, person having right to dispose of under succession by disposition, 269
purchaser, not necessarily the last, 271
when becoming, 269
resettlement by tenant for life and remainderman, the latter becomes, 270
successor who is also, duty not payable, 277
"principal Act," the Finance Act, 1894, referred to as, 183
principal value, Commissioners to fix according to market price, 207
depreciation through death of deceased, allowance made, 208
how estimated, 207
meaning of, 207
price in open market, what, is, 207
rule as to payment of probate duty on, 312
probate duty, additional duty on discovery that estate of greater value than that paid on, 315
affidavit, charge based on, 314, 315
British ships, situation of, the port of registry, 310
calls on shares paid in ordinary course of administration may be deducted on accounting, 313
charge of, property not subject to, 306
upon what made, 306, 311

ESTATE AND OTHER DEATH DUTIES—*continued.*
probate duty, charge of, where made, 305
collection of by means of stamps, 314
Commissioners may grant probate on credit, 315
debts, doubtful, must be accounted for when paid, 313
deductions allowed on accounting, 313, 314
devolution of property, every grant necessary to establish is liable to, 308
domicil has no effect on, 309
double duty where accountable person in default, 317
estimate of value when conjectured must be set right when facts known, 313
exemptions from charge of, 311
fixed duty, where payable, 312
foreign partnership business, when not an asset subject to, 311
Indian securities, when deemed personal estate in England, 310
interest in expectancy, value of contingent, how ascertained, 313
payable, rate of, for arrears, 317
lease of real estate with option to purchase, where liable to, 308
leaseholds for years, payment of duty on, 306
liability subject to death of testator or intestate before 2nd August, 1894...306
mistake, correction of, must be made by person acting in the administration, 316
mortgage debt of leaseholds may be deducted on accounting, 314
overpayment of, where repayment made, 318
partnership, real property in, when impressed with character of personalty must pay, 308
payable, when, 315
payment of, in general out of residuary personal estate, 316
on mortgage debts, 306
person by whom duty payable, 315
personal property passing under will or intestacy, subject to, 181
when liable for, 306
personalty, bequest of, notwithstanding legatee's death in testator's lifetime, must pay, 308, 309
principal value, rule as to, 312
proceedings for recovery, how taken, 317, 318
properties, situation of, as affecting, 309, 310
rates of, 312
real estate, condition of, by way of equitable principles, test for liability to, 307
property, conversion of, into personalty, when liable to, 307
repayment of, when refused by Commissioners, 318
return of, when contract goes off, where real estate contracted to be sold in lifetime of deceased, 308
shares of member registered in colonial register dying domiciled in United Kingdom, effect on situation, 310
principal value their market price, 313
situation of property must be within the jurisdiction of British court, 309
probate, grant of, must be made where duty payable, 305
revocation of, and administration granted, effect on legacy duty, 244
to bear certificate that affidavit delivered and stamped where necessary, 316
validity of, not affected by payment of insufficient duty, 305
proceedings, appeal, accountable party may, 303, 304
attachment may issue for non-compliance with writ, 226
probate duty, recovery of, mode of procedure, 317, 318
property, aggregation of, 202, 203
agricultural, exception as regards, 208
assessment of legacy duty on, when not reduced into money, 261
succession duty on, when separate properties, 297
charge, extinction of determinable charge on, duty payable, 272
on, where s. 5 of Succession Duty Act, 1853, does not apply, 272
first, upon which estate duty is, 220
" competent to dispose," deemed to pass at death, 185
contingencies, when no allowance made for purpose of succession duty 291

ESTATE AND OTHER DEATH DUTIES—*continued.*
property, debts allowed against what, 211
" deemed to pass," meaning of, 185
to be regarded as if passed, 185
devolution of, by law, rules applicable to, 267
disposition of, with reservation of benefit ceasing on death of grantor, succession, 273
how increase of beneficial interest is valued for purposes of succession duty, 289
to take effect for purpose of evading succession duty, effect of, 273
enlargement of interest in, a succession from disponer as predecessor, 271
gift of, passes on the death unless *bonâ fide* possession assumed by donee, 189
under will of ancestor surviving to issue of deceased "passes on the death," 186
immediate gift of, *inter vivos*, not made *bonâ fide*, 188
inalienable, duty paid out of, 220
inspection by valuers, 209
interest in, ceasing on death, where duty payable, 186
not aggregated when deceased never had an interest in, 203
" passing " and " deemed to pass " are synonymous terms, 185
" passing on the death," meaning of, 183
what it comprises, 183, 184
includes, 185
payment, not obligation to pay confers enjoyment to exclude duty, 189
person competent to dispose, meaning of, 185
reverting to disponer not passing by reason of its reverter in his lifetime, 194
sacrifice to be occasioned by sale, payment of duty postponed, 214
separate assessments of succession duty for separate properties comprised in a succession charge of duty, 300
situation of, as affecting probate duty, 309, 310, 311
immaterial for purpose of succession duty when brought under protection of British law, 273
spes successionis, although a mere, is an interest in expectancy, 186
trustee, in hands of British, deemed British property for purpose of duty, 274
valuation of, at cost of Commissioners, 209
value of, how ascertained, 209
what is included in, 183
when not " settled " within meaning of Finance Act, 1900...203
public purposes, gifts of objects of national interest for, duty on may be remitted, 182
surrenders for, liable for estate duty, when, 187
purchase, *bonâ fide*, when parties members of same family, 196
change of security is not a, 195
consideration may be where money paid to persons other than vendor or grantor, 196
something in addition to money, a partial consideration, 195
meaning of *bonâ fide* purchase, 195
purchaser, *bonâ fide*, for valuable consideration and without notice not liable to estate duty, 220
not accountable for succession duty, 296
estate in possession of, entitled to have succession duty cleared, 299
liability of, for duty, right of recoupment in respect of payment, 253, 254
no succession where possession on death arises under contract for value in money, 277
predecessor, may be a, 269
is not always the last, 271
rate of duty, will, when challenged but allowed to stand on terms, 244, 245
rates of duty, exceptions as to 1 per cent. legacy duty, 243, 244
legacy duty, 242, 243, 244, 245
real property, allowance for prior principal charge, 290
charge on, not a testamentary expense, 220

ESTATE AND OTHER DEATH DUTIES—*continued.*
real property, charge on, not affected by bequest to successor of sum sufficient to pay duty, 220
successor's interest for duty, extent of, 299
corporate bodies, when taken by, duty payable on principal value, 286
England, situate in, devolving on death, liability of to succession duty, 274
estate duty is a charge on, 220
option to pay by instalments, 213
Land Transfer Act, 1897, has no effect on duties relating to, 220
legacies out of, by whom succession duty payable, 296
passing to executor under Land Transfer Act, 1897...220
probate duty, when subject to as personalty, 307
sale of, interest arising from is liable to succession duty, 264, 265
succession duty a charge on, where successor competent to dispose, 298
mode of payment, successor competent to dispose, where not, 292, 293
payable on principal value, 286
successor, cesser of interest of, within four and a half years, duty not wholly payable, 281
interest of, in, how value for duty arrived at, 286
trust for conversion and reinvestment, subject to, calculation of duty, 288, 289
what it includes, 263
where not exonerated by specific bequest, 219
receiver, appointment of, in proceedings for recovery of duty, 226
registration, certificate as to, without notice of liability for death duty, 224
release, right of disposition may be acquired by, 269
remainderman, predecessor under resettlement, when, 270
remission, Commissioners and the Treasury, power of to make, 182, 258
power of Commissioners to remit duty and interest, 224
Treasury may remit duty and interest, 224
retainer, legacy, of, what amounts to, 250
reversion, expectant on determination of leases, not an "interest in expectancy," 186
reversioner, estate of, exempt from succession duty on death of life tenant where estate duty paid, 279
Royal Family, legacies and successions, exemption from legacy duty as to, 242
satisfaction, legacy duty, how affected by, 249
of, without payment, 250
Scotland, duty, raising of, where order made for sale of property, 223
estate duty, provisions exclusively affecting, 183
heritable property in, as to charging duty expenses on, 223
provisions of the Finance Act, 1894, applying exclusively to, 228
statutes dealing with succession duty in, 262
settled property, contingent settlements, property comprised in regarded as, 229
meaning of, 184
property passing to a person not competent to dispose, 229
will, settlement by, where settlement estate duty is leviable, 229
settlement, deceased dying after 8th April, 1900, and before 19th April, 1907, settled property is aggregated, 203
discretionary trust of income in favour of settlor and others during his life, effect of, 191
instrument, when a, 184
interest reserved may be of any kind or secured in any way, but must pay duty, 191
under, failing before possession does not pass on the death, 193
meaning of, 191
for purpose of estate duty, 198
within s. 2, Settled Land Act, 1882...184
parol trust is, under Finance Act, 1894...184
policy of insurance where deceased paid the premiums, liable to duty, 192
power of appointment reserved in and exercised is read into and passes under, 191
property not "settled" where limited to same person for different interests, 228

ESTATE AND OTHER DEATH DUTIES—*continued.*
settlement, property passing under, made by person dying prior to 2nd August, 1894, not aggregated, 203
settled, when subject to aggregation, 203
under, becoming vested, effect of, 193
when not settled within meaning of Finance Act, 1900...203
reservation in, when property deemed to pass on settlor's death, 190, 191
resettlement, by person expectantly entitled, 198
when an appendage, 198
tenant for life, liability of, for interest on estate duty, 223
trustee of, accountable on death of tenant for life, 217
vested interest divested by death under specified age, not a beneficial interest in possession, 193
settlement estate duty, account, when to be delivered, 231
annuity fund, liability of to duty, 229
where bequeathed after annuitant's death is subject to, 230
collection of, upon an account, 230
compensation for immunity of property from duty on death of tenant for life, 228
competency to dispose in any event, not clearly leviable, 229
directions in the will affecting payment of, 231
estate duty is, and is subject to enactments covering, 231
exceptions from charge of, 230
gifts *inter vivos*, when liable to, 229
nature of, 180
a further estate duty on settled property, 228
not payable in respect of property settled by disposition taking effect before 2nd August, 1894...230
payable once only during continuance of settlement, 230
payment by application of capital money in a settlement, 223
rate of, 230
where death prior to 30th April, 1909...230
repayment, when contingency does not arise, 229
settled property, is charged on, in exoneration of rest of estate, 231
testamentary expense, is not a, 231
shares, calls on, paid in ordinary course of administration, may be deducted on accounting for probate duty, 313
colonial register, owner of shares registered in, dying in United Kingdom, effect on situation of, 310
Ionian Bank, in, transfer to Greek subject, 215
principal value, their market price, 313
private limited company, in, value of, 208
situation of property in, the location of the register, 310
specific articles bequeathed in succession, while enjoyed in kind, not subject to legacy duty, 240
bequest of, to body corporate, not subject to legacy duty, 240
stamped receipts, annuities, rule affecting, 255, 256
legacy, person paying, must take, 255, 256
penalty for paying or receiving legacies without, 259
succession, acceleration of, when duty payable, 294
alienation of, person liable for duty, 267, 268
when duty payable, 294
arises, when death occurs, 292
devolution by law conferring a, how derived, 270
where applicable, of beneficial interest in property upon death, constitutes a, 267
disposition, person who had the right to dispose of property is predecessor, 269
under a, what constitutes, 265, 266
established, when, cannot be got rid of, 267
legacy enjoyed by persons in, liable to same rate of duty, duty payable by executor, 253
of specific articles to be enjoyed in, payment of duty, 251

ESTATE AND OTHER DEATH DUTIES—*continued.*
succession, meaning of, 263
new, how conferred, 267
notice of to be given to the Commissioners and true account delivered, 296
persons taking jointly pay duty in proportion, 272
possession of part only of, proportion of duty only payable, 294
property, enlargement of interest in, is a, 271
settlor, person out of whose estate succession derived, 268
specific articles enjoyed in, when duty payable, 251
trustees, where liable for duty on legacy enjoyed by persons in, 253
succession duty, acceleration of succession, when duty payable, 294
account, persons liable to, 295
may raise duty by charging property, 301
when, unsatisfactory, procedure by Commissioners, 297
additional duty, where not payable, 279
administration, court must provide for duty out of funds under control, 301
advance to an expectant successor is an acceleration, 294
advowson, duty not payable on, until disposed of for money or its worth, 281
sale of, in concert with successor, duty chargeable, 287
when duty payable in respect of, 294
age of purchaser, a basis for calculating life interest at date of falling into possession, 287
agricultural property, mode of calculating duty payable by successor, 287
alienation of succession, person liable for, 267, 268
when duty payable, 294
allowance for prior duty against duty, chargeable on exercising general power of appointment, 291, 292
annuity secured, is money payable under an engagement, 263
valuation of, for purpose of, 289
articles while enjoyed in kind, not subject to, 280
assessment of, by Commissioners, 297
benefit reserved by dispositions accruing to grantee on death of grantor pays, 273
certificate of discharge before distribution of fund, 298
payment, exonerates purchaser even if account or assessment incorrect, 302
of, issue of, by Commissioners, 292
cesser of life interest in personal property by death within four years, duty proportionately payable, 282
charge, determination of, when duty payable, 294
extinction of, person benefiting liable to, 272
first, on successor's interest in personal property, 298
chargeable, where not, on payment of other death duty, 278, 279
charitable purpose, property subject to a trust for, duty payable, 286
charity, power of trustees to raise duty on property the subject of, 300, 301
trust for conferring a succession, time for payment of, 293
collection of, Commissioners to provide stamps for denoting rate of, 292
Commissioners to keep books and give receipts, 292
commutation of, future claims to, where made, 302
compounding or commuting of, by person accounting, 295
compromise of conflicting claims to realty, duty follows strict rights of parties, 285
consideration entitling to exemption need not be the exact value, 278
contingencies, when no allowance made for, 291
contingent incumbrances, where allowance made for, 291
corporate body, duty payable on principal value of real estate taken by, 286
power of, to raise amount of duty payable, 301
Crown debt, a, due from successor, 295

ESTATE AND OTHER DEATH DUTIES—*continued.*
succession duty, Crown debtor, every person accountable is, for unpaid duty, 295
death must be after the 18th May, 1853...263
deductions allowed for necessary outgoings, 289, 290
"derive," sense of word as used in Act, 268
directions as to payment of duty, where applicable to, 281
disentailing assurance conferring power of appointment, effect on, 266, 267
dispositions taking effect at periods depending on death, 266
to take effect, when fraudulent for purpose of avoiding, 273
document other than a testamentary, filing of attested copy, 298
domicil, as affecting, 274, 275
person entitled, immaterial, 276
exception, none where consideration not of money or money's worth, 278
exceptions to payment of, 276, 277, 278, 279, 280, 281, 282
executor, in his capacity as such, accountable on paying covenant debt, 296
exemption where duty paid upon dead reversioner's estate, 279
in certain cases estate duty paid on the property itself, 279
fines and other charges, when allowance made for, 291
foreign immovable property directed to be sold and settled in British settlement, 274
not liable to, 274
imposition of, extent of charge, 262, 263
incumbrances, when no allowance made for, 290
"incurred," what is embraced by, 290
interest in expectancy where sold or mortgaged prior to 2nd August, 1894...287
on, provision as to, 303
joint predecessors, how duty apportioned, 268
land, transference of, in satisfaction of, 292
law, by, devolution of, what constitutes, 267
leaseholds for years included in real property for purpose of, 213
leases at rack-rent, successors on determination of, not liable to, 278
legacies, when payable out of or charged on real estate are chargeable with, 264
legacy charged on real estate, duty to be retained by person paying legacy, 299
payable in respect of, person accountable, 296
liability to, test of, 273
limitation of personal liability for, 297
time within which persons may be liable to, 301
marriage not a valuable consideration for purpose of, 278
mines unopened excepted from imposition of duty, 288
money applied in payment of duty not subject to, 281
arising from sale of an interest in real property, 264, 265
mortgage by tenant for life and remainderman, no allowance for in calculating, 290
national interest, objects of, as to estate duty applies also to, 292
none payable on personal estate liable to legacy duty, 279, 280
notice of succession to be given to Commissioners and true account delivered, 296
objects of national interest, subject to duty when sold, 281
overpaid by mistake or overcharge may be refunded, 304
partial consideration, succession diminished by amount of consideration payable, 278
payment by moieties and instalments, death of successor before full payment, effect of, 299
in advance, discount may be allowed, 295
no prejudice to right of repayment (if any), 305
of, time may be allowed for, by Commissioners, 295
penalty in respect of, where notice of succession or delivery of account not given, 303

ESTATE AND OTHER DEATH DUTIES—*continued.*
succession duty, person domiciled abroad directs creation of a British settlement of personal property situate in Britain, liability, 274, 275
personal property does not include leaseholds for purpose of, 263
person liable on transmitted successions in, 295
settled by British settlement irrespective of domicil or *situs* must pay, 275
transmitted successions on duty, payable, 285
when subject to trust for investment in realty, payment of, 289
where to be invested in real property, when chargeable, 265
policy of insurance, moneys received from, 263, 264
possession, not necessary to be immediate upon death, 266
power of appointment, person having, domiciled abroad, but property subject to British settlement, effect of, 276
predecessor, person from whom successor derives interest, 268
principles upon which value of property based, 286
property, devolving by law, what constitutes a succession, 267
disposition of, with reservation of benefit when subject to, 289
producing a yearly fluctuating income, calculation of duty, 288
relinquished by successor on taking succession, allowance made for, 291
term includes real and personal property, 263
purchase *bonâ fide* for valuable consideration is not accountable for, 296
purchaser does not pay, where right to possess property arises on death of vendor, under contract for value or money, 277
rates of, how determined where devolution before 30th April, 1909, 282, 283, 284
real property, a charge on, when successor competent to dispose, 298
allowance to successor where there is a prior principal charge, 290
cesser of limited interest in, within four and a half years, duty not wholly payable, 281
duty a charge on successor's interest where not "competent to dispose" of, 298, 299
where payable on principal value of, 286
mode of payment of duty, where successor competent to dispose, where not, 292, 293
settled, subject to power of sale etc., shifting of charge, 300
situate in England, liability of, to, 274
subject to a trust for conversion and reinvestment of proceeds in other real estate, calculation of, 288, 289
what is included in, 263
remission of, Commissioners have power to make, 182, 302
sale, as to what will not confer an exception to duty, 277
Scotland, relating to, 262
separate assessments for separate properties comprised in a succession, charge of, 300
small successions, where whole succession under £100 in value, not subject to, 280
succession destroyed, exception from, 277
meaning of, 263
part of, falling into possession, part duty only payable, 294
successor entitled under own disposition, when liable to duty, 285
liability of, for unpaid, 300
marriage of, to person of nearer consanguinity to predecessor pays same duty as such person would be liable to, 284
meaning of, 267
not competent to dispose, duty a charge on his interest, 298, 299

ESTATE AND OTHER DEATH DUTIES—*continued.*
succession duty, successor who is also predecessor does not pay, 277
surrendered, interest, or extinguished before 19th May, 1853, not chargeable with, 276
tenant for life and remainderman, conveyance by, person liable for, 268
disentailing and resettling is no acceleration, where immediate annuity secured to remainderman, 295
timber, duty on, imposed as from the death, 288
payable on sale of, 281, 287
not subject to duty until sold, 281, 287
proceeds of sale, when accountable for duty, 294
time at which valuation of a succession should be made, 286
for payment of, 292
title to succession accelerated by surrender, effect of, 285
transferred interests not conferring new succession, rate payable, 285
trust for charitable or public purpose, rate of duty payable, 284
successor, allowance made to, on relinquishing property on taking a succession, 291
death of, before full payment of duty, 299
liability of, for unpaid duty, 300
marriage of, to person of nearer consanguinity to predecessor pays same rate as such person, 284
meaning of, 267
surrender of life interest, effect when prior to Finance Act, 1900...187
to remainderman, where estate duty payable, 186, 187
surrenders, public or charitable purposes, for, duty payable if made within twelve months of death, 187
survivorship, property transferred by absolute owner to himself and another, liable to duty, 191
temporary estate duty, how leviable, 181
tenant for life, account on death of, to be made by trustee of settlement, 217
conveyance of settled real property by, in conjunction with remainderman, alienee is the successor, 268
liability of, for payment of interest on duty, 223
mortgage by, in conjunction with expectant successor, 212
remainderman, and, disentailing and resettling is no acceleration of succession where immediate annuity out of property secured to remainderman, 295
succession duty, no allowance for mortgage by tenant for life and remainderman, 290
tenant in tail, "competent to dispose," may be, 185
testamentary instrument, definition of, 236
documents which may be, 236
timber, estate duty on, how payable, 213
exemption in case of annual sales less than £10 net, 281
sale of, on, owner or trustees must account, 217
succession duty, exception in case of coppice or underwood, 288
not payable on, until sold, 281, 287
on, imposed as from the death, 288
sale of, when accountable for, 294
payable on sale moneys, 287
value of timber to be aggregated, 214
Treasury, remission of duty and interest by, 182, 224
trust property, gift of interest bearing bonds remaining unpaid at donor's death, not property held by debtor as trustee for creditor, 193
not included in property "passing on the death," 193
trustee, disposition by will to, a legacy, 234
new, appointment of, entitled to remuneration, does not take same as a succession upon death of former trustee, 266
personal liability of, for legacy duty, limitation of, 256
term, what it includes, 295, 296
trustees, gift to, in secret trust, trustees are the legatees, 237
heirlooms, liability of, for duty on, 253
liability of, where legacy enjoyed by persons in succession, 253
valuation, cost of, defrayed by Commissioners, 209
valuers, appointment of, 227

ESTATE AND OTHER DEATH DUTIES—*continued.*
voluntarily, meaning of, 185
voluntary settlement, what constitutes under Customs and Revenue Acts, 1881—1889...191
will, beneficiary named, but amount of benefit in discretion of trustees, a legacy, 237
expression, what is included in, 216
gift of indefinite sum in trust for another, legacy to extent of sums applied, 237
legacy duty, how payable when will challenged, but allowed to stand on terms, 244, 245
power of appointment, exercised under general power, limited power, effect of, 238

ESTOPPEL.
acquittals, effect of, on subsequent proceedings, 328
action, plaintiff, by, who was defendant in former action, 331
Admiralty Court, 363
record, not a court of, 354, 363
admissions, judgment as result of, final judgment, 327
appeal pending, judgment effective notwithstanding, 326
arbitrator, award of, 353, 364
assault, dismissal of charge without hearing, effect of, 353
bailment, acceptance of, creates an estoppel *in pais*, 324
bankruptcy, debtor's action not continued by trustee no bar to separate action by trustee, 346
bill of exchange, second action on, where not barred, 355
signatory to, estopped as against subsequent holder, 324
review, action in nature of, for fraud, 334
sale, estoppel not applied against discovery of real nature, 370
bond, obligor, estoppel against, 372
cause of action, determined, when, on its merits, effect of, 333
company, liquidator barred by finding in action, defendant not a shareholder, 331
compromise, action to set aside, will estop action to revoke probate founded on, 331
conclusion, estoppel frequently referred to as, by older authorities, 32
consent, judgment by, effect of, 327
conveyance, consideration money, receipt for, estops party by deed, 371
operative words in, create no estoppel, 367
copyholds, application of principle to, 367
corporations, judgment by consent, no estoppel where contract *ultra vires*, 327
Medical Council, General, order removing practitioner from register, effect of, 328
parties, and other, there is no estoppel between, as to their powers, 371
seal, corporate, necessity of, 327
court-martial, sentence of, may be pleaded by way of estoppel, 363
covenant estoppel not created by mere statement in, the averment must be absolute, 367
running with the land by estoppel, 372
to convey, does not estop denial of seizure in fee, 372
criminal proceedings, information for penalties for breach of revenue laws, is not, 343
subsequent action in, principle applied, 331, 349, 356
debtor, trustee of, by not continuing action of debtor is not barred from separate action, 346
deed, action not arising out of but wholly collateral, no estoppel, 372
cancelled, use of, as evidence, 373
date of, statement as to, no estoppel arises by, 366
estoppel by, where statement of fact by parties under seal, 323
execution of, refused and not recognised, no estoppel, 366
illegal by statute, purpose of, estops parties, 370
mutuality of estoppel in, depends on construction, 325
party may be stranger to his own, 368
to, guilty of fraud cannot set up estoppel by, 369
purchase-money unpaid, purchaser cannot raise estoppel by, 371
recital in, as to seizure in fee must be absolute, 367
statements in, inference drawn from, will not create estoppel, 36
void on account of fraud does not create an estoppel, 369
deed poll, doctrine of estoppel said to apply equally to, 323, 365, 366
sed quære, 365, 366

ESTOPPEL—*continued.*
default, judgment obtained where party in, is "final," 327, 358, 359
disability, effect of, on judgment, 327
divorce, decree for, effect of, 326
King's Proctor, intervention of, on grounds *dehors* the verdict, 326
principle of estoppel as applied to, 331
dower, widow's action of not estopped by recital in husband's deed, 346
ejectment, whether estoppel must be pleaded in claim, 350
estoppel, conclusive evidence, and, distinction between, 324
court-martial, sentence of, may be pleaded by way of, 363
deed or record, by, must be pleaded if opportunity available, 350
definition of, 322
divisions of, 322
maxim, "must be certain to every intent," 379
mutual or reciprocal, must be, 325
precludes, even from stating the truth, 322
receipt, where doctrine applied, 372
remainderman, action by, when not party to former proceedings, 352
stranger to matter cannot take advantage of, nor be bound by, 325
estoppel by deed, ambiguity, none allowed in, 366
attorning tenant, doctrine applicable to, 367
basis of principle, 365
bill of sale, no estoppel to discovery of real nature, 370
binding on parties and privies, how far, 368
bond, estoppel against obligor, when applied, 372
consideration money, receipt by solicitor for vendor or mortgagor, 372
construction of deed determines whether one or more or all parties are bound, 323
contingent remainderman, conveyance by, effect of contingency happening, 374
conveyance, operative words in, create none, 367
receipt for consideration money, party estopped by, 371
copyholds, application of principle to, 367
corporate body, no estoppel between, and other parties, as to its power, 371
covenant that person entitled does not create estoppel, averment must be absolute, 367
to convey not sufficient to raise estoppel to denial of seizure in fee, 372
covenants when running with estates by estoppel, 372
deed, date of, statement of the, no estoppel arises by, 366
execution of, refused and not recognised, no estoppel, 366
in action not founded on, no estoppel, 372
inference drawn from statements in, will not create estoppel, 367
mistake in, circumstances in each case must be considered, 370
must be genuine and undisputed, 370
where common to all parties and not acted upon to detriment, no estoppel, 370
poll, estoppel may be raised by, *sed quære*, 323, 365, 366
to effect purpose, illegal by statute, estoppel as between parties, 370
when cancelled, use of as evidence, 373
invalid, *quære* if third party can set up estoppel on, 368
relied on, facts party may put in to open estoppel, 350
estate, when part only of, in grantor or lessor doctrine is applicable thereto, 373
evidence, rule of, admitting no contradictory proof, 366
fraud, by third party acting on behalf of party setting up estoppel, 369
deed void on account of, no estoppel, 369
person guilty of, in connection with deed cannot apply doctrine, 369
heir-at-law, or devisee under intestate's bad title, may set up Statute of Limitations, 374

ESTOPPEL—*continued.*
estoppel by deed, illegal deeds, estoppel will be opened on being set aside, 370
implication, there is no estoppel by, 367
infant, no estoppel by deed, against, 371
instrument, truth appearing by same, where no estoppel created, 367
" in witness whereof," words following, part of deed, *sed quære*, 366
lease, no estoppel where premises not comprised in, 366
or other interest in land when created by estoppel, 373
when interest granted larger than grantor's estate, no estoppel, 373
legacy duty, mistake of fact as to amount payable, effect when common to parties, 370
lessee or grantee, effect of doctrine on, 373
lessor, subsequent acquisition of estate by, 374
when title of, determined, lessee not estopped, 373
married woman, admissions made by, in deed, 371
effect of restraint on anticipation on doctrine of estoppel, 371
matter creating, must be particular and not of a generality, 367
negligence, deed executed with, containing false representation, effect of, 369
party may be stranger to his own deed, 368
plea of *non est factum*, as to, 369
policy of insurance, constructive total loss under, limits of doctrine relating to, 373
principal and agent, alterations in deed by agent after execution, effect of, 368
where agent and person setting up estoppel acted at variance with terms of deed, 368
purchase-money not paid, no estoppel in favour of purchaser, 371
recital as to seizure in fee must be absolute, 367
intention of, a question of construction, 368
of devise, effect of, 366
statement in, when mutually agreed to, 368
that father entitled in fee, binding son party to mortgage deed, 366
the averment relied on may be contained in, 366
when statement of one party only, doctrine confined to that party, 368
true but incomplete, does not estop party completing truth, 367
recitals in anterior deeds do not estop person who has executed deed of conveyance, 367
deed out of which estoppel does not arise, not conclusive, 372
parties to deed are bound by, to what extent, 366
release by pecuniary legatees, no estoppel on subsequent funds falling in, 372
shares, forged transfer of, principle of representation by conduct, application of, 369
illegal issue as fully paid up, company estopped against future transferee, 370
statement in deed for purpose of concealing an illegal contract, 370
of fact in deed by parties under seal, 323
strangers, rights of, not affected, 368
solicitor and client, transaction between, subsequent purchaser with knowledge must inquire, 372
tenant for life, persons privy to subject to, same estoppel as, 374
under invalid devise may dispute title of remainderman, 374
where grantor's title bad, estopped as against remainderman, 374
holding under lease by indenture, 373
tenants in common, having distinct estates, lease by, effect of, 373
testator, person purporting to claim under, when estopped from setting up the Statute of Limitations, 374

ESTOPPEL—*continued.*
estoppel by deed, trustee making fraudulent conveyance cannot benefit by acquiring title, 374
trustees for public purpose, nature of estoppel applicable to, 371
not protected against doctrine of, 371
truth appearing in deed relied on to support estoppel, effect of, 354
estoppel by record, acquittal in the Exchequer, effect of judgment, 350
acquittals, effect of, 328
action, dismissal of, by consent, where no compromise of cause, no bar, 359
for want of prosecution, no bar to new action, 359
administration, suit for, suit for distribution of assets, 331
Admiralty Court, plea of *res judicata* in, demurrer to, effect of, 354
admissions, judgment as result of, 327
affiliation order, no appearance on application to quash, no bar to new action, 359
agreement, existence of, affirmed in former action, Statute of Frauds cannot be pleaded against, 356
which has been worked out, second action on, 355
allegations not inconsistent with record not subject to, 354
arbitrator, award by, lacking qualification which is a condition of his appointment, none, 353
arising, where, 323
assault, dismissal of charge without hearing, no bar to subsequent action, 353
averments, not proved nor admitted, not a basis of, 358
award by jury, signed by sheriff under Lands Clauses Consolidation Act, 1845, effect of as, 353
bankruptcy, right to set aside judgment debt upon which adjudication founded vests in trustee, 352
bill, dismissal of, for want of equity, how far a bar, 359
of exchange, second action on, where not barred, 355
claim, statement of, several demands in, judgment for one only, presumption, 356
when too little, and taken out of court when paid in by defendant, 358
where two heads of, verdict on one only, no estoppel as to other, 356
contract, true construction of, party may rely on, where pleading alternative construction, 358
corporate seal, necessity of, 327
corporation, return by, to writ of mandamus to compensate discharged officer, effect of, 358
court, decree of, unknown to the law, doctrine not applicable, 353
courts of law, records of, 325
criminal proceedings, principle applied as to subsequent actions, 356
in, 331, 349
decision, grounds of, to ascertain, judge's reasons cannot be looked at, 356
decree of nullity of foreign court cannot be impeached here while standing, 352
default, judgment by, 327
ground for estoppel must be found on face of, 358
subsequent action for further sum, where no estoppel, 359
of defence, judgment in, party suffering, where not estopped, 358
defence, confession of, how far an estoppel, 358
in substance of *autrefois convict*, 352
defendant, judgment for, not always as decisive as judgment for plaintiff, 349
on dilatory grounds or on one of many defences, 349

ESTOPPEL—*continued.*
estoppel by record, defendant jointly sued cannot set up estoppel between same plaintiff and himself alone, 349
demurrers to plea of *res judicata*, when formerly allowed, 354
disability of party against whom judgment obtained, 327
discontinuance without leave, no bar to subsequent action, 359
divorce decree, intervention of King's Proctor, effect of, 326
proceedings, verdict in, effect of, 326
doctrine of, maxims expressing, 326
ejectment, in action of, whether estoppel must be pleaded in statement of claim if relied on, 350
"estoppel against estoppel doth put the matter at large," no decision supporting maxim, 361
"estoppels are odious," practice which found expression in old maxim, 351
facts, material to the action, when agreed upon by parties, estoppel in future action, 357
final judgments, classes of, 327
"final," meaning of, as used, 326
foreclosure, decree for, effect of, 326
defendant submitting to, not estopped if transaction infringes usury laws, 355
foreign court, without jurisdiction, administering estates of deceased persons, no estoppel, 354
judgment, effect of, 326
judgments, pleas as to jurisdiction affecting, 354
principle applicable to when not interlocutory, 359
purporting to affect matrimonial status of persons not domiciled, no estoppel, 354
fraud, action to set aside for, may be stayed as vexatious, 352
allegations of, must be specific and material, 352
decree of nullity disregarded when obtained by, 351
effect of, on persons not party to judgment either *in rem* or *in personam*, 351
when judgment obtained by, 351
judgment obtained by, how now set aside, 352
on foreign judgment, effect of, 351
party to judgment obtained by, should apply to set aside to avoid estoppel, 352
where letters of administration obtained by, 351
friendly action to prevent hostile action, no bar to second action, 352
immovables, status of, declaration as to, 327
implication, matters decided by, no estoppel, 356
interlocutory judgment, where intention of, "final," 326
interpleader, party failing to raise as ground of defence at trial, 358
Irish judgment, principle as applied to, 354
issue, when directed by court, principle applied, 356
judgment by consent, matters pleaded in defence previous to, cannot be set up in subsequent action, 357
nature of, 327
no estoppel as to matters not in issue, 357
none where contract by corporation *ultra vires*, 327
default, the estoppel is limited to what is patent, 357
effective if finally determining rights, 326
everything that goes to make up the record must be looked at to raise, 356
for plaintiff, where not necessarily conclusive, 355
"*in personam*" or "*inter partes*," definition of, 327
in rem, definition of, 327
effect of, 361
inter partes not affected by judgment ***in rem***, where, 361

ESTOPPEL—*continued.*
estoppel by record, judgment *in rem*, ways in which the "*res*" must be affected, 327
must be looked at to ascertain issue previously decided, 356
nature of, must be final, 326
not a *res judicata* or estoppel unless given before second action commenced, 361
roll, terms of, not in accordance with written findings of the jury, no estoppel, 354
where efficacy limited, 327
judgments *in rem*, conflicting, subject to doctrine as applied to estoppel by representation, 361
examples of, 328
jurisdiction, lack of, deprives judgment of any effect, 353
of court decreeing judgment essential, 353
juror, where withdrawn, litigation not put to actual end thereby, 359
jury, where discharged without finding on issue submitted, no bar, 359
letters patent, estoppel as between grantee and the Crown, 349
libel, plea of justification, where not conclusive in action for repeating libel, 355
limited to extent of authority, 351
lis pendens, without judgment, no estoppel, 361
magistrate's dismissal of information, where *ultra vires*, none, 353
order, absence of condition necessary to found jurisdiction, none, 353
where good on its face and objection to non-existence of condition not raised, 354
refusal to order delivery up of goods not an adjudication on title, 353
married heiress-at-law, bound by decree in probate proceedings, 327
woman cannot remove restraint by consent, 327
matter must be in issue to raise question of, 355
misdemeanour, prosecution for, where jury discharged without finding on issue submitted, no bar, 359
money, action to recover, paid under judgment, principle affecting, 326
oral evidence as to facts in issue and determined, when admissible to admit doctrine, 357
parties, allegations and admissions of, in pleadings, how far creating estoppel, 357
party against whom estoppel is set up must have been party to earlier proceeding, 349
taking advantage of doctrine must have mutual rights, 349
patent action, consent to injunction in, no estoppel against denying validity and infringement, 357
where validity and infringement denied in former action, 357
infringement of, judgment for, unaffected by subsequent judgment for revocation, 361
pauper, order of sessions quashing order of removal of, effect of, 349
relating to, if on the merits, is conclusive between parties, 349
payment for value of stone does not bar action for damage by quarrying, 356
into court defendant not estopped from setting up matters which might have constituted a defence, 358
money taken out by plaintiff, judgment not signed, but action abandoned, 359
where several causes of action, taking money out, how far estoppel arises, 359

ESTOPPEL—*continued.*
estoppel by record, payment into court, with denial of liability, how far a *res judicata*, 359
with denial of liability, judgment signed for costs and money taken out, effect of, 358
pendency of suit, application to stay, 361
plaintiff a defendant in former action, 331
recovering judgment obtains a decision on the issues on their merits, 349
plea, not taken advantage of, by record becomes evidence only and is not conclusive, 350
of judgment recovered, 350
statements of party in, not to be treated as confessions of truth, 357
where no opportunity of using, record conclusive, 350
pleading, alternative, party not bound by, 358
practice, modern, relating to pleas of, 350
price of goods, judgment in action for, no answer to action for damages for their quality, 355
where paid into court in first action, 355
prior verdict creates no estoppel, where principles and evidence different in earlier and later suit, 355
prize court, foreign, judgment of, acquiesced in, when no jurisdiction, 351
probate action, failure of, for want of evidence of contents of will, no bar to new action, 359
prohibition of action for goods sold, no bar to action for account stated, 356
purchaser acquiring title to property *bonâ fide* and for value on faith of judgment *in rem*, 351
receiving order, refusal of, no adjudication on debt, 353
record, no evidence admissible to contradict, 356
default of pleading, as to effect of, 357
registrar's book as evidence of what done at trial, 357
rule as to estoppels generally, 349
Scotch judgment, where not a bar in suit for declaration of legitimacy, 349
second action, circumstances existing at time of, non-existent when first brought, 350
sheriff by his return is charged to full value except as to perishable goods, 360
false return by, proof of malice unnecessary to plaintiff's cause, 360
must answer to value of goods returned, 360
not estopped by return of *fieri feci* showing defeasible title of execution debtor, 360
from denying what he did not affirm by his return, 361
return of, conclusive in proceeding by *sci. fa.* against him as to value of goods seized, 360
no bar to action for false return, 360
of seizure of debtor's goods not conclusive in action by creditor for false return, 360
to writ of execution by, no averment admitted against, 359
conclusive as to fees taken by his bailiff, 360
limitation of estoppel as to, 359
of rescue, a bar to rescuer showing cause against attachment, 360
of rescue, is in itself a conviction against rescuer, 360
remedy applicable to, when false, 359
taking greater fees than allowed by statute, 360

ESTOPPEL—*continued.*
estoppel by record, Statute of Frauds, as to omission to plead, 357
third party, plea by, of conviction for obstructing highway in action by former defendant for trespass, 349
tithes, action for, for different years, how affected by, 355
trover, in, judgment for defendant, no answer to action for money received in respect of same goods, 350
truth, where appearing on the record, doctrine does not apply, 354
use and occupation, successive actions, no estoppel, 355
verdict, minute of, entered by officer of court, how far binding, 354
not followed by judgment, does not create, 326
want of prosecution, dismissal of action for, when a bar, 327
widow, cannot take advantage of estoppel by deed of husband's tenant, if not herself estopped, 349
Workmen's Compensation Act, agreement for weekly payment under, where not estopped, 355
estoppel *in pais*, acts establishing certain relations of parties, 324
in pais formerly referred to, 375
ultra vires, distinction between, and non-compliance with necessary formalities, 380
administrator, appointment of, effect of when claiming goods, 407
advances on shares before being informed that there was no charge on them does not create, 384
advice note of railway company to consignee not intended to be acted upon, 384
affidavit of party showing cross dealings described as "payment" not estopped from showing no payment, 378
agency by estoppel, effect of Factors Act, 1889, on, 391
agent, contract with, in ignorance of existence of principal, who settles with agent, 398
facts known to, the legal consequences are immaterial, 386
which would invalidate policy, premiums retained by company, 386
false accounts of, with principal, in absence of mistake, bind agent, 388
fraudulently representing goods bought for himself as bought for principal, 386
knowledge not imputed to, in fraud of principal, 386
of, acquired within scope of his authority is that of principal, 385
may estop himself from denying that he contracted as principal, 395
of insurance company cannot set up title of third persons to moneys received on company's behalf, 407
ostensible, where person dealing with, may estop himself, 395
person dealing with, may set off his debt as against agent's debt by estoppel, 395
giving credit to, duty on discovering principal, 397
representation by, must be made within the scope of his authority to effect an estoppel, 385
made by, effectual by estoppel against principal, 385
signing bill in firm's name, liability of, 391
unratified contract of, without real authority, what is necessary to create estoppel, 391
with authority to fill up blank stamped paper, exceeds limit of amount, estoppel on principal, 392
indicia of an authority in excess of actual authority estoppel on principal, 392
agent's authority, no holding out to person knowing limits of, 390
agents charging themselves in account, effect of, 385
intrusted with goods for consignment or sale, protection of persons dealing with, 391
agreement, representation as to ambiguous expression in, cannot be afterwards denied, 377

ESTOPPEL—*continued.*
estoppel *in pais*, application of phrase, now much wider, 375
arbitrator, award of, case arising on, 376—377
party appearing before unqualified, may deny jurisdiction, 389
arising from conduct, usual meaning of, 324
assignee of lessor, may be shown to be an assignee not *de facto*, 405
assumption, unfounded, may be basis of estoppel, 382
attornment, mere, where purchaser knows the facts and bailee is ignorant, effect of, 408
auctioneer, as to estoppel against, 408
sale of goods by, improperly seized by distress, notice too late to stop sale, effect of, 406
bailee, as to estoppel of, 406
cannot set up title of third party in absence of claim, 407
estopped from denying title of bailor, generally, 406
may interplead, where action by third party expected, 407
show that bailor's title has expired since bailment, 407
of shipmaster, holding for lien for freight liable to owner of goods, 406
refusing to deliver goods to true owner is guilty of conversion, 406
setting up title of third party must do so on third party's authority, 406
when admittedly defending in own interests, 407
while in possession of goods can set up title of third party, 406
bailment, acceptance of, 324
bailor, estopped from denying title of one to whom he attorned as his bailee, 406
fraud of, not necessary to prevent estoppel if bailee ousted by title paramount, 406
bailor and bailee, estoppel between ceases if bailee evicted by title paramount, 406
Bank of England estopped as to contents of registers relating to Government stock, 411
banker and customer, neglect of customer may estop him, 400
cannot put forward customer's carelessness to justify his own fault, 401
customer of, delaying information as to forged cheque is estopped, 385
may be estopped by error in pass book when acted upon, 388
return to, of pass book by customer not evidence of stated account, 388
taking securities from money-lender not protected by estoppel, 413
bankers, advice of, as to collection of bill of exchange, when acted upon, creates estoppel, 386
estopped by their manager's representation as to making a loan, 386
bill, acceptor of, not properly destroying after return to him, estopped, 402
drawn and indorsed by arrangement of parties in name of deceased person, 383
in name of dead person to knowledge of acceptor, 394
forged, drawer learning of forgery omitting to give prompt notice to bank after advance made, 384
payable to fictitious payee, 394
payment by banker of genuine, with forged indorsement, 395
of, which was accepted without authority does not estop denial of similar acceptance of second bill, 390

ESTOPPEL—*continued.*
estoppel *in pais*, bill of exchange, acceptor of fictitious, expressed to be payable at his bank is estopped, 394—395
duty of acceptor to prevent amount being fraudulently increased, 400
or promissory note, signatory to, 324
bills, forged, advice of, coming forward for payment, effect of, 400
Bills of Lading Act, statutory estoppel on master or person signing bill, 387
bills of lading, erroneous statement in, by shipowner, that freight paid in advance, 387
estoppel on master signing does not bind the owner, 387
master of ship may make statements as to condition of goods, 385
mere identification marks in, may be shown incorrect, 387
persons giving, knowledge that purchasers will act on statements therein, 384
signed by master, "contents unknown," effect of, 383
treated as evidence and conclusive when by agreement, 387
chattel, owner of, not estopped by parting with possession, 379
cheque certified by bankers with blanks, no estoppel where amount wrongfully increased, 401
completed and negligently left in open drawer, application of doctrine, 401
forged on company's banker's by secretary known to have previously committed forgery, effect of, 401
signature of, in such form or manner that a person can tamper, is not negligence, 400
signed in blank and left in unlocked drawer, no estoppel when stolen, 401
clerk, employment of dishonest, not a public duty to refrain from, 399
common carriers, delivery to true owner at his request not estopped, 406
company, action by, to remove name of shareholder, fraud of broker, 412
agent of, when managing director, is deemed to have powers he purports to exercise, 390
by their directors, holding out person as agent for particular purpose, 390
certification by, not a document or warranty of title, no estoppel arising thereon, 412
proper officer of, what it amounts to, 411
condition on certificate that transferee must produce it before registration, 409
delay by and acting on fraudulent transfer, estopped from refusing to recognise it, 397
directors of, cannot be presumed to have powers to confer a title to its shares, 390
issuing debentures representing that company's powers not exhausted, 378
representing to have powers to draw bill in name of, 378
extent of duty of, to person presenting transfer for registration, 410
giving share certificate liable for refusing to register transferee, 409
inquiry by, of persons transferring shares is for own protection not a duty to transferee, 410
irregularity in issue of debentures by, cannot be set up against original holder, 381
issuing certificates on forged transfer not estopped, 409
debentures, estopped by its conduct on afterwards setting up an irregularity, 381

ESTOPPEL—*continued.*
estoppel *in pais*, company estopped by certificate stating that shares fully paid up, 410
issuing share certificate to individual shareholder is estopped as against transferees, 408
letter from, informing person of proposed transfer of shares, no estoppel, 409.
not estopped where transferee of shares gives value without seeing certificate, 409
not making reference to register, not estopped unless transferee thereby altered his position, 410
person whose name on register and who acts as owner of shares estopped as against calls of, 411
register of members of, only *primâ facie* evidence of contents, 411
registering forged transfer when not estopped, 410
registration by, of forged transfer, of no effect, 411
representation by directors of, as to meaning of ambiguous expression, 378
representations of officer of, in course of business may effect an estoppel, 385
secretary of, effect of fraudulent acts of, 411
has not ostensible authority to represent shares fully paid up when not so, 412
statement by, on certificate of shares, that they were fully paid up, 388
transfer of bonds by, to contractor estops as to purchasers from him, 393
where estopped as against transferees for value without notice from denying that shares fully paid up, 410
composition deed, acceptance of payment under, estops denial of execution, 389
conclusive evidence, is of the category of, 325
conduct, innocent, amounting to misrepresentation, effect of, 381
what amounts to representation, cannot be determined by general rule, 388
congregation, members of, estopped as to property enjoyed by minister inducted with their acquiescence, 395
contract for sale of whole interest, party having partial only cannot deny, 377
illegal, no estoppel to denial of existence of, unless where penalties attached, 380
innocent misrepresentation may be conclusive evidence of, 378
conveyances and share transfers containing receipt for purchase-money, effect of, 387
copyholder having done fealty cannot dispute lord's title, 375
corporate body cannot be bound by estoppel to go beyond its powers, 380
may by notice *intra vires*, to be acted upon at receiver's option, conclusively elect, 380
not bound by estoppel to refrain from doing its duty, 380
estopped from denying entering into of contract which was *ultra vires*, 380
corporation, permitting secretary to have custody of seal, is not guilty of negligence, 399
counterfeit signature, duty of person whose signature forged, to give notice, 396
Crown lease, doctrine of estoppel has no application, 403
damage or prejudice when made out, effect where other circumstances create an estoppel, 385
declaration, false, as to value of horses tendered for carriage, 386
deed of assignment, dissenting creditors to, not estopped from relying on an act of bankruptcy, 395
deed poll, whether creating lease by estoppel, 403
title, liability of owner not affected by forgery of authorised borrower where forged document not relied on, 394

ESTOPPEL—*continued.*
estoppel *in pais*, deed, title, owner of, not estopped by parting with, 379
where not estopped by parting with in fraud of creditors, 379
person advancing without notice to holder with authority to borrow is protected, 397
intrusted with power to deal by way of sale obtaining loan, owner is estopped, 394
delivery by master, no estoppel from stating that he delivered all goods shipped, 387
note given by wharfinger and addressed to himself does not create estoppel, 408
order handed by owner to agent in blank, creates an estoppel as against warehouseman, 392
orders as documents of title, railway company supposed to know that credit is given for, 384
duty of merchants to use due care in issue of, 399
railway company or warehouseman issuing in duplicate, 399
director of company confirming allotment of shares to himself cannot allege appointment *ultra vires*, 389
directors of company as guarantors to notify change in identity of company, 396
disability, no excuse for standing by and allowing money to be paid in ignorance, 380
distress, payment of rent on threat of, no conclusive admission of distrainor's title, 406
submission to an acknowledgment of tenancy, 406
dividends, receipt of, estoppel in action for calls, 389
dock warrant, mere issue of, is no attornment of warehouseman, 408
document on its face transferable by delivery, person so transferring is estopped, 393
documents relied on having no commercial significance, 387
statements in, to which credit is given in mercantile dealings, 387
draft by post, omitting to send separate advice, sender may set up facts if stolen, 401
duty to speak when arising, 396
ejectment, in action of, defendant may show alteration in landlord's title, 404
election, person entitled to, must not lie by so long as to indicate an election, 397
error, party contributing to, cannot take advantage of, 390
estoppel by statement, instances of, very numerous, 386
not a cause of action but a rule of evidence, 378
executor not bound to disclose gift over to himself, 395
facts, statement of, when true and accompanied by erroneous inference of law, no estoppel, 378
false statement, a false representation of fact, 378
and mere misrepresentation of legal effect, effect on party making, 379
freight, acceptance of, on goods shipped under bills of lading, creates an estoppel, 389
friendly society, loan by, surety for, cannot allege it to be *ultra vires*, 389
goods, not shipped, master no authority to sign for or to represent quality of, 385
incumbrances on fund, statement as to, effect of, 379
infant, not liable for fraudulent representation as to age, inducing a contract, 380
standing by to prejudice of purchaser, estoppel founded on fraud, 397
informality, person dealing without notice of, may presume *omnia rite esse acta*, 381
instruments in blank, execution of, 393
insurance broker, settling loss by allowance in account cannot deny receipt of the money, 388

ESTOPPEL—*continued.*
estoppel *in pais*, interpleader, how far a protection to bailee, 407
investigation of title, estoppel as to existence of contract, 389
invoice, person named in, as seller of goods, no estoppel when no person misled, 387
receipt of, indicating erroneous belief as to authority imposes duty to correct error, 396
jurisdiction, want of, objection to, whether waived by party who commenced action, 389
landlord after distress cannot bring ejectment for cause accruing before, 406
and tenant, payment and acceptance of rent, 324
estopped from treating tenant as his after requiring him to be tenant of another, 403
person claiming as, not the person who let tenant into possession, no estoppel, 404
lease, assignment of, by mortgagor in possession, no estoppel against tenant, 405
by mortgagor, assignee of mortgagee not estopped by, 403
for lives, consenting party not effected by doctrine, 376
person entering under, which is void by statute, may plead the Statute of Limitations, 403
surrender, fraud of tenant will vitiate, 376
of, acceptance by landlord of possession, 374
secured by innocent misrepresentation, 376
void, acceptance of, will not work a surrender, 375
voidable, acceptance of, when afterwards made void, effect of, 375
made void contrary to intention of parties, effect of, 375
leasehold, grantor of, held to statement as to restrictive covenant, though afterwards taking new lease without restraint, 378
legal estate, want of, in lessor does not prevent rule of estoppel applying between lessor and lessee, 406
lessee for years who has subdemised, mere consent to grant of fresh lease, effect of, 376
not estopped from showing on lessor's death that lessor was tenant for life and not tenant in fee, 405
that lessor had no title to pass to an assignee, 405
precluded from denying lessor's right to distrain in certain cases, 406
lessor, assignee of, estopped from denying tenancy of lessee, 403
estopped from disputing title of lessee let into possession, 403
letters patent, statement as to novelty in petition, 383
licence by tenant to place goods on premises does not estop licensed person denying tenant's title, 404
licensee in possession and tenant, no distinction between in applying doctrine of estoppel, 404
life policy handed by mortgagor to mortgagee for alteration, forgetting to get it back, effect of, 401
litigants carrying on proceedings with knowledge of irregularity cannot afterwards set it up, 389
market overt, true owner estopped from denying title of purchaser, 398
marriage contracts, as applied to, 376
married woman, contracting as *feme sole* cannot allege separate estate, 380
restrained from anticipation, effect of doctrine on, 380
mercantile agent, possessing goods with consent of owner may make disposition, 391
purchaser relying on title of, how far protected by owner's consent, 391
mind, state of, a fact, as much as state of digestion, 378
misrepresentation, innocent, may be conclusive evidence of title in action for conversion, 378

ESTOPPEL—*continued.*
estoppel *in pais*, misrepresentation, innocent, not a cause of action by estoppel, 378
mistake of party by which another misled should be corrected immediately on discovery, 396
money, acceptance of, affording conclusive evidence of waiver if an irregularity, 388
not the only conclusive evidence of it, 389
mortgagor cannot set up title of third party against mortgagee, 407
mutual insurance company, member of, when estopped in action for calls, 380
negligence, company permitting transferor to obtain share certificates which he fraudulently used, 401
must be in transaction itself to create an estoppel, 400
the proximate or real cause of result, 400
representation by, included in representation by conduct, 377
when the proximate cause of loss, 412
will not raise an estoppel unless duty to use care shown, 398
negotiable instrument, handed to agent with authority to fill up and issue, 402
issued with material part left in blank, estoppel in favour of holder in due course, 392
person paying and allowing it to remain in holder's hands, 402
unauthorised transfer of, estoppel is the foundation of rights arising on, 402
want of care in custody of, principle applied, 401
when completed by defendant, effect of, 394, 402
owner allowing another to expend money in mistaken belief must compensate, 397
culpably allowing another to hold himself out as owner of property thereby estopped, 396
of property, knowingly allowing another to contract for purchase, effect of, 396
partner, liability of retired, founded on agency by estoppel, 391
where new creditors in ignorance of change have option to claim against old or new, 391
partners, creditors of old and new, must elect as to which they will sue, and are concluded thereby, 391
partnership, by estoppel, as to, 390
patent, as affected by, 413
licence, equitable assignee not acting under is not estopped, 413
of, estoppel ceases to apply on expiry of, 413
licensee of, cannot dispute its validity, 413
show patent bad where stranger can, 413
may show that thing done by him is not in the patent, 413
purchaser from, not bound by estoppel, 413
using same estoppel from denying patentee's right to royalty, 413
patentee, after assignment, estopped from disputing validity, 413
bankruptcy not estopped against the assignee of the trustee, 413
and licensee, doctrine of estoppel as applicable to, 413
holding out agent as authorised to sell free from conditions, effect, 390
not bound to give notice of his patent rights, exception, 395
partner of, so becoming after assignment, not estoppel, 413, n.

ESTOPPEL—*continued.*
estoppel *in pais*, payment of money to contractor due on completion, no estoppel against allegation that work not complete, 383
under mistake due to representation where recoverable back, no estoppel, 384
under mistake due to representation, where damage suffered may, create, 384
pleading, rule as to, where opportunity arose, 350
pledgee, greater latitude allowed to than to other bailors, on account of pledgor's implied undertaking as to title, 407
policy of insurance, acceptance of premiums, when estopping insurer, 388
marine insurance, receipt for premium conclusive between insurer and assured, 388
repudiation of, by underwriters delayed after loss of ship known, 384
possession of goods, premature, by buyers, effect of Factors Act, 392
transfer of, working surrender, by tenant to landlord, referred to doctrine, 375
principal bound by knowledge of agent acting within the scope of his authority, 386
conduct of, holding out person as agent, 390
principle distinguished, at law, in equity, 376—377
of, by representation, advantage of reduction to rules questioned, 376
known as equitable estoppel, 376
promissory note given in blank for safe custody pending instructions, maker not liable by estoppel, 401
handed to agent with authority to issue for any amount, giver of note estopped, 401
is not "negotiated" to a payee as a "holder in due course," *sed quære*, 392
obtaining signature to, by false statements, maker not estopped, 401
public duty, no person can estop himself from performing a, 380
purchaser, objecting that sale not by auction, when estopped, 389
receipt as between parties, no estoppel to denial of payment of money, 383
where evidence of accord and satisfaction, 383
third party has acted upon it, 383
recital in policy by deed poll, as to effect of, 389
release of collateral security does not discharge original security, 389
party in custody under *ca. sa.*, remaining under sheriff's supervision, effect of, 390
rent, acceptance of, in waiver of forfeiture, effect of, 389
representation, arising through owner parting with possession, 393
as an estoppel, what is necessary to take advantage of, 377
as to right to recall before being acted upon, 385
things *in futuro*, doctrine not applied, 377
cannot form, nor mere statement of intention, 377
conduct of party making conducive to party acting upon, 382
estoppel by, 376
in licence to assign lease, 386
made after party altered his position, does not create, 384
may be of fact, although involving matter of law, 378
withdrawn even if acted upon, 383
mere silence in absence of duty to speak, not a, 395

ESTOPPEL—*continued.*
estoppel *in pais*, representation must be acted upon as meant to be to create an estoppel, 384
upon as true by party to whom made, how far applied, 383
of existing fact to found, 377
need not necessarily be false to knowledge of party making, 382
not to be relied on as an estoppel by person concealing material fact, 381
of inability to contribute expense to mine, licence to co-adventurers, 382
state of things as being of continuous nature, effect of, 378
party cannot by, raise an estoppel, to illegally create a certain state of things, 379
to whom made must act to his prejudice, to create an estoppel, 384
person acting upon, after notice, no estoppel, 383
whose consent is required, standing by with knowledge of act may be estopped, 395
should amount to contract or licence before doctrine of estoppel applied, 382
to effect estoppel, whole of, must be looked at, 379
found estoppel must be unambiguous, 379
one person, and acted upon, not of advantage to another not so acting, 383
persons who acted upon it without being influenced, 383
what is sufficient alteration in position, induced by, to create estoppel, 384
when by party to contract, 377
contained in deed, 379
induced by party seeking advantage, by estoppel, none, 381
relied on creates an estoppel, 383
where unknown to be false, but intended to be acted upon, 382
seller of unappropriated goods accepting delivery order from pledgee who acts on acceptance, 408
share certificate containing blank transfer on back, effect of signing of transfers by registered owners, 412
does not amount to implied warranty on which transferee can sue, 409
certificates obtained on forged transfer, effect as regards transferee and his pledgee, 409
shares, application for, by person under disability, 387
in fictitious name, share issued, 387
irregular forfeiture of, in cost-book mining company, as to, 395
person signing blank transfer and handing to broker estopped if instructions obeyed, 412
signing of blank transfers by executors, as to, 412
transferor signing in blank and handing to broker who commits fraud, where no estoppel, 412
unregistered transfer of, not the legal estate in, 412
when known to be vendor's shares, person taking and not relying on certificate, effect of, 411
sheriff, return of, how far conclusive, 359, 379
ship, bailment of, subsequent mortgage by bailor, possession demanded by mortgagee, 407
register, flag and pass of, presumption of nationality, 375
shipmaster, representation of, when binding on owner, 387
shipowners when estopped from denying that goods were shipped in good order and condition, effect of, 385, 387
shipper selling wine branded with his name estopped from averring the custom, 389

ESTOPPEL—*continued.*
estoppel *in pais*, shipping agents, where estopped as to their accounts, 386
silence, effect of, where there is right of election, 397
mere, does not amount to election, 397
no estoppel unless duty to communicate, 379
solicitor advising client of the investment of money on mortgage, effect of estoppel, 386
statement, erroneous, by warehousemen, when acted upon, 386
false, party hearing, may be indirectly put in better position, 378
made voluntarily, where likely to be acted upon, should be made with care, 399
of intention when true, person may change his mind, 378
person making erroneous, is put in same position as if it were true, 378
true, as far as it goes, does not mean more than it says, 379
when false as to ownership of goods, 386
surrender, acceptance of, after forfeiture by subletting, as to, 389
by operation of law where owner estopped from disputing his act, 375
tenant, constructively evicted by person of paramount title, not estopped by his lease, *sed quære*, 404
denying landlord's title when determined, should not go out of actual possession unless claiming premises, 404
disputing lessor's title after it has determined should surrender, 404
estopped from disputing landlord's title, 402
estoppel of, not confined to leases by deed, 402
holding under landlord with bad title cannot deny that title as against an assignee, 403
must show better title in another to impeach title of person to whom he paid rent, 405
not estopped, when, by new lease taken from original lessor, 405
where landlord's title is determined, 403
payment of rent by, to person other than person letting him into possession, no estoppel, 405
person holding under, where bound by doctrine, 402, 403
who does not replevy estopped from denying landlord's title, 406
third parties, when taken to be allottees, 411
party, notice by, to bailee sufficient evidence of authority for retaining goods, 407
trader, person representing himself to be, estopped from denying the fact in bankruptcy, 377
transfer, executed in blank form, as to effect of, 392
signed with blanks, person giving, not estopped, 401
transferee taking transfer in blank and filling up in own favour, no estoppel in favour of, 412
transferor signing blank transfer must not hinder registration, 412
trover, in action of, founded on estoppel, plaintiff may recover whole value of goods, 385
trustee, fact of legal estate being in, is not a representation of authority as against *cestui que trust*, 393
in bankruptcy, allowing bankrupt to continue trading, effect of, 389
not an agent, 393
where lulled into making erroneous statement that trust fund unincumbered, effect of, 381
trustees, as to unauthorised dealings by, 379
persons dealing with not protected by estoppel, 393
underwriters receiving notice of abandonment, effect of silence, 397
vendor selling land free from tithes, finding himself lay impropriator is estopped from suing, 377

ESTOPPEL—*continued.*
estoppel *in pais*, vendor, puffing exaggeration, by, to induce sale does not create estoppel, 382
vendors, allowed to retain possession of goods, rights of purchaser without notice, 392
of unappropriated goods, statement by, recognising delivery orders as correct, 386
warehouseman accepting without qualification specific order, may be estopped, 408
in possession of goods attorning to buyer is estopped, 408
mere acceptance of order by, does not pass property, 408
statements by, recognising title of transferee of goods, 386
writ of possession granted to landlord against tenant though the landlord's title expired before trial, 404
estoppel *quasi* of record, Admiralty Court, conclusiveness of, never been doubted, 363
not a court of record, 363
approbate and reprobate, person may not, principle a species of estoppel, 364
arbitrator, appointment of unqualified, party ignorant of fact not estopped, 364
award of, how far doctrine applies, 364
must be of the very matter in dispute, 364
decision of, on construction of agreement, effect of, 362
bill of sale, party securing advantage by setting up, cannot afterwards allege bill of sale bad, 364
commissioners of sewers, orders of, admissible as evidence of reputation, 364
court martial, sentence of, may be pleaded as, *sed quære*, 363
courts, decisions of, to which doctrine of estoppel has been applied, 362
decree, to be admissible evidence, must be of known court, 362
deprivation by a college visitor, sentence of, 363
Ecclesiastical Courts, former decrees of, when conclusive, 362
not courts of record, 362
expulsion by a college, effect of sentence, 363
friendly society converted into company, member's action when estopped, 365
General Medical Council, order of, 364
interpleader, judgment creditor in, taking proceeds out of court, effect of, 365
jactitation suit, decree in, merely operated *in personam*, 362
judicial authority, judgment of, respected in all proceedings, 362
separation, decree of, effect of, on setting up of previous separation deed, 364
Lands Clauses Consolidation Act, 1845, verdict of jury assessing compensation, 364
"martial law," sentence of court administering, effect of, 363
matters preventing doctrine arising, same as applicable to estoppel by record, 364
Merchant Shipping Act, 1894, order of naval court on complaint against seamen, 363
order made in ignorance of true facts, party obtaining, cannot go behind to prejudice of third party, 365
party taking advantage of, cannot reprobate, 364
party, person not a, to proceedings, taking benefit, effect of, 365

ESTOPPEL—*continued.*
estoppel *quasi* of record, policy of assurance, alleged void, cannot afterwards be alleged valid, 365
remedies, where two alternative, parties pursuing one in ignorance not estopped, 365
schoolmaster, dismissal of, by order of trustees, 363
specific performance, successful action for, estops subsequent action for damages, 365
university, court of vice-chancellor of, a court of record, 363
evidence, estoppel a branch of the law of, 322
is only a rule of, and cannot found an action, 322
executor, verdict against on plea of *plene administravit*, effect of, 331
fact, representation of, conduct of party, by, intention conveyed, action upon, 323
falsehood, by, and with knowledge of, 323
mutuality of estoppel, when applying, 325
negligence arising from conduct, amounting to, 324
foreclosure, decree for, effect in action for redemption, 326
foreign court, administration of deceased estates without jurisdiction, 354
decree of nullity in, cannot be impeached here while standing, 352
fraud as affecting judgment of, 351
judgment of, effect of, 326, 354, 359
judgment, effect of, 327
fraud, action to set aside for, may be stayed as vexatious, 352
allegations must be specific and mutual, 352
persons not party to judgment, effect as to, 351
friendly action, no bar to second action, when, 352
interlocutory judgment, effect of, when intended to be "final," 326
issue, of fact, county court, determinable in action in, cannot be raised in subsequent action in High Court, 337
finally determined judicially, effect, 323.
status of person or thing, affecting, when determined in final manner, as part of judgment *in rem*, 323
point raised in, where solemnly found, party raising is estopped, 331
the same, in actions with different objects, 331
heir-at-law under intestate's bad title, may set up the Statute of Limitations, 374
infant, no estoppel by deed against, 371
interpleader, estoppel as to ground of claim or defence, not raised at trial, 358
judgment, admissions, as result of, 327
consent, when obtained by, 327, 357
corporations consenting to, not estopped where contract *ultra vires*, 327
court, by a, having no jurisdiction is void and cannot give rise to estoppel, 330
default, by, effect of, 327, 357
disability of party against whom set up, 327
effective, notwithstanding appeal pending, 326
"final," classes of, 327
foreign, as to, 326
in personam or *inter partes*, meaning of terms, 327
interlocutory, when intended to be "final," 326
Irish, principle applied to, 354
limited in its efficacy, when by consent or default, 327, 342, 357, 358
matter determined with certainty by, effect where, 327, 330
money paid under, action to recover, principle, 326
verdict, must follow, to create estoppel, 326
when not a judgment *in rem*, 329
judgment *inter partes*, bankruptcy, fraudulent preference, innocent trustee, not estopped by, 348
petition, court inquires into merits of judgment debt, 348
no effect on the *res judicata* of the debt where court refuses order, 348
refusal of, creates a *res judicata* as the petition only, 348
rejection of proof by trustee, effect of s. 35 (2) of the Act of 1883...348

ESTOPPEL—*continued.*
judgment *inter partes*, bankruptcy, trustee in, duties of, as to inquiries into a judgment debt, 348
may set up fraud where bankrupt estopped, 348
not continuing debtor's action, not barred from bringing his own, 346
bill of exchange, indorsee of, not affected by proceedings commenced after indorsement, 346
class, members of, effect of judgment against or for representative of, 348
how far decree final, 348
order appointing person to represent, does not affect distinct rights, 348
conviction of seamen for refusing to go to sea does not estop action for wages, 344
proof of, not evidence of guilt in civil proceedings, 344
copyholders and lord of manor, privity of estate between, 346
successive lords of same manor, privity between, 346
debtor and third party, between, does not affect execution creditor, 345
no privity between, and a sheriff nor execution creditor, 345
divorce court, finding of, as to party's adultery in previous case, conclusive evidence, 344
dower, widow's action of, not estopped by recital in husband's deed, 346
estoppel against parties to proceedings and their privies only, 343
evidence, conclusive, against strangers of the judgment and terms only, 343
not, of facts established by the judgment, 344
gaming debt, an invitation to vote by debtor's solicitor in scheme does not estop trustee as to, 348
heir of deceased, claiming by purchase, not bound by estoppel on deceased, 345
incumbent, privity between, and his patron in, 344
indemnifying parties and plaintiff in action, whether estoppel between, 347
indemnity, parties to contract for, estoppel between covenantor and person indemnified, effect of, 347
of, no privity of estate between, 347
landlord and tenant, whether privy, 346
lis pendens, notice of, to privy in estate not sufficient to bind, 346
manor, tenants of a, effect of representative judgment on, 348
minors suing as representatives, effect of decree on class, 348
mortgagee, estoppel by lease on mortgagor does not bind, 346
not affected by judgment against mortgagor for fraud after mortgage, 346
next of kin, determination as to who are, no effect on rights of persons on renunciation by, 345
ouster, judgment of, against corporator, effect on title by his vote, 345
parties or privies must have claimed or defended in same right in both actions, 346
party and privy, latter must derive title from former to be affected by, 345
character in which sued does not affect principle if in own right, 346

ESTOPPEL—*continued.*
judgment *inter partes*, patentee, against, for want of novelty, not conclusive in subsequent action for revocation, 346
personal representative, action by, for damages sustained by death and to property, no estoppel, 347
plaintiff subsequently co-plaintiff, conviction for non-repair of highway of former, effect of, by privity of estate, 346
possession, successive, of similar interest, evidence of privity of estate, 345
principle, applicable to, as to persons bound by estoppel, applied to deed, 346, 368
privies in blood not affected by Inheritance Act, 1833... 344
the classes of, to, 344
privity between parties, when *quasi*, 347
in estate to party litigant, what is necessary to conclusiveness of judgment against, 346
of estate between assignor and assignee of a bond, 345
mortgagor and purchaser of equity of redemption, effect of, 344
second incumbrancer and mortgagor, 347
servant of corporation and corporation, 345
trustee with bankrupt, limitations on the effect of, 344
public right, affecting a question of, effect of, 343
purchaser for value from devisee with legal estate without notice not affected, 344
of land not estopped by proceedings commenced after purchase, 346
surety and principal debtor or his trustee in bankruptcy, no privity between, 347
not concluded by judgment, that debtor's discharge a fraudulent preference, 347
receiving notice of proceedings by party indemnified, effect of, 347
tenant admitted by landlord upon surrender by former tenant, no privity with former tenant, 345
proceeding by direction of landlord, is privy to him, 346
third parties, effect of, on, 343
trustee and *cestui que trust*, how affected by judgment against the other, 347
trustees, after breach of trust, not estopped from denying damage, by judgment against plaintiff, 347
judgment *in personam*, Admiralty, no bar to action *in rem*, in, 328
how far binding, 338
judgment *in personam* or *inter partes*, defence of *res judicata*, when pleadable, 330
for detention of chattels, effect of, 330
judgments included in, 330
land, action for recovery of, rights determined in, 330
meaning of term, 330
third party's rights not affected by, 330
judgment *in rem*, Admiralty, no bar to action *in personam*, in, 328
admissible in evidence against strangers when not conclusive, 341
architect, certificate of, under London Building Act, 1894, is in nature of, 329
bankruptcy, adjudication or order of discharge in nature of, 329
company, order for dissolution, or declaration of such void, effect of, 329
conclusive only against strangers on the point decided, 339

ESTOPPEL—*continued.*
judgment *in rem*, conclusiveness of, rule as to, difficulties of application, 339
rules affecting apply to judgments *inter partes*, 339
condemnation in the Exchequer, conclusive as to title of Crown, 340
conflicting judgments, effect of, 361
consent, by, how far affecting a *res judicata*, 342
protection of purchaser of *res* on faith of, 342
to establish will, not binding on absent party, 342
estoppel between parties created by, 342
of parties, how far conclusive against third parties, 342
contract, capacity of parties to, effect of law of domicil, 339
court of competent jurisdiction, of, effect of, 338
criminal case, in, how far conclusive, 342
definition of, 327
dentist, order of General Medical Council, admitted as evidence between dentist and third parties, 342
relating to conduct of, effect of, 342
distinction between judgment *in personam* and, 338
divorce, decree absolute in, conclusive as to dissolution of marriage only, 342
effect, limit of, 339
election petition, decision of court in, how far conclusive, 340
fact, finding of, on face of judgment seems to be binding *inter partes* though not necessary to decision, 340
foreign court, establishment of penal status by, effect of, 338
judgment as to title of person of foreign domicil to personalty, effect of, 338
immovables, as to, 338
lunacy, finding of jury on an inquisition in, an exception, 338, 342
as to mental state, how far admissible at later period, 342
only binding *inter partes*, 342
though in nature of judgment *in rem*, creates estoppel, 329
marriage, dismissal of nullity suit, not evidence of, 343
matters inferred by argument from the judgment not concluded by, 339
not in nature of, 329
nullity, decrees of, as distinguished from decrees of divorce, 343
conclusive on question of existence of marriage, 343
in case of marriages in British consulate, 343
of foreign court, as to marriage of foreigners celebrated abroad, 343
dismissal of suit for, not conclusive evidence of marriage, 343
pauper's settlement, as to, conclusive on all facts which are necessary steps to decision, 338, 340
prize case, exceptional rule affecting, 340
court, finding of fact in, how far pleadable, 341
foreign, decision of, conclusive between owners and underwriters as to grounds of sentence, 341
ground of condemnation to be conclusive must be in operative part of sentence, 341
presumption of cause of condemnation, when conclusive, when not, 341
recitals in sentence of, may be looked to, 341
uncertainty of ground of condemnation, effect of, 341
Probate Court, decree of, how far conclusive, 338
probate, grant of, how far conclusive as to validity of testamentary document, 340

ESTOPPEL—*continued.*
judgment, *in rem*, probate, grant of, not conclusive in favour of prisoner charged with forging will, 342
property, right or title to, conclusively determined by, 338
rule, "that estoppels must be certain to every intent," prize cases exception, 341
salvage action, in, effect of, on strangers to the action, 339
owner's right against underwriters not affected by, 339
separation order, whether admissible as conclusive of desertion, 340
status of persons or things, effect of the judgment on, 338
strangers, to affect, finding should be essential to judgment, 340
must be ascertainable without ambiguity, 340
not discoverable only from judge's reasons, 340
judgment recovered, administration suit, question in second suit arising while first pending, 337
subsequent proceeding for relief which could not be granted in former suit, 337
bill of exchange, principal and interest of, recovery by separate action, 337
but not to action for same trespass to land, 337
causes of action, application of principle *transit in rem judicatam*, 336
cheque or bill of exchange of joint contractor, judgment on unsatisfied, when no bar, 336
compromise, matter outside claimed in second action, 335
consent judgment not set aside to prejudice of third party, 335
contract, successive breaches of, subsequent action not barred, 337
conversion, unsatisfied judgment in action of, no bar to action against joint tortfeasor for fresh tort to same goods, 335
county court, counterclaim exceeding limit, defendant might formerly proceed for balance in High Court, 337
judgment for £50 for fraud bars further claim for same tort, 335
covenant, breach of, to keep in repair, when continuing, 337
damage to person and to property, test of right to second action, 337
damages, recovery of, for loss by death, no bar to claim for damage to estate, 336
false imprisonment, action for, no bar to action for malicious prosecution, 338
further sum not recoverable after judgment for same cause, 334, 335
husband and wife, judgment against either when jointly liable, a bar, 335
joint contractor, against, ground of bar to action against others, 336
where defence personal to defendant, no bar, 336
contractors, all parties to action, where separate judgment against one, 336
debtors, payment of half debt by one, leave to defend given to other, effect of, 336
liability, judgment only against one, effect, 335
tortfeasor, action against, bar to action against other in contract, 335
land, action for trespass to, not barred by recovery in replevin of value of goods taken in same trespass, 337
married woman, against, for ante-nuptial debt, liability of husband, 335
merger of action, where none, 336
nature of plea, 334
partner, several liability of estate of deceased, 335
plaintiff for same cause is estopped from again suing, reasons, 334

ESTOPPEL—*continued.*
judgment recovered, principal and agent, plaintiff electing to sue one is barred, 336
principle acted upon, where damages could be and are not claimed in one cause, 335
replevin, recovery in, of goods, bar to action for damage to same goods, but not to action for same trespass to land, 337
restraint order in Chancery Division as to shares, how far a bar, 335
second action must be for same cause to effect complete bar, 336
origin of, the same but different cause, no bar, 337
successive actions, circumstances the same, cause of different, 337
surety, right of indemnity of, against partner preserved, 336
trespass, in action for, no bar where cause continuous, 337
tribunal elected by party, not empowered to grant adequate remedy, 337
landlord and tenant, mutuality of estoppel between, extent of, 325
payment and acceptance of rent, estoppel *in pais*, 324
lease, grant of larger estate than lessor has, not lease by estoppel, 373
land, of, when created by estoppel, 373
premises must be comprised in, to create estoppel by, 366
lessor, determination of title of, relieves lessee from estoppel by deed, 373
liquidator, barred by finding in action for calls that defendant not a shareholder, 331
married woman, deed, admissions in, by, effect, 371
heiress-at-law, estopped by decree in probate proceedings, 327
restraint on anticipation, effect as doctrine of estoppel, 371
not removed by consent, 327
Merchant Shipping Act, 1894, order of magistrate under, effect of, naval court expressly conclusive under, 363
mistake, deed, in, as to, 370
negligence, conduct, by, amounting to a representation of fact, 324, 398
must be in the transaction itself and real cause of belief, 324, 400
deed executed with, containing false representation, effect of, 369
nullity of marriage, decree of foreign court not impeached here while standing, 352
fraud, decree obtained by, disregarded, 351
policy of insurance, constructive total loss under, limits of doctrine relating to, 373
principal, deed, alteration in, by agent after execution, effect of, 368
estopped from relying on, where agent and person setting up estoppel acted at variance with terms, 368
privies, who are, 344
promissory note, signatory to, how estopped, 324
probate, decree in proceedings, effect of, 327
quasi of record, subsequent proceedings under tribunal other than court of record, 323
receipt, consideration money for, in conveyance, creates an estoppel, 371
of, by solicitor for vendor or mortgagor, 372
estoppel, when arising, 372
seal, not under, estoppel does not arise, 372
recital, anterior deed, in, does not estop party who executed conveyance, 367
averment relied on may be contained in, 366
deed, in, as to seisin in fee, must be precise, 367
intention of, a question of construction, 368
statement in, when mutually agreed to, effect of, 368
only of one party, that party only estopped, 368
release, legatees, by pecuniary, no estoppel as to subsequent funds, 372
remainderman, action by, when not party to former proceedings, 352
contingent conveyance by, happening of contingency feeds the estoppel, 374
rent, payment and acceptance of, 324
replevin, judgment in action of, effect in action for rent, 331
res judicata, application to all courts of competent jurisdiction, 334
bankruptcy, mistake in proof in, doctrine not applicable, 333
cause of action when determined on its merits, 333
claim or defence which was open in former action, 333

ESTOPPEL—*continued.*
res judicata, county court, judgment in, subsequent summons before justices, 334
matter determined by, intended to be final, 334
debt where subject of a set-off previously allowed, 332
defence of, what is necessary to support, 330, 332
doctrine, nature of, 332
of, a branch of the law of estoppel, 331, 332
not technical, 334
evidence, fresh, discovery of, no answer to defence of, 333
when and how cause of action restored on, 333
finality, want of, effect of, 333, 359
interlocutory order, made as declaration of rights of parties, 334
justices, decision of, when a mere exercise of discretion, 334
dismissal of summons before, question of building line, effect of, 334
libel, where subject-matter of both actions the same, 332
matters to which doctrine strictly applied, 333
party not able to raise matter in first action, no application, 333
petition, dismissal of, for insufficient evidence, 334
plea of, by defendant, effect of, 330
what it amounts to, 331
must show plaintiff's opportunity of recovering in first action, 332
prohibition, effect of, 333
separate causes need not be joined in one proceeding, 332
Statute of Frauds, failure to plead, principle applicable, 332, 333
third party costs paid by successful plaintiff in action for damages, 334
Workmen's Compensation Act, 1906, what will exclude doctrine from order under, 333
seamen, conviction of, for refusing to go to sea, does not estop action for wages, 344
sessions, judgment of, order quashing order of removal, conclusive only *inter partes*, 328
shares, illegal issue as fully paid up, company estopped against transferee, 370
transfer of, when forged, principle of estoppel by conduct applied, 369
sheriff, award of jury signed by, under Lands Clauses Consolidation Act, 353
solicitor and client, purchaser subsequent to transaction between, must inquire, 372
strangers matter, to, cannot take advantage of, nor be bound by estoppel, 325
to deed, rights of, not affected by estoppel, 368
surrender, operation of law, by, takes place by estoppel, 324
tenant for life, grantor, title of, bad, effect of, 374
invalid devise, under, may dispute title of remainderman, 374
privies to, subject to same estoppel, 374
tenants in common, lease by, having distinct estates, effect of, 373
trespass, actions, successive, for, to same close, 331
cause of action continuing, judgment does not create estoppel, 337
trustee making fraudulent conveyance, does not benefit purchaser by acquiring title, 374
trustees for public purpose, not protected against, estoppel applied, 371
verdict, judgment, where not followed by, 326
will, establishing in solemn form by consent does not estop parties absent, 342

EVIDENCE
accomplice, evidence of an, corroboration required, 603
judge should direct jury as to value of, 421
account books, admissibility of, against interest, 561
admissions as against party keeping, 561
entry in, by agent, effect of, when erroneous, 561
when evidence of employment necessary, 561
accounts, direction of court as to, 561
old, prove themselves, 561
acts of ownership, boundaries of manor, perambulations of lord, as evidence of, 443
court rolls, when admissible as, 540
declarations accompanying, as proof of nature of acts, 442
evidence of, how received, 443
proof of, by production of ancient documents, 515
title to property, when presumed from, 442

EVIDENCE—*continued.*
Acts of Parliament, admissibility of copies of, when printed by the King's printers, 525
judicial notice of, when bound to be taken, 485
private, proof of contents of, 525
when receiving judicial notice, 525
adjournment, evidence may be cause of, where better can be produced, 422
Admiralty, affidavit, actions in which evidence may be given by, 622, 624
deponent party to the action abroad may be ordered to attend in this country for cross-examination, 621
filing evidence in, 629
admissions, arbitrator, of, as to improper award where inadmissible, 462
bill of exchange, by former holder of, when receivable against present holder, 460
cestui que trust, of, are evidence against his trustee, 460
conduct of party, when evidence amounting to, 424
counsel, of, where binding on client, 462
document, how far an admission by party to, 458
evidence of parties, where not, 461
when, against party making them, 423
executor, of, as evidence against legatee, 460
form of, immaterial, 458
guardian or next friend, of, not evidence against infant, 460
joint contractors, of, concerning joint undertaking, effect of, 460, 461
jury may attach different degrees of credit to different parts of, 458
married woman, by, cannot get rid of a restraint on anticipation, 456
partnership, by partner are evidence against, 460
party, of, made on former occasions, presumed true as against, 456
privity, by person in, meaning of term, 459
privy, by, only *primâ facie* evidence against party, 459
railway company's servants, by, when evidence against company, 461
record, how made on the, for purposes of trial, 484
representative, by, when suing personally, when as representative, effect of, 457
ship, by captain of, where evidence against owners, 462
shipowner, of, when evidence against master, 460
solicitor, of, when binding on client, 462
statement proved against party may be wholly receivable, 457
statements by person in privity with party may be evidence of, 459
made out of court, how received, 436
of party when tendered otherwise than to prove their truth, how accepted, 456
subordinate, by, do not affect estate of a superior in title, 460
tenant, by, do not restrict landlord's right, 460
in common, of, do not affect co-tenant, 461
third party, by, when amounting to evidence against principal, 424
trustee, of, where binding co-trustees, 461
value of, dependent on circumstances, 457
wife, of, where receivable against husband, 462
written or verbal, may be, 424
adulteration, certificate as to, 478
evidence as to quality of drugs, 479
adultery, continuance of, where presumed, 441
proof of, evidence received in, 452
advancement, presumption as to, 507
affidavits, admissibility of, as evidence, 544, 619, 620, 622, 624
alterations in, must be initialled by the officer taking, 627
applications as to, when considered interlocutory only, 626
blind or illiterate persons, by proof of, 627
costs, rules as to, relating to, 626
evidence by, in interlocutory proceedings, 619
filed, how, 629
form of, 625
illiterate deponents, by, 627
interlocutory proceedings, use of, in, 482
jurat, form of, 626
jurisdiction, when made out of, how sworn, 628, 629
master, attestation of, effect of, 627
office copies of, rules as to use of, 630

EVIDENCE—*continued.*
affidavits, party using, as evidence must give notice of intention to use, 544, 619, 621
persons empowered to take, 627
making, may be ordered to attend before the court, 619, 621
seals of persons authorised to administer oaths to, when receiving judicial notice, 496
unfiled, use of, rules as to, 629, 630
affirmation, form of, permitted to Quakers and Moravians, 592
age, appearance of person, *primâ facie* evidence of, 508
certificate of baptism, where admitted in proof of age, 537
witnesses, opinions of ordinary, are receivable as to, 482
agency, acts of, repeated, when admissible to prove, 452
agent, accounting by, 561
admissions by, 461
agreement, extrinsic evidence as to, 566, 567, 568
sale of goods, for, when not to be performed within a year, how evidenced, 425
writing, in, when superseded by deed, the latter must be produced, 422
alibi, evidence of prisoner essential to prove an, 448
almanack, the, time is regulated by, 492
alterations, affidavits, in, must be initialled, 627
deeds, in, presumed made before execution, 506
will, erasures or interlineations in, presumed made after execution, 506
ambiguities, written documents, appearing on face of, when verbal evidence may be given as to, 428, 568
analyst, certificate of, when conclusive evidence against defendant, 478
ancient documents, acts of ownership, production of, in proof of, 515
custody of, proper, what has been held to be, 505, 512, 513
handwriting in, proof of, by opinions of witnesses, 608
presumption as to purport of, 505
proof of, by mere production, 505, 512
witness necessary to prove, must understand it, 549
leases, admissibility of, as evidence of reputation as to value, 515
maps, admission of, when reported made by "the King's geographer," 532
public rights, declarations by deceased persons as to, form of, 469
of deceased persons as to, where receivable in evidence, 467, 468
maps and surveys, where receivable as evidence of, 469
old deeds, where admitted as evidence of, 469
animals, behaviour of, similar facts as to, admissible in evidence as to, 452
cruelty to, intention of person inflicting, not necessary to proof of guilt, 449
apothecary, action against, for practising without a certificate, proof of certificate lies on defendant, 435
admission of, as to improper award, where inadmissible, 462
arbitrators, evidence, bound by laws of, 433
witnesses, attendances of, before, how compelled, 579
arrest, witnesses, where privileged from, 585, 586, 587
assessments, land tax, of, how far conclusive as evidence, 475
assessors, court is not bound to follow, 432
judge differing, duty of, when differing in opinion from, 433
sitting with, does not hear evidence as to navigation, 480
attachment, contempt of court, for, when witnesses liable to, 579, 616
motion for, the requisites for, 589, 590
attesting witness, deceased, statements of, as to forged deed, when inadmissible, 467
when to be called, 511
award, proof, as conclusive of facts found, how far admissible, 545
of, in what manner, 552
statutory, under public officer, when presumed valid, 552, 553
awards, inadmissible as proof, where, 545
Bank of England, evidence of death, nature of, acceptable to the, 503
seal of, does not receive judicial notice, 496
banker and customer, books kept between, access to, knowledge implied, 448
bankers, books of, when evidence of transactions recorded therein, 478
bankers' books, copies of entries in, when evidence of matters recorded, 554
inspection of, by party to proceedings, when order made for, 554, 555
production of, how compelled, 554
bankrupt, answers of, not admissible against parties in same proceedings, 460
deceased, admission of, where not admitted, 464

EVIDENCE—*continued.*
bankruptcy, adjudication in, proof of, by copy of the Gazette, 551
affidavit, evidence generally given by, in, 624
bankrupt, where compelled to answer, 576
creditor may call bankrupt as witness, 574
depositions filed in, may be used in other proceedings in same, 630
intention immaterial, where undischarged bankrupt obtains credit without disclosing fact of, 449
proceedings in, how proved, 551
reputed ownership, evidence of custom and usage as affecting, 445
barristers, evidence by, need not be given upon oath, 592, 593
bastardy, corroboration essential in proceedings in, 421, 603
bigamy, presumption of marriage, when neutralised, 504
bill of exchange, holder of, declarations of former holder when receivable against, 460
secondary evidence, admission of, when bill abroad, 520
bills of exchange, alteration in, apparent, no presumption as to period of, 506
evidence of payment of a debt, when, 562
lading, receipts for goods shipped, as, how governed, 563
blind or illiterate persons, affidavits by, how taken, 627
Board of Trade, inspector appointed by, under Companies Act, when report of admissible, 546
books, entries in, kept by party or his firm, not evidence in party's favour, 424
of transactions of deceased persons, where admissible, 465
reference to by witness, when evidence of contents, 424, 597
witness may refresh his memory by reference to, 424, 596
boundaries, "parcel or no parcel," a question for the jury, 432
breach of promise, corroboration essential in action for, 421, 603
statement of plaintiff to defendant not replied to, effect of, 459
British colonies, British Law Ascertainment Act, recourse to, in deciding law of part of, 490, 491
laws of, must be proved to be subject to judicial notice, 487, 488
Law Ascertainment Act, provisions of, when recourse had to, 490, 491
ship, certificate of registrar, evidence of registration of, 477
building societies, certificate of registrar as to passing of rules, effect of, 467
burden of proof, adducing evidence, by, may shift continually during trial, 434
charterparty, in action under, division of burden between parties, 434
division of, when made, 434
false imprisonment, in action for, is on the defendant, 434
innkeeper, action against, where burden is divided, 434
malicious prosecution, in action for, burden is on plaintiff, 434
rebutting evidence, of, upon whom lying, 435
rule, general, as to, 433
of, distinction to be drawn in applying, 434
statutory, when, no single uniform rule will apply, 435
tenant, in action against, for non-repair, burden is on plaintiff, 434
test as to person upon whom it falls, 433, 434
burial, register of, what is proved by, 538
bye-laws, proof of, how given, 526
capacity to act, evidence of, where mere acting not received as, 444
certificates, admissibility of, as evidence, 477
evidence by, as required by statute, 422, 476
statutory, and certified copies of documents distinguished, 478
certified copy, document, of, where accepted as secondary evidence, 422, 524, 525
cestui que trust, admissions of, are evidence against his trustee, 460
character, civil actions, in, evidence of, where admissible, 454, 600, 603
criminal cases, in, evidence as to, not primarily admissible, 454
divorce, to disprove act of cruelty in, respondent may not call evidence of, 454
evidence as to, by oral, by affidavit, 483
of bad, in what cases admitted, 454, 455, 600, 603
libel, bad character of plaintiff, where admitted in evidence, 454
party's, not directly in issue, evidence of, not usually admitted, 454
charterparty, action for damage under, where burden of proof divided between plaintiff and defendant, 434
on, in, measure of evidence where criminal negligence alleged, 434

EVIDENCE—*continued.*
charterparty, stamping of lost, when presumed, when presumption rebutted, 506
cheque, debt, when evidence of payment of a, 562
post-dated, when admitted to prove its own validity, 562
child, evidence of unsworn, judge must direct jury as to value of, 421
when received, 569
children, age of, irrebuttable presumptions arising from, 499
incapability of, to understand the nature of an oath or affirmation, 569
nature of, to do mischievous acts is judicially noticed, 495
City of London, judicial notice is taken of customs of, 486
club, rules of, access to, implies knowledge of contents, 448
collateral facts, evidence relating to, when admissible, 452
colonial and foreign registers, entries in, when admissible as evidence, 475
Colonial Laws Validity Act, certificate of colonial officer under, as to documents, 491
colonial probates and letters of administration, admissibility of, as evidence in England, 553
colonies, Acts of, when copies admissible in evidence, 492
statutes of, how proved, 491
commissions, practice relating to order for appointment of, 612, 613
return of, how made, 617
witnesses, examination of, by, how order obtained, 609
order to examine, by, how order made, 612
commissioners, foreign courts, of, appointment of, 610
of land tax, assessments by, in certain name, when admitted in proof of ownership, 529, 530
communication, distinct portions of, where not provable, as an admission, 458
company, books of, entries in, statutory provisions as to, 478
knowledge of contents, not imputed to shareholder or director, 449
where implied, 449
directors or manager, admissions by, where evidence against, 461
document, affixing of seal to, by, how proved, 510, 511
liquidation, books and papers of, when evidence in, 555
minute books of, how far evidence of proceedings, 555
railway, stationmaster, admissions of, where evidence against, 461
register of members is *primâ facie* evidence of matters inserted therein, 555
complaints, evidence of, received in offences against females, 446
making, of, must be on the first reasonable opportunity, 446, 447
voluntary, must be, 447
conduct, habitual criminal, charge of being an, admissibility of evidence as to, 451
intention, as proof of, 450
money, criminal prosecution, where tender of, not necessary, 585
payment of, 578, 579
recovery of, 584
where witness unnecessary, 579
sufficient and reasonable, must be, 583
witness, should be tendered to, 578
of party, evidence of, relating to material fact, 446, 448
party, of, may be evidence of admission, 424
conflicting evidence, jury must decide which party's they accept, 429
contempt of court, person disobeying order to give evidence before or produce documents to an examiner, commits, 615
sufficient excuse for, what would be, 589
witness, punishment of, for, form of, 588, 589, 590
contract, foreign country and language, made in, interpretation of, 489, 490
production of, when in writing and subject of transaction, 422
copyright, infringement of, evidence as to, 509
corporation, 592
corporations, books of, entries in, statutory provisions as to, 478
when admissible as evidence, 478
execution of documents by, proof of seal, 510
minutes of proceedings of, where evidence by statute, 555
corroboration, bastardy, essential in proceedings in, 421
breach of promise, essential in action for, 421
evidence of, where required, 421, 603
instances in which necessary, 421, 603, 604
counsel, admissions of, when binding on client, 462

EVIDENCE—*continued.*
counsel, communications between, and solicitors, where not to be given in evidence, 427
evidence by, 592
counsel's opinion, fact of obtaining, where received in defendant's favour, 450
counties, divisions of, how far receiving judicial notice, 494
county court, admiralty references in, evidence by affidavit, how obtained, 624
affidavit, evidence by, when ordered, 624
where all facts are proved by, 624
evidence in, how taken, 624
judge's note conclusive on appeal to divisional court, 550
powers of judge of, to order inspection, 509
prisoner may be compelled to give evidence in, by order of the judge, 580
proceedings in, how proved, 549
court rolls, admissibility of, as between lord and tenants of the manor, 539
customs, entries of, on the, effect of, 540
custody of, 512
evidence, when conclusive, 539
proof of, how admitted, 541
reputation and acts of ownership, when admissible as evidence of, 540
tenant's holding and amount of rent paid are evidenced by, 540
crime, information given for detection of, cannot be given in evidence, 427, 573
criminal cases, character, evidence of, not primarily admissible, 454
conduct as evidence of guilt, when admitted, 447, 448
money, when need not be tendered, 584, 585
evidence which may be given whether identity established or not, 447
identity, the main point of evidence in, 451
similar acts, proof of, where admissible in, 451
skill or knowledge peculiar to act, or want of, may be shown in, 447
witness, dangerous illness of, examination out of court, 613
court, judicial proceedings in, how proved, 550
proceedings, documents in, as to production of, by solicitor, 582
cross-examination, questions permissible in, 598
rules, rigid, of examination in chief are relaxed as to, 598
unstamped document, on, party not subject to, 517
witness, of, when it takes place, 597
when, cannot be subjected to, 597, 598
Crown, documents, private purposes of the Crown, made for, where not public documents, 529
public documents, when, are subject to same manner of proof, 528, 529
inquisitions to ascertain rights of, where admissible, 475
Office, subpœnas, issue of, by, 578, 579, 580
witnesses for the, are privileged from disclosing channel of information, 573
custody, documents, of, how proved, 514
what has been held to be "proper," 505, 512, 513
may be improper, 514
evidence of, reasonable, is sufficient, 513, 514
custom and usage, binding, what is necessary to make, 445
evidence of, matters affected by, 445
where admitted, 444, 445
horse dealers, what is evidence against reputed ownership, 445
local, when judicially noticed, 445
restraint of trade, in, reasonableness of, a question for the judge, 432
trade description, evidence of, as explaining, 445, 567
customary fine, reasonableness of, a question for the judge, 432
damages, divorce, in, jury must assess the damages, 432, 433
reduction of, evidence of bad character in libel action may be given in, 454
de bene esse, order to examine witnesses, contents of, 618
deaf and dumb person, evidence of, how taken, 569
death, disproof of, burden of, after presumption of, arises, 435, 501
presumed, where, and not presumed, 500, 501, 502, 503
several persons in same disaster, of, *onus probandi* on person alleging survival, 503
deceased persons, bankrupt, admissions of, where not admitted, 464
books, entries in, where transactions of, recorded, when admissible, 465

EVIDENCE—*continued.*
deceased persons, competency of, to make declarations, must be proved, 468
creditor, acknowledgment of deceased, when receivable as declaration against interest, 464
declarations of, against their own interest, where admissible, 463, 464
form of, to be admissible, 469
in course of duty, 464, 465
duty to make, necessary to admission as evidence, 465
must be *ante litem motam*, 468
explicit to be admissible, 469
specific headings of, admissible, 463
to prove ancient public rights, where admissible, 467
when admissible, 424, 425
received as evidence of illegitimacy, 470
where admissible to prove matters of pedigree, 469, 470
knowledge of, in making declarations, where unnecessary, 464
oral statements in contradiction of written documents, where inadmissible, 467
private rights, declaration of, as to, 468
professional men, duty of, may be, to make records, 466
statement of, as to contents of lost document, when receivable as secondary evidence, 423
made in course of duty must be contemporaneous, 466
when admitted in evidence, 463
testators, declarations of, when admissible as to their wills, 471, 472
declarations, deceased persons, of, 463
against interest, 463, 464
competency of person must be proved, 468
must be *ante litem motam*, 468
explicit to be admissible, 469
dying persons, of, grounds of admission as evidence, 471
state of mind, as evidence of, not evidence of truth of matters stated, 450
deed, presumption as to, when of more than thirty years' standing, 505
superseding written agreement, when, must be produced, 422
depositions abroad, taken, statutory provisions relating to, 527
admission of, against deponent, when he is a party, 548
depositions, criminal case, when not put in by parties, power of judge to direct jury as to, 618
evidence may be given by, when deponents cannot attend the court, 422
that deceased had formerly given evidence against accuser, admitted to show motive, 447
wrongly admitted in, at discretion of court, as to, 618
examiner, taken before, time within which return to be made, 618
inadmissibility of, when in nature of *res inter alios acta*, 547
judicial proceedings, taken in, when admissible in subsequent proceedings, 546, 547
statement in, when inadmissible as evidence in subsequent proceedings, 546
statutory provisions, as to admissibility of, 548
director, company, of, not affected with knowledge of contents of company's books, 449
divorce, adultery, acts of, received in evidence, 452
witness need not answer question tending to show guilt of, 576
cruelty, to disprove act of, evidence of character may not be allowed, 454
damages in, must be assessed by the jury, 432, 433
defence to petition by one party only, respective duties of judge and jury, 432
undefended petitions, truth of petitioner's allegations, judge to decide as to, 432
documents, access to, affords presumptive evidence of knowledge of contents, 448
adversary, in hands of, where notice to produce not given, secondary evidence is inadmissible, 520, 521

EVIDENCE—*continued.*
documents, adversary, in hands of, who fails to produce them, proof by secondary evidence, 520
ambiguities not appearing on face of, may be explained by verbal evidence, 427, 428, 568
attestation of, when proof not required, 511
required by law, the attesting witness must be called, 604, 605
where solicitor necessary, 511
proof of, rules relating to, 511
attesting witness, proof of execution by, exceptions to rule, 606
when he may be contradicted, 605
certified copy of, when admitted by statutory provision, 524
where made evidence by statute, 422
construction of, circumstances affecting found by jury, 430
is a matter for the judge, 81, 429, 430
corporation, execution by, proof of seal, 510
criminal cases, production of, in, where unstamped, 515
custody of, how proved, 514
need not be that which is most strictly proper, 513, 514
what may be improper, 505, 514
enrolled according to statute or entered in notarial book, 518
under statute, how proved, 606
estimate, signature of surveyor to, when evidence of authenticity, 518
execution of, competency of witness to, 511
when strict proof required, 605
existence of, in proof, but production impossible, how proof admitted, 422, 423
extrinsic evidence as to, exceptions to rule of inadmissibility, 567
where inadmissible, 566
foreign, construction of, 489
copy of, when admissible as proof in English court, 420
language, in, meaning of words must be first determined as a fact, 430
law, relating to, court may examine, 489
lost, construction of, within province of judge, 430
or destroyed, when secondary evidence admissible, 518, 519
proof, as to stamping of, 516
when presumed stamped, 506
notice to produce, form and service of, 522
where unnecessary, 521
oral evidence as to, generally excluded, 566
of, when admitted, 423
parol evidence, where admissible to interpret, 568
partly requiring to be stamped, how far admissible when unstamped, 516
party, how far an admission by, of truth of contents, 458
possession of, by person served with notice to produce must be proved, 521
power of attorney, executed under, proof required, 514, 515
produced, to be, must be specified in *subpœna*, 580
production of, at trial, how enforced, 580
from which witness refreshes his memory, 596, 597
order for, may be made at any stage of proceedings, 582
when impossible, secondary evidence may be given as to, 519, 520
proof of, by admission, when no attestation is required, 511, 512
when secondary evidence admissible, 518
secondary evidence as to, when admissible, 605
signature of unattested, how proved, 510
situation of, abroad, when secondary evidence admissible, 520
solicitor refusing to produce document of client, effect of, 520
solicitor's lien does not prevent production being compelled, 582
third party, in hands of, when secondary evidence admissible as to, 520
unstamped, may be shown to witness to refresh his memory, 516
not amounting to an agreement may be looked at, 516
party cannot be cross-examined on, 517
when inadmissible, 515
validity of, where presumed, 505

EVIDENCE—*continued.*
documents, witness attesting, when not necessary to prove by, 604
may object to produce, on ground of privilege, 581
which may not be referred to by, 596
witnesses, by which, may refresh their memories, 595
drunkenness, intention of party, when condition of mind due to, 450
dying person, declarations of, grounds for admissibility of, 471, 547
easement, title to, user as evidence of, 443
engineer's reports, principle upon which admitted, 563
engraving, witnesses, testimony of, when received as to, resemblance to picture, 482
equitable presumption, matters subject to, 507
evidence, acceptance of, varies according to usages of each country, 419
accomplice, of an, judge should direct jury as to value of, 421, 603
adducing, burden of, 434, 435
may shift continually during trial, 434
admissibility of, as to the, judge must determine, 428, 429
examples of matters for the judge's decision, 428, 429
question as to, decided by the judge, 421
admission made by party is, as against party making it, 423
or rejection of, questions relating to, must be determined by the *lex fori*, 420
affidavits, admissibility of, as, 544, 618, 620
application of law of, what it pre-supposes, 419
arbitrators are bound by laws of, 433
better, may be insisted upon, 422
books, entry in, by party or his firm, how affecting party, 424
questions asked on, while witness refreshing his memory, makes them, 424
conduct, by, amounting to admission, 424
conflicting, jury must decide as to, 429
corroboration of, where required, 603
credibility of, a question for the jury if tried before, if not, for the judge, 421
deaf and dumb person, of, how taken, 569
distinction between original or circumstantial and hearsay, 455
documents, unstamped, when inadmissible, 515
experts, of, how far admissible, 437
facts, of, relevant to the issues, what are, 420
hearsay, exceptions to rule against, 456
in camerâ, when heard, 594
inadmissible but admitted in references, where award not set aside, 433
to prove occurrence of main fact, 451
intention, of, proof of, 449, 450
judgment, existence of, is conclusive, of its own existence, 484
jury, where none to go to, party favoured by decision may require to put his evidence on record, 429
law, and, distinction between, 450
oath or affirmation, when must be given on, 590
out of court, how obtained, 609
proof is founded by, 419
public documents, statements in, grounds for being received as, 472, 473
policy, where facts not allowed to be given in, 427
rejected where it cannot be adequately tested, 422
result of, not necessarily proof of itself, 419
rules of, cardinal, 420
how formulated, 419
seals, where received as evidence, 427, 495
seeing or hearing, of, must be by person who saw or heard, 421
similar facts, of, purposes for which tendered, 450
where received in, 452
statements accompanying an act, where received, 438
sufficiency of, to go to jury, judge must decide as to, 429
third party, of, as to conversation between two persons, 439
opinion of, where evidence against party seeking, 462
verbal, as to ambiguities not appearing on face of written documents, may be given, 428
weight of, when, is looked at, 604
writing necessary, in what cases, 425
when transaction evidenced by, it must be produced, 422
written document cannot be varied by extrinsic, 427, 566

EVIDENCE—*continued.*
ex turpi causâ non oritur actio, application of rule, 487
examination in chief, leading questions, where inadmissible, 594
examined copy, High Court, of record of proceedings in, must not be abbreviated, 549
examiner, appointment of, practice relating to, 610, 611
depositions taken, duly signed by, must be returned to Central Office by, 618
documents to be supplied to, by party applying for the examination, 616
examination of witnesses by, procedure relating to, 610
fees of, person liable for, 617
notification of, 617
persons attending before, entitled to same privileges as witnesses, 616
questions, any, should be allowed unless palpably inadmissible, 616
witnesses, examination of, practice as to, 616, 617
execution, writ of, as evidence of judgment, 544
executors, action against, evidence necessary to personally charge, 425
admissions of, are evidence against a legatee, 460
affidavit, failure of, to dispute contents of, how an admission by, 458
experts, competency of, to give evidence, 481
evidence, in giving, may refresh their memories by reference, 482
of, how far admissible, 437
examination of, 481
opinions of, when admitted, when rejected, 480, 481, 608
extradition, foreign warrants and documents for purposes of, how proved, 527
extrinsic evidence, document, exceptions to rule as to inadmissibility of, 567
where inadmissible as to, 566
fact, acceptance of, proof necessary to, 419
existence of main, how proved, 440
notoriety of, to party's calling or neighbourhood, some evidence of knowledge as to, 449
opponent, within knowledge of, burden of disproving lies, upon him, 435
proof of, by what evidence, 421
in a specific way, 425
when allowed for what it is worth, 440
where not allowed, 427
which the court does not require, 426, 427
proving or disproving main fact, where admissible, 440
relevant to the issues, when, 420
rumour as to existence of, not evidence of party's knowledge, 449
transaction inquired into, being part of, when provable, 420
res gestæ, when known as the, 420
facts in issue, evidence, how far the subject, of, 436, 437
incidents not constituting, evidence of, but of declarations accompanying an act, qualification governing, 438
meaning of, 436
relevant to the issue, definition of, 439
judicial inquiry, which may be relevant to, 440
fair comment, defence of, judge decides if matter of public interest, 431
jury decides if the matter is, 431
false imprisonment, burden of proof of reasonable cause for, is on defendant, 434
family Bibles, pedigree, admitted to prove facts concerning, 560
papers, admittance of, in cases of pedigree, 560
entries in, to prevent disputes, do not affect admissibility, 561
examples of, sometimes admitted in pedigree case, 560, 561
females, complaints of, not evidence, if induced by leading or intimidating questions, 447
offences against, where particulars of complaint admitted in evidence, 446
Fleet and King's Bench Prisons, registers of, not admissible in evidence, 539
foreign country, contract made in, and in foreign language, construction of, 490
depositions taken in, statutory provisions relating to, 527, 628
document of, not proved in English court by copy unless admissible by English law, 420
evidence, acceptance of, varies according to usages of each, 419
hearsay evidence freely admissible in, 423
law of, competency of witness to prove, 488
laws of, are not subject to judicial notice in English courts, 487
difference between, and English law, burden of proof as to, 488

EVIDENCE—*continued.*
foreign country, laws of, proof of, 488, 527
court, commissioners to take evidence in, how appointed, 610
letters of request may be sent to, to secure the examination of witness, 611
defendant, evidence, entitled to have, including his own taken on commission where he resides, 615
Foreign Enlistment Act, ship, builder of, burden of proof of ignorance of use in contravention of Act, lies upon, 435
foreign judgments and acts of state, proof of, by authenticated copies, 527
language, document in, meaning of words to be first determined as a fact, 430
law, rules of evidence and procedure followed in considering a question of, 490
Statutes of Limitation and Statute of Frauds, when applied, to, 490
Foreign Law Ascertainment Act, case for opinion of another court, practice under, 490, 491
foreign registers, certified copy, by whom made, 534
countries included in term, 534
extracts duly certified which have been admitted in evidence, 534, 535
proof of facts stated in, when and how admitted, 534
tribunals, evidence for use before, statutory provisions as to, 630, 631
warrants, extradition, and documents for purposes, of, how proved, 527
fraud, document may be impeached by verbal evidence as to, 427
mind, the inside of the, must be looked at to find, 438
fresh evidence, party, when given leave to call, 599
further evidence, judge and jury, power of, to recall witnesses for, 599
Gaming Act, relied on, when, must be pleaded, 487
Gazette, the, royal proclamations, orders, and regulations are proved by, 525
General Medical Council, report of committee, where admissible as evidence, 475, 476
geography, judicial notice is taken of the positions of States indicated by, 493
Great Seal, exemplifications under, when evidence of record, 549
habeas corpus ad testificandum, prisoners, attendance of, as witnesses compelled by, 580
handwriting, evidence of, by inspection, 508
signature of unattested documents, proof of, 510
witness may be compelled to write a specimen in court, 509
state his opinion or belief as to, 607
witnesses, opinions of ordinary, may be received as to, 482
health, inspection, refusal to submit to, may be evidence against persons as to, 508
hearsay evidence, admissible, not, as a general rule, 455
except in certain cases, 423, 456 *et seq.*
admissions of one of the parties, when evidence against party, 423, 459
distinction between, and original or circumstantial, 455
kinds of, 423
exceptions to rule against, 456
as to non-admissibility of, 423
judicial inquiries, statements made in hearing of party during, not evidence against him, 459
privies to party, classes of, 459
rejection of, reasons usually advanced for the, 455
slander, uttering of, evidence of is not, 423
statements made in presence and hearing of party, how far evidence against him, 459
term, what it imports, 455
High Court, documents filed in, where office copies are admissible as proof, 520
examined copies, the record of proceedings in, how proved, 549
judicial proceeding in, how proved, 548, 549
record of proceedings in, copies of, kinds admissible, 549
history and science, works of, where evidence of facts of a public nature, 478, 479, 563
not admissible as evidence, 563
homicide, presumption as to, 499
horse, nature of, receives judicial notice, 495
hostile witness, cross-examination of, by party calling him, is in the discretion of the judge, 600

EVIDENCE—*continued.*
hostile witness, meaning of, 600
House of Lords, judgment in, how proved, 551
judicial notice of English, Scottish, and Irish laws, how taken by the, 485
Houses of Parliament, journals of, proof of, by copies printed by the printer to either House, 527
husband and wife, admissions of wife, where receivable against husband, 462
communications between, when not to be given in evidence, 427
privileged, 573
conversations, overheard, may be disclosed by third party, 574
identification, photographs, when admitted in proof of, 565
witness may state opinion in matters of, 607
identity, proof of, when admitted by evidence of reputation, 480
ignorance of law, irrebuttable presumption as to, when expressed to be, 499
illegitimacy, admission of deceased person received as to his own, 470
declarations as to, form of, immaterial, 471
no strict rule applies to competency of person making, 470, 471
of deceased father admissible as to his son's, 470
impeachment of credit, character of witness called in, may itself be impeached, 602
in camerâ, evidence, when heard, 594
incriminating answer, foreign country, fear of prosecution in, when ground for refusing evidence, 574
ground for refusing to give evidence, 574
indecent matter, evidence involving unnecessary disclosure of, not permitted to be given, 427
India, affidavits, how sworn in, 629
registers of marriages of Christians in, provisions as to admittance of, 535
Indian court, Attorney-General, statement of, sufficient to support a rule to order the taking of evidence by, 614
inferior courts, rules of, when subject to judicial notice, 487
innkeeper, action against, for loss of guest's luggage, upon whom burden of proof rests, 434
inquisitions, Crown, to ascertain rights of the, how far admissible as evidence, 475
inscriptions, pedigree cases, when admissible in, 564
tombstones, on, where admissible, 564, 565
inspection, age of person, in some cases, ascertained by, 508
court or jury may obtain information by, 508
deceit, action of, not decided merely by judge's inspection, 509
judge, powers of, to order, by jury and others, 509
things, of, by which court or jury obtain information, 507, 508
witness, demeanour of, as mode of proof, 508
intention, animals, cruelty to, intent of party inflicting, not necessary to proof of guilt, 449
bankrupt, undischarged, obtaining credit without disclosing fact of bankruptcy, intent immaterial to offence, 449
conduct as proof of, 450
drunkenness, where condition of mind due to, 450
evidence and substantive law, line of demarcation between, not always clearly observed in cases, 449
when cognisable by the law of, 449
infringement of patent, cause of action not affected by party's, 449
presumption of, where material, 499
proof of, 449, 450
interlocutory proceedings, affidavits, use of, in, 482
Chancery Division, practice as to evidence in, 619
evidence by affidavit in, practice as to, 619
in, how taken, 619
interrogatories, evidence under commission or letters of request may be taken by, 618
struck out, may be, when tending to criminate, 575
Ireland, judicial notice of law in, as taken by the English courts, 485
register books, certified copies of entries in, when admissible, 535
issue, disclosure of, in modern times, 421
marriage, during continuance of, when presumed legitimate, 504, 505

EVIDENCE—*continued.*
issue, what is the, the point to be determined, 421
joint tenants, admissions of either are evidence against the other, 461
judge, document where lost, any construction on must be by the, 430
documents, construction of, a matter for the, 429, 430
duty of, to direct the jury upon the application of law to matters in dispute, 428
evidence, admissibility of, determined by, 421
by, must be sworn to, 592
examples of, requiring judge's decision as to admissibility, 428
must decide as to the admissibility of, 428
to go to jury, question as to, must be decided by, 429
function of, after evidence admitted to direct the jury, 421
to decide matters of law, 428
determine what is relevant to the issue, 421
when sitting with jury, when sitting with assessors, 433
issue to be discovered by, in what manner, 421
witnesses out of court, power of, to order, 593
judge's notes, witness, statements of, not evidenced by, 475
judgment, admissible as conclusive proof of its contents, 542
effect of, as evidence may differ as they are pronounced for or against party, 483
evidence, where not of fact, not directly decided, 483
existence of, is of itself conclusive, 484
foreign, how impeached as evidence, 483
House of Lords, of the, how proved, 551
impeachability of, as evidence, 483
in personam, admissible, as conclusive, between parties and privies, 543
strangers, cases in which it is admissible against, 543
in rem, conclusiveness of proof of facts decided, 542
inferior courts, of, how proved, 552
witness may be contradicted by the admission of, 484
Judicature Act, evidence, technical rules of, power to dispense with under, 419
judicial disclosures, evidence by way of, cannot be given, 427
inquiry, facts which may be relevant to the issue, 440
notice, Acts of Parliament of which judges are bound to take, 485
almanack, the, receives, 492
children, mischievous acts of, as becomes their nature, receives, 495
City of London, customs of, when receiving, 486
counties, divisions of, where receiving, 494
English law, every branch of, receives, 485
foreign laws are not the subject of, 487
ruler, status of, when receiving, 493
States existence and titles of when receiving, 493
gestation, period of, receives, 495
Government of the country, its officers and orders receive, 492, 493
inferior courts, rules of, when subject to, 487
law merchant, usages of, when subject of, 485, 486
matters occurring in the ordinary course of business receive, 495
of which judges are bound to take, 484, 485
notorious facts receive, 494
practice relating to, 486
quarter sessions of county, takes, of petty sessional divisions, 494
seals and signatures receiving, 495, 496, 497
solicitors, privileges and obligations of, receive, 487
state of war, existence of, receives, 493
taxing masters, practice of, receives, 487
time, expression of, in Acts of Parliament and legal instruments, 492
proceedings, criminal court, in, how proved, 550
High Court, in the, how proved, 548, 549
judgment, conclusive proof of existence, 542
old superior courts, of, proof of, by production of record, 551
jury, admissions, may attach different degrees of credit to different parts, 458
direction of, by the judge, 421
documents, construction of, when judge assisted by, 429, 430
duty of, to accept and follow the directions of the judge upon the law, 428
evidence, the credibility of, is a question for, 421
to go to, judge must decide as to, 429
function of, to decide questions of fact, 428

EVIDENCE—*continued.*
jury, land, identification of, a question for, 432
view by, of any place, may be ordered by judge, 509
juryman, evidence, who gives, must take an oath before doing so, 592
justice, certificate of, where evidence of dismissal of charge of assault, 477
orders of, forming a highway district proved by certified copies, 552
King's printer, Acts of Parliament and official documents proved by copies printed by the, 525
knowledge of party, inferred, may be circumstantially, 448
letters with seals broken in possession of party, implied as to contents, 448
usually shown by documentary evidence, 448
landlord and tenant, admissions of tenant do not restrict landlord's rights, 460
law merchant, judicial notice of, where taken, 485, 486
reports, not evidence of the facts therein stated, 475
leading questions, form of, suggesting an answer, where inadmissible, 594
lease, counterpart signed by lessee as evidence of ownership, 442
legal adviser, witness, when a, may remain when witnesses ordered out of court, 593
legatee, executor, admissions of, are evidence against, 460
legitimacy, presumption of, where rebutted, 504, 505
register of baptism, entries in, as to, where admitted in evidence, 537
letters, date of, *primâ facie* evidence of date of writing, 557
delivery of, how proved, 556
evidence required as to, 439
failure to answer not necessarily an admission of the truth of contents, 458
knowledge of contents implied when in possession of party with the seals broken, 448
posting of, how proved, 556
notice, statutory provisions as to, 556, 557
receipt of, presumed on proof of proper addressing and posting, 441
unsealed, presumed so posted, 441
proof of, where conclusive by statute and orders, 441, 556
"without prejudice," when excluded as proof, 457
written "without prejudice," 557, 558, 559
letter-book, letter copied in, is, as against the owner, evidence of posting, 557
letters of request, foreign court, examination of witnesses by, issue of, to, 611
lex fori, admission or rejection of evidence, questions relating to, must be determined by, 420
libel, basis of, an official state communication, action for cannot proceed, 487
character, bad, of plaintiff, admissible in reduction of damages, 454
fair comment, plea of, respective duties of judge and jury, 431
identity in cases of, may be shown by testimony of ordinary witnesses, 482
when proof of, by reputation admitted as evidence in, 480
malice, evidence of, similar facts may be given to show, 453
opinions of witnesses, when receivable as to meaning of words used, 483, 607
privilege, plea of, respective duty of judge and jury as to, 431
words capable of being defamatory, judge must decide as to, 431
licence, exportation of goods, for, presumed as being entered at Custom House, 442
life, presumption of law as to, 500
lighthouse journals, public records, admitted as, 542
litigant, witness, statement by, on behalf of, where not evidence against him in other proceedings, 458
Lloyd's List, statement in, as notice of a state of blockade, 473
log book, man-of-war, of, evidence of facts stated therein, 541
books, merchantmen, of, not admissible as evidence, 542
London Gazette, bankruptcy, matters relating to proceedings in, when proved by copy of, 551
Lords' Journals, House of Lords judgments may be proved by copy of, 551
lost document, search for, must be *bonâ fide* and diligent before secondary evidence admissible, 518, 519
objection to sufficiency of, must be taken at trial, 518
grant, proprietary rights in, when lawful origin presumed, 506
instruments, presumption as to, being properly stamped, 516
proof, burden of, as to not being properly stamped, 516
lunatic, evidence by, necessity for inquiries as to mental condition, 592
malady, nature of, of, may show that defendant knew of the lunacy, 448
malice, libel, evidence of similar facts may be given to show, 453

EVIDENCE—*continued.*
malicious prosecution, counsel's opinion as to defendant acting in good faith, effect of, 450
probable cause, judge must decide as to, on facts found by jury, 431
mandamus, issue of, to the High Court of India to examine witnesses, 611
manorial documents, admissibility of, 540
manslaughter, by negligent driving, burden of proof on defendant as to driving with care, 435
maps and surveys, ancient public rights, where evidenced by, 469
evidence by, when received as proof, 479
tithe commutation, when received as evidence, 531
marriage, bigamy proceedings, strict proof of, required in, 446
cohabitation, mere, *primâ facie* evidence of, 444
inferred by treatment of persons as married, 446
presumed, where, until contrary shown, 504
register, extract from, relating to admissibility of, 538
of, what it proves, 537
married woman, admissions by, cannot get rid of a restraint on anticipation, 456
medical man, evidence of patient's health by, how admitted, 439
record, no obligation on, to keep records of patients' illness, 466
officer, register of, kept under orders of Poor Law Commissioners, inadmissible as evidence, 474, 475
mental condition, evidence of witness as to his own, at given period, 439
relating to, how given, 439
what may be given in proof of, 448
witness may not testify directly as to that of others, 438, 608
motor car, driving of a, the, by defendant when stopped, evidence of driving in recent stage of same journey, 440
excessive speed, time marked on stop watch is evidence of fact, 603, 604
necessaries, goods, whether they can be, a question for judge, whether they are, question for jury, 431, 432
negligence, servant, by, burden of proof that servant was acting within scope of authority, where upon plaintiff, 435
new trial, notice to produce where served in former trial is notice in, 522
newspaper, report, inadmissible, where, 566
reports, witness may refresh his memory by reference to, 565
witness may refer to, for purpose of refreshing his memory, 596
Nonconformist registers, admissibility of, as evidence, 474
non-parochial registers, extracts from, when admissible as evidence, 538
nonsuit, plaintiff, of, where consent necessary, 436
notice, omission to give, amounting to crime, presumption as to, 499
rents, as to receipt of, by person other than vendor, effect of, 442
to produce, documents must be specified with reasonable particularity, 522
form and service of, 522
new trial, fresh notice unnecessary in, 522
service of, where necessary, where unnecessary, 520, 521
notorious facts, judicial notice is given to, 494
oath, form of, 591
statutory declaration, where made in place of, 592
oath and affirmation, children of tender years, where incapable of understanding, 569
declaration, solemn, in lieu of, where witness has no religious belief, 591
evidence, when not received except on, 590
Scottish, form of, 592
statements not made by, before justices, may be refused hearing, 419
office copy, document, of, filed in High Court, how proved, 549
official certificates, evidence, as, receivable at common law, in few instances, 476, 477
where admissible as, by statute, 477
justices, of, evidence of dismissal of charge for assault, 477
matters triable by, 476
public officers, of, when receivable as evidence of facts therein stated, 476
Sovereign, of, under his sign manual, as an evidence of fact, 476
old deeds, ancient public rights, evidence of, by production of, 469

EVIDENCE—*continued.*
Omnia præsumuntur rite esse acta, matters to which maxim applies, 506
opinion, ancient documents, proof of, by, of witnesses, 607, 608
evidence of, rule as to, 607
inadmissibility of, general rules as to, 479
rule as to evidence of, when relaxed, 607
witness, matters in which, may give his, 607, 608, 609
of, as to motives of another, inadmissible, 608
when, may give evidence on his own, 608
writing may be compared and proved by, of witnesses, 608
oral evidence, document, as to contents of, when admissible, 423, 566, 568
proof of fact by, 421
statement of deceased persons as to contents of lost document, when receivable as secondary evidence, 423
ordnance survey admissible, not in general, 532, 564
" parcel or no parcel," question for the jury, 432
parents, evidence as to bastardy of their offspring by, 427, 504
parish books, custody of, is subject to statutory provision, 514
registers, admissibility of, as evidence, 473
in evidence, 536
certified copies of entries in, are admissible, 536
Parliament, judicial notice is taken of the officers and orders of, 492, 493
parol evidence, ambiguity in document, where admitted to explain, 568
documents, admissibility of, to interpret, 568
partners, books of, access to, is presumptive evidence of knowledge of contents, 448
partnership, admissions by partner in ordinary course of business are evidence against firm, 460
similar acts where not allowed in proof of, 452
passing off goods, action for deceit, not decided by mere inspection, 509
passport, evidence, when, that person described therein was abroad, 477
patent, infringement of, in action for, evidence of expert cannot be given as to there being an infringement, 437
intention of party infringing immaterial to cause of action, 449
reference to former by skilled witness, 432
patents, Patent Office, records of, when evidence of specification of, 479
patients, health of, evidence as to, by their medical advisers, 439
pawnbroker, article offered to, in pawn, question as to reasonable suspicion of theft for judge to decide, 431
payment, receipt, when *primâ facie* evidence of, 562
pedigree, declarations as to, by deceased persons, when admissible, 469, 470
competency of person to make, relative to, 470
description in wills admissible to prove, 559, 560
family papers admitted in cases of, 560
inscriptions, admissibility of, in cases relating to, 564
" matter of," what constitutes as a question in issue, 470
reputation of family in proof of matters of, 479, 480
peerage, decrees and answers in Chancery, where admissible in cases relating to the, 543
principles applicable to admission of documents in cases relating to the, 533
registers, themselves, to be produced in cases relating to the, 536
peers, evidence by, in ordinary courts, regulations as to, apply equally to, 592
penalties, statutory provision for, 590
witness, liability of, for non-attendance on *subpœna*, to, 588, 590
penalty, liquidated damages or, a question for the judge, 432
period of gestation, judicial notice is given to the, 495
perjury, indictment for, proof of action in which committed, how made, 549
perpetuation of testimony, actions for, who may bring, 630
personal identity, criminal cases, act and authorship, proof of generally separable, 447
evidence which may be given to prove or disprove, 447
photographs, identity, admitted in proof, when verified, 565
as evidence of, when admissible, 482
matrimonial cases, how received as evidence in, 482
physical condition, evidence of, how given, 439
plans and maps, admissibility of, as evidence, 531, 532, 564
private nature, of, where inadmissible, 563, 564
pleadings, admissibility of, as evidence in subsequent proceedings, 543

EVIDENCE—*continued.*
pleadings, facts in, admitted by defendant, plaintiff cannot call evidence except by leave, 436
issue formerly disclosed by, 421
portraits, witness may state opinion as to identity of person or thing portrayed, 607
possession, ancient documents in evidence of, where produced from proper control, 442
where acts of ownership consist of production of documents, 443
property in, of person arrested on criminal charge is material evidence, 510
title to property, as evidence of, 442
post, letters sent by, proof of posting, 556
postmark, evidence of time and place of posting, 556
power of attorney, document executed under, what proof required, 514, 515
predecessor in title, statements by, evidence against party claiming through him, 459
presumption of fact, adultery, proof of, as applied to, 441
as distinguished from that of law, 440, 441
business, general course of, presumed to follow, 441
debt once proved to exist, presumed to remain unpaid, 441
definition of, 497
jury in their discretion may infer from, 498
letters, receipt of, where presumed, 441
licence for exportation of goods, where entered at custom house, 442
life, as applied to, 441, 500
rules of law governing, distinction between, 497
ship, becoming unseaworthy without visible cause, so presumed on leaving, 441
unlawful condition, continuance of, not presumed, 441
innocence, evidence of guilt, *primâ facie*, must be shown before answer is called for, 499
law, ancient documents, when purport of, is presumed correct, 505
documents, regularity and validity of, how presumed, 505
irrebuttable, unsatisfactory nature of, 498
issue of deceased person, not subject of, 504
nature and effect of, 498
rebuttable, matters to which it relates, 499
nature of, 498
wrong-doer, always against, as to unexplained circumstance as between that person and innocent party, 507
presumptions, statutory, as to, 507
previous convictions, proof of, by producing record and by identification, 550
primary evidence, document, production of, and best evidence as to its authenticity and contents, 517, 518
production of, where possible, 420, 421, 422
principal, agent, statements of, in that capacity affect, 460, 461
prisoners, witnesses, as, how attendance compelled, 580
private Acts of Parliament, proof of, 525
statements in, where wholly inadmissible as evidence, 473
documents, inadmissibility of, in what cases, 532
rights, declarations as to, by deceased persons, when admissible in evidence, 468
privies, classes of, 459
privilege, communication not the subject of, 572
confidential communications between legal advisers and client, when subject to, 571, 572
counsel, when called by client, cannot plead, 572
document subject to, when referred to by litigant, 572
husband and wife, where subject to, 573
judge may claim and refuse to be called as witness, 571
legal adviser, client to, may waive, 572
plea of, respective duty of judge and jury as to, 431
public officials are subject to, 573
secrets of state are subject to, 572, 573
solicitor cannot claim privilege from disclosing his client's name, 571
witness may claim, 570

EVIDENCE—*continued.*
privilege, witness may refuse to give an answer tending to incriminate himself, 574, 575
produce his title deeds, 574
witnesses, of, from arrest, reason for, 587
probate, domicil is *primâ facie* evidence of, 554
production of, to prove validity or contents of will, 512
probate and letters of administration, matters proved by production of, 553, 554
production of, or of copies, as evidence, 553
proclamations, certification of, by officers mentioned in the schedule to the Documentary Evidence Act, 525, 526
professional men, duty of, in some cases, to keep records of work done, 466
proof, burden of, distinction to be drawn in applying rule as to, 433
general rule as to, 433
test as to person upon whom it falls, 433, 434
evidence is the foundation of, 419
facts, truth or falsity of, is determined by, 419
property, possession, effect of, on title to, 442
rents and profits, receipt of, as evidence of title, 442
title to, matters admissible as evidence of, 442
presumption of, by acts of ownership, 442
public analyst, report of, where inadmissible to prove facts stated, 532
authority, surveys made under, when receivable in evidence, 475
capacity, acting in, where evidence of title so to act, 443
officials whose appointment held provable by acting, 443, 444
documents, certified copies of, when admissible in evidence, 524
parts of, not admissible when outside the scope of writer's authority, 528, 531
documents which are within the category of, 473
examined copies must not contain abbreviations not in the original, 524
of, when admissible as evidence, 524
examples of, provable in manner of, 529, 530
exemplifications of, now rarely used, 523
histories duly accredited, how receivable, 478, 479
non-parochial registers, when admissible in evidence as, 538
office copies of, admissibility of, as evidence, 523
parish registers, admissibility of, as, 536
production of copies of, when admissible as evidence, 523
proof of, by means of copies, statutory provisions as to, 523
public inquiry, embodying results of, is evidence of facts therein stated, 527, 528
statements in, grounds for being received as evidence, 472, 473
officials, privileged, are, from disclosing the source of information, 573
policy, evidence of facts, when not allowed as against, 427
registers, entries in, effect of, as evidence, 473
statutes, judicial notice, receive, and require no proof, 525
statements contained in, where admissible in evidence, 473
Quakers and Moravians, affirmation, form of, by members of the bodies of, 592
quarter sessions, admissibility of sessions book in proof of proceedings in court of, 551
court of, takes judicial notice of petty sessional divisions, 494
rate books, poor rates, when evidence of due making, 541
tenants, entry of names of, in, when evidence of ownership, 541
rebutting evidence, burden of proof of, upon whom lying, 435
similar facts, where tendered by way of, 453
receipts, admissible where amounting to statement of deceased person against interest, 563
effect of, as matter of contract, 562
old, thirty years, prove themselves, 563
parol evidence may be admitted to contradict, 562
payment, *primâ facie* evidence of, 562
unstamped, when received in evidence, 516, 517
receiver of wrecks, examination of master by, not admissible in collision cases, 531
stolen property in possession of, burden of explanation is on, 447
record, certified copies of, admissibility of, as evidence, 524
inspection of, peculiarly a matter for the court, 430
re-examination, witness, of, questions which are permissible in, 599

EVIDENCE—*continued.*
regimental books, records made in, provisions relating to, 535
register, baptism, of, what is proved by, 537
marriage, of, what is proved by, 537
registers, colonial and foreign, when admissible as evidence, 475
custody of, regulations as to the proper, 537
facts recorded in, where admissible under statute as evidence, 474, 475
inadmissibility, of, in what cases, 538
marriages of British subjects abroad, of, provisions relating to, 536
statutory provisions, kept pursuant to, 539
Registrar-General, birth certificate, of, what is proved by, 533
certified copies of register relating to births, marriages, or deaths, when received in evidence, 533
death, certificate of, what is proved by, 533, 534
marriage, certificate of, nature of proof contained in, 534
non-parochial registers, where admissible by statute, 539
rent, notice as to receipt of, by person other than vendor, effect of, 442
rents and profits, evidence of ownership of property, where, 442
reports, General Medical Council, of, where admissible as evidence, 475
inquiries, of, where admitted, where not so admitted, 546
public documents, admissible when of the nature of, 545
reputation, identity, when proof of, admitted by evidence of, 480
public rights, received as evidence in proof of, 479
res gesta, declarations sometimes falling within the principle of, 439
res gestæ, facts sometimes defined as the, 420
res inter alios acta, depositions, when inadmissible as being in nature of, 547
facts sought to be proved as part of the *res gestæ* must not be, 420
restraint of trade, custom in, reasonableness of, a question for the judge, 432
on anticipation, admissions by married woman cannot get rid of, 456
revenue books, admissibility of, in proof of facts therein stated, 541
royal commission, return to, must be signed and sealed by the commissioners to be admissible, 530
proclamations, proof of, by copy of the Gazette, 525
Rule Committee, evidence, rules relating to, may be made by, 419
rules, evidence, of, cardinal, 420
rumour, existence of, not evidence of knowledge of fact by party, 449
sale of goods, action in contracts for, when of the value of £10 or upwards, when to be evidenced by writing, 426
agreement, when not to be performed within a year, is evidenced by writing, 425
Sale of Food and Drugs Act, 1875, analyst's certificate, when conclusive evidence against defendant, 477, 478
Sale of Goods Act, 1893, evidence, rules of, provided by, 426
Scotland, judicial notice of the law of, how accepted in English courts, 485
register books, certified copies of entries in, when admissible, 535
seal, county court, of, significance of, in proof of proceedings in, 549
seals and signatures, judicial notice is taken of, 495, 496, 497
recognition of, as evidence, 427
search, document, lost, person offering secondary evidence must give proof of, 518, 519
secondary evidence, acceptance of, when primary evidence not obtainable, 422
document, lost, when proof of, may be given by, 518, 519
of, when admissible, 422
documents, as to, when inadmissible, 520
Secretary of State, prisoner, power to compel attendance of, 580
shareholder, company, of, not affected with knowledge of contents of company's books, 449
ship, admissions by captain of, when evidence against owners, 462
log of, entries in, must be made contemporaneous with subject of entry, 467
master, letter of, admissible of facts stated against owners, 531
sale of, evidence as to, must be in writing, 426
unseaworthy, presumption of fact relating to, 441
ship's register, births, deaths, and marriages, provisions as to entries in, 535
signature, proof of, by witness who has seen it on another occasion, 607
unattested document, to, how proved, 510
silence, assent by, when inferred, 459
similar facts, admissible, where not, 450
animals, behaviour of, admissible in evidence in proof of, 452

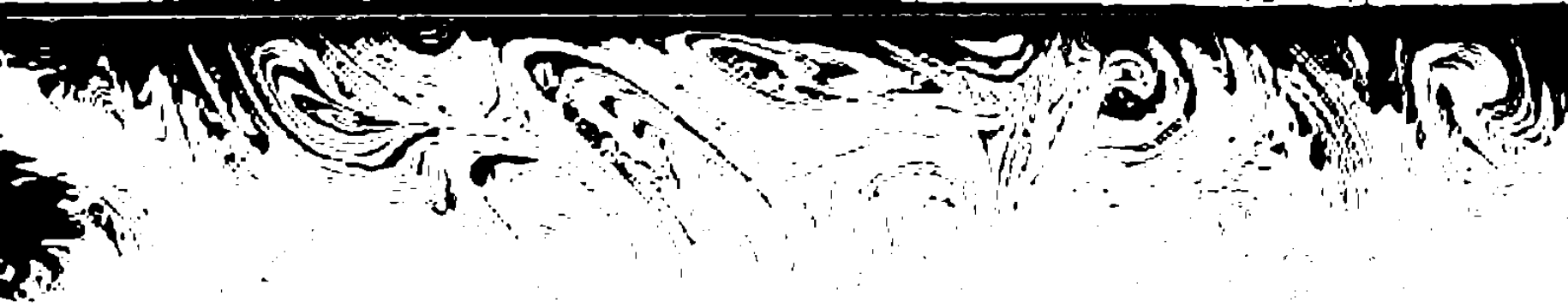
EVIDENCE—*continued.*
similar facts, evidence of, in what cases admissible, 452
must be of same specific kind, 453, 454
purposes for which tendered, 450
when received to show intent, 453
exclusion of, origin of rule as to, 451
partnership, where not allowable in proof of, 452
rebutting evidence may be given by tendering, 453
received in evidence, in what cases, 452
title to property, admitted in proof of, 452
slander, word capable of being defamatory, judge must decide as to, 431
solicitor, admissions of, where evidence against client, 462
affidavits cannot be sworn before, acting in the cause or matter, 628
appearance of, as evidence of capacity to act for client, as to, 444
communications between, and their clerks, where not admissible in evidence, 427
documents in possession of, where production compellable, 581, 582
judicial notice is taken of privileges and obligations of, 487
liability of, for expenses of witness, 584
subpœna duces tecum, when served with, may refuse to produce documents which client could withhold, 581
transactions of, no obligation on to keep records of, 466
unstamped document, production of, received as evidence where undertaking to stamp given by, 515
stamps, documents, when inadmissible as evidence unless properly stamped, 515
obliteration of, does not prevent document being received as evidence, 517
state of mind, acts and declarations of party important in judging, 450
declarations as evidence of, not evidence of truth of matters stated, 450
fraud, to find person guilty of, the state of mind must be looked at, 439
intention, proof of, 449, 450
when a matter of evidence, 449
mental condition of party, how proved, 448
sanity, where, of recipient of letter in issue, knowledge of contents, where not presumed, 448
similar facts, where receivable as evidence to show, 453
testator, sanity of, permission of physician to make a will, not received as proof of, 445
state of war, existence of, receives judicial notice, 493
State secrets, disclosure of, forbidden to be put in evidence, 427
statements, predecessor in title, by, when in possession of title, effect on party claiming through him, 459
Statute of Frauds, agreements to be in writing by, before admitted as evidence, 425
Limitations, document sufficiently acknowledged to take out of, a question for the judge, 432
statutes, letters, receipt of, where proof conclusive by, 441, 556
statutory declaration, oaths out of court taken by way of, 592
subpœnas, attachment for contempt where persons refuse to comply with, 579
Crown Office, service of, when witness within the United Kingdom, 579, 580
persons, action against, preventing service of, 578
who may issue, 578
service of, 578
set aside, may be, 578
subpœna ad testificandum, *subpœna duces tecum*, use of, 577, 578
substituted service of, may be made, 578
validity of, as to time, 578
witness, action for damages against, for non-attendance on, 590
subpœna duces tecum, documents, production of, compelled by, 580
required must be specified, 580
duty of witness in possession of documents when served with, 581
solicitors may refuse to produce confidential documents when served with, 581
third party must be served with, before secondary evidence admissible, 520
subsequent proceedings in same cause, evidence taken on hearing or trial of any cause may be used in, 548

EVIDENCE—*continued.*
summary proceedings, certificate of dismissal by justice is evidence of such dismissal, 551
register of the court or certified extract, is evidence of matters the subject of, 550
surveyor, books of deceased, entries in, where admissible as evidence, 465, 466
taxing masters, judicial notice is taken of practice of, 487
telegram, form, the original, which is, 559
proof of meaning, when sent by a code, 559
tenant for life, remainderman, title of, not affected by admission of, 460
testator, sanity of, not proved by permission of physician to make a will, 445, 446
will, lost, declarations as to contents admissible by deceased, 472
testators, declarations of deceased, where receivable in evidence as to their wills, 471, 472
third party, admission by, when binding principal, 424, 459
documents in hands of, when secondary evidence admitted, 520
evidence of, as to conversations between two parties, where admissible, 439
opinion of, when evidence against party seeking, 462
time, Acts of Parliament, expression of, in, how regulated, 492
almanack, the, is part of the common law, 492
sunrise and sunset, meaning of expressions, 492
tithe commutation map, title to land, inadmissible as evidence as to, 531
title deeds, construction of, a question for the judge, 432
identification of land described in, a question for jury, 432
tombstones, inscriptions on, where admissible, 564, 565
inadmissible, 532
treatment, acts of ownership, when evidenced by, 446
state of things, of, as being in existence, how received in evidence, 445, 446
treaty, foreign State or British colony, with, how proved, 491
trial, admissions, how made on the record for purposes of, 484
on affidavits, consent as to, must be in writing 620
court may order proof of fact by, 622, 623
refuse to take evidence in this manner, 620
cross-examination of deponent, how effected, 622
deponent, attendance of, may be required by party, 621
infants or persons of unsound mind, how consent given by, 620 626
instances where court ordered proof by affidavit, 623
mode of procedure, 620
order refused by court, in what cases, 623, 624
person making affidavit cannot withdraw on threat of cross-examination, 622
practice as to, 620, 621
rule relating to proof of fact by affidavit, 623
trustee, admissions of *cestui que trust* are evidence against, 460
where binding co-trustees, 461
user, evidence, as, of title to easements, 443
valuation lists, rates, taxes, and qualifications, where conclusive evidence of, 530
verdict, divorce court, of, when admitted as proof of cruelty and adultery, 545
proof, conclusive, where, as between parties and privies, 544
strangers, where admissible against, 544
warranty, statement of horse dealer of veterinary surgeon's opinion does not negative the giving of a, 445
will, alterations in, by erasure or interlineation presumed made after execution, 506
contents of, evidenced by probate, 512, 559
interpretation of, declarations of deceased testator when received as to, 471, 472
lost, declarations of deceased testator as to, admissible as secondary evidence, 472
original may be looked at for purpose of construction, 559
proof of validity and contents by production of probate or sealed copy, 512
proves itself when thirty years old and produced from proper custody, 559
testator, declarations of deceased, when receivable in evidence as to, 471, 472
"without prejudice," letters written, and expressed or proved to be, when admissible, 557
where communications protected, 457

EVIDENCE—*continued.*
"without prejudice," privilege, how waived, 559
where existing, extends to whole correspondence, 558, 559
rule as to letters written, how confined, 557, 558
witnesses abroad, examination of, practice as to, 616, 617
power of court to order examination of, 614
what is required before letters of request will issue to examine, 614
where an order for examination will not be made, 614
age, opinions as to, may be received from ordinary, 482
answer, are bound to, where question admissible, 595
improperly obtained is inadmissible in subsequent proceedings, 575
answers by, statutory provision as to, 575, 576
where there is no refusal to give, 576
they cannot be refused, 575
of, excluded when involving inferences of law or fact for court or jury to draw, 437
when they may be contradicted, 601, 602
arbitrator may be called as witness in proceedings to enforce his award, 571
arrest of witness attending court, how discharge obtained, 588
privilege of, from, in what cases, 585, 586, 587
arresting a witness, when a contempt of court, 588
attachment of, requisites for, 589, 590
attendance of, how enforced, 577, 578, 615
practice relating to enforcement of, 577, 615
when compellable, 577
attesting witness, when he may be contradicted, 605
bankrupt may be called by a creditor, 574
blind, may have documents read over to them to refresh their memories, 596
books, may refresh their memory by looking at, in giving evidence, 424, 595
character of, may be impeached, 601
children, when not admitted as, 569
commission, examination of, under, how order obtained, 609
to examine, how order for, made, 612
conduct money should be tendered to, 578
contempt of court by, form of punishment, 588, 589, 590, 615
counsel or solicitors may give evidence while acting as advocates, 570
credit of, may be re-established, 603
criminal cases, where wife or husband can testify, 570
cross-examination, when not subject to, 597, 598
Crown, for the, where privileged, 573
damages against, action for, where no attendance on *subpœna*, 590
deaf and dumb, how evidence of, taken, 569
demeanour of, information to be gained by, 508
document, to attestation of, competency, 511
evidence as to their own sanity, cannot give, 608
of adultery, when witness need not answer showing guilt, 576
examination of, by commission, 609
examiners, mode of procedure, 610
in chief, 594
order for, within the jurisdiction, when made, 613
expenses of, courts to which provisions relating to payment apply, 585
payment of, may be claimed before evidence given, 579
waiver of, 583, 584
witness offering to bear his own, has no answer to motion for attachment, 583, 584
expert, competency of, 481
may remain in court when other witnesses excluded, 594
opinions of, in what cases admitted, 480, 481
where and how admissible, 480, 481, 482
foreign country, fear of prosecution in, where ground for refusing to give evidence, 574
law, competency of witness to prove, 488
in giving evidence as to, witness may refresh his memory, 489

EVIDENCE—*continued.*
witnesses, grand jurors cannot give evidence of what has passed before them, 571
handwriting of party may be proved by opinion of ordinary, 482, 607, 608
hostile country, in, when order for examination of, made, 615
husband and wife, overheard conversation may be disclosed by third party, 574
identity, testimony of, as to, 482, 607
impeaching credit of, 600
when permissible, 594
impeachment of credit of, questions tending to the, where limited, 601
incriminating answer, can be refused by, 574, 575
inferior courts, failure to attend, where no attachment can issue, 590
judge, competency of, to give evidence, 570
duty of, to decide as to the competency of, 570
judgments may be admitted to contradict, 484
jurisdiction, when not within the, how attendance compelled, 579
out of the, how examined, 610
juror, competency of, to give evidence, 570
litigant may act as his own advocate and be sworn as a witness, 570
memory, may refresh their, by reference to papers, 595
mental condition at given time, may give evidence as to own, 439
newspaper reports, may refer to, to refresh memory, 565
non-attendance of, on *subpœna*, statutory penalties for, 590
opinion, cannot give an, as to the motives of another, 608
opponents, impeaching credit of, 601
ordinary, opinions of, when admissible, 482, 607
out of court, judge may order, 593
persons not affected by judge's order, 593
party, when, may cross-examine his own, 600
peers may give evidence when trying one of their number, 570
penalties, to, liability of, 588, 589, 590
persons competent to be, 569
of unsound mind, when permitted to give evidence, 569
who are incompetent, 569
petty jurors cannot give evidence of what took place between them at the trial, 571
previous convictions, may be asked as to, 601, 602
prisoners as, how attendance compelled, 580
privilege, judge may refuse to give evidence as to judicial proceedings that have been before him, 571
persons who may claim, 570
when, may be claimed by, 570
protection of, in respect of evidence given, 588
questions relevant to the issue, in most cases must only be put to, 601
re-examination of, questions admissible in, 599
recalling of, by judge or jury, 599
refusal by, to answer question, when to be made, 575
of, to leave court when ordered is contempt, 594
to answer *subpœna*, consequences of, 579
religious belief, of no, may make solemn declaration, 591
statements by, called by litigant when not evidence against him in other proceedings, 458
subject-matter of action may be sent out of the jurisdiction for examination by, 614
subpœna, when served with, by both parties, rights of, 584
subpœnas, served with, must be paid or tendered expenses, 583
which may be issued against, 578
surveyor, when assisting the court, ought not to be called as a, 571
testifying to matters in issue, when, must state them with reasonable fulness, 437
title deeds, cannot be compelled to produce, 574
writ, of commission, mode of examination to be taken abroad is prescribed in, 615
time of issue on, conclusive proof of time of issuing, 543, 544
writing, transaction evidenced by, writing must be produced if existing, 422
written document, execution of, by party, implies knowledge of contents, 448
extrinsic evidence, where inadmissible to contradict, 427, 566

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